Current Law Reports

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VOL. XII

1st July, 1942 — 31st December, 1942

Weiss Press, Jerusalem

CIVIL APPEAL No. 22/42.

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

Before:— Gordon Smith, C.J., Frumkin, J. and Khayat, J.

Olga Walder (also known as Azgour) Appellant.

v.

1. Samuel Azgour.
2. The Attorney-General Respondents.

Religious marriage in Palestine between Jewess and Jew of Egyptian nationality — Divorce by a ritual of mutual consent according to Jewish Law without any order of a Rabbinical Court but duly certified by the Rabbinical Authorities — Application by way of motion to District Court, Jerusalem, for a declaration that applicant was divorced from her husband (residing in Tel-Aviv), respondent to motion being Attorney General, husband being joined later by order of Court — Question as to proper Court where application should have been made — President District Court dismissing application on ground that it could not be made by way of motion and that no Court in Palestine has jurisdiction as regards foreigners to declare that they are divorced — Appeal to Court of Appeal signed by advocate having no power of attorney or delegation but acting upon instructions of other advocate who represented Appellant all through the proceedings — When matter can be brought before Court by motion, not by way of action — Nature of Jewish divorce under Rabbinical Law — Courts to recognize Certificate of Divorce by Rabbinical Authorities regarding Jews of foreign nationality, if divorce valid under national law of parties, and to issue declaratory judgment that parties divorced.

1. Delegation in writing — only necessary when one advocate represents another in hearing before Court but not for mere signing of application.

2.*) Application for declaration that parties divorced, not being on "action" within Rule 4 of Civil Procedure Rules, need

*) The relevant part, approved by the Court of Appeal, of the Judgment of the District Court and to which this headnote refers reads as follows:

"Now Mr. Gorodissky contends that since there was no fiat the Attorney General was never a party and although he (respondent) was joined by order of the Court that did not prevent him raising the point at the first opportunity that the place of residence of his client, namely, Tel-Aviv must under Rule 4 of the Civil Procedure Rules determine the place of trial. Rule 4 contains provision for fixing the place where civil proceedings however commenced shall be instituted in the appropriate Court by reference to the place of residence of the defendant, and provides for actions, not being wholly in respect of immovable property, concerning debt or movable property. It does not appear therefore to follow that an application for a declaration that the parties have been divorced must under that Rule be instituted before the District Court of Tel-Aviv where the respondent resides. That being the view I take it is not strictly necessary for me to decide the point as to the

not necessarily be made in Court of place where respondent resides.

3. Where only a declaratory order applied for and not relief against respondent such as sought in an "action" matter can conveniently and properly be brought by motion, not by way of action.

4. *a*) Divorce under Jewish law a ritual act of mutual consent, not a dissolution judicially effected by Court; that parties foreigners or not members of (recognized) Jewish Community — irrelevant, and Palestine Courts should recognise divorce certificate issued by Rabbinical Authorities, if parties national law recognizes such divorce.

b) Person satisfying District Court that 1) he obtained a divorce valid under Jewish Law, 2) his national law would recognize such divorce — entitled to declaratory judgment that he is properly divorced, such judgment being not a decree of dissolution of marriage but merely a judicial declaration of fact.

Goitein and Weyl for Appellant.

Gorodissky for Respondent No. 1.

Solicitor-General and *Beham* for Respondent No. 2.

Appeal from judgment of District Court, Jerusalem, dated 21.1.42, in Motion No 299/41.

JUDGMENT

This was an appeal against the judgment of the District Court, Jerusalem, which dismissed the application which had been made by way of motion, for a declaration by the Court that the Applicant, Olga Waldar (also known as Olga Azgour), was divorced from Samuel Azgour in December, 1940.

As various and numerous technical objections were made on behalf of the first Respondent, both before the District Court and before us, it is desirable to deal with these matters before coming to the substance of the motion. My brother Frumkin, whose judgment I have had the opportunity of reading, has fully dealt with the technical objection that there was no proper appeal before this Court, and I agree that there is no substance in this objection and I need say no more in this respect. Considerable argument appears to have been addressed to the District Court as to whether the Attorney-General was properly made a Respondent, and he appears to have been struck out of the proceedings, but I think he was properly served with the notice of motion and it could be left to him to appear or not, irrespective of whether he was named as a Respondent or not. Actually, we heard the Solicitor-General in argument, at his own request, and we are grateful to him for his comments.

Another point was that the application should have been made in the Tel-Aviv District Court and not the District Court at Jerusalem, but at the date the motion was filed the second Respondent was not

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absence of any fiat, but it is perhaps as well if I express my opinion that under Section 3 of Cap. 38 such authorisation was not necessary.

then a Respondent and was joined later *). The President dealt with this point and held that it was properly before his Court, and we agree. Neither is there any substance in the point that the matter should have been brought by way of action and not by motion, and reference was made to our local definition of action in Rule 2 and to Rules 7 and 12. But I would observe that the preceding words "unless the context otherwise requires", qualify this definition which says that "action" includes all civil proceedings commenced in any manner prescribed. No relief is sought against the Respondent, and under Rule 7(1)(h) such must be stated in an "action". Rule 305 and following Rules specifically provide for applications by way of motion, and I think the learned President erred in saying that not only was it inconvenient and unsuitable to try this matter by motion but that such matter could not be brought before the Court or originated by way of motion. I would also refer to Order 25 Rule 5 of the English Rules, which says that no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not. It is clear from the notes to this rule, and authorities there quoted, that although there is a discretion in the Court to hear such matters by way of motion and which should be carefully exercised, in my opinion it is the most expeditious, convenient and satisfactory manner of obtaining a declaration of this nature.

A further objection before us, and one made for the first time, was that Abcarius Bey, who filed an affidavit as to the law in Egypt on the point, was not competent to advise this Court. This is rather an astonishing objection in view of the fact that no counter affidavit was filed in this respect, and moreover Abcarius Bey states that for many years he was sub-Director of the Mixed Tribunal in Egypt in the Ministry of Justice at Cairo.

All these technical objections are somewhat surprising in view of the facts of the case. Some of these facts are set out in the application, as follows:—

(1) The applicant, a widow, and whose previous marriage took place outside Palestine, came to Palestine after the death of her husband, and in August, 1937, married the second Respondent, I assume, in Palestine.

(2) No details are given of this marriage but it is stated that at that time the second Respondent was, and still is, an Egyptian subject.

(3) No civil ceremony was performed, and one must assume that

*) Edit. Note. Originally only the Attorney-General was cited as Respondent to the motion, Mr. Azgour was joined later by order of the District Court. In the judgment appealed from the Attorney-General is referred to as 1st Respondent and Mr. Azgour as 2nd Respondent.

such religious ceremony took place before a Rabbi and in accordance with Rabbinical law and custom.

(4) It is not so stated, but one can and must assume that both parties are Jews.

(5) In December, 1940, so it is stated, the parties were divorced according to Jewish Law, and such divorce was recognized by the Rabbis of the Chief Rabbinate and a certificate to this effect was issued, dated the 29th December, 1940, a copy being attached to the application.

(6) The application then goes on to state that under Jewish law and as has been recognized and confirmed by this Court, Jews can divorce themselves by a ritual of mutual consent without any order of a Rabbinical Court being necessary.

(7) That, similarly, under Egyptian Law, such a divorce by mutual consent is recognized in the case of Jews, once it has been recognized by the Rabbis.

The details given in the application might have been much fuller and also more precise, and it would then have been more helpful in what is admittedly a difficult case, but so far as they go the facts have not been disputed nor have any assumptions I have made or which were made by Counsel for the Applicant, been controverted.

The application concludes by praying for a declaration that the applicant was divorced from the second Respondent in December, 1940.

There is a further fact that must not be lost sight of and that is that both parties, not having acquired Palestinian citizenship under the Palestine Citizenship Order-in-Council, 1935, as amended in 1939, are therefore foreigners, (vide Art. 59 of the Order-in-Council, 1932), and as stated in the application the second Respondent is an Egyptian subject and so I believe was the Applicant.

I accept the statement contained in paragraph (6) supra, as to the Jewish law and custom, confirmed as it is not only by the case of Volkenberg v. Volkenberg, C.A. 22/1934, but also ratified, if I may say so, in the judgment to be read by my brother Frumkin, and I accept the statement contained paragraph (7) supra, as to Egyptian law, confirmed as it is by the affidavit of Abcarius Bey.

Is there any reason therefore why this Court cannot make the declaration sought? Apart altogether from the question of the form in which these proceedings were brought, the learned Judge in the District Court dismissed the application, distinguishing the case Sasson v. Sasson, which I will refer to later, and stating, "I do not think this Court can go further than to pronounce upon the effect of the national law of the parties in relation to the divorce which the Applicant states she has obtained. That is a very different matter to declaring that the Applicant was divorced". In other words, he would have been prepared to make a declaration that the Egyptian law (i.e. the national

law of the parties) recognized this divorce obtained under the religious law of the parties, as being valid but he was not prepared to declare that the divorce was valid or to be recognized as valid under Palestinian law for all purposes, or that the marriage had in fact been dissolved. At least, that is how it appears to me that his judgment is to be interpreted. It was with some hesitation that the learned Judge came to this conclusion but quoted a Tel-Aviv District Court ruling as supporting his view, but he admitted that Sasson v. Sasson had not been referred to or quoted in that case.

Jurisdiction in connection with divorce is dealt with in the Order in Council, 1922, as amended from time to time, and by an amendment in 1939 Article 65. A envisaged and authorised a Marriage and Divorce Ordinance being enacted for non-Moslems and non-Members of religious communities, which unfortunately has not yet come into force. We therefore have to refer to the provisions in the Order itself.

Marriage and divorce are both matters of personal status (Art. 51) and by Articles 52, 53 and 54 respectively, the Moslem Religious Courts, the Rabbinical Courts of the Jewish Community and the Courts of the several Christian Communities are to have exclusive jurisdiction in these two matters (inter alia), but it is to be observed that foreigners are expressly excluded from coming within this jurisdiction, anyhow so far as concerns Jews and Christians,and that by Article 47 the Civil Courts also have jurisdiction in matters of personal status, of persons in Palestine, but subject to the foregoing other provisions I have mentioned. Again, by Article 64, the District Court is to have jurisdiction in matters of personal status of foreigners and the personal law of such foreigners is to be applied. Both in this article and in the succeeding Article 65, under which foreigners may consent to the jurisdiction of Religious Courts, there is a prohibition on the granting of a divorce to foreigners. The latter article has been amended to include a prohibition of a decree of nullity of marriage, but the former article has not been so amended.

I have thought it desirable to refer briefly to these somewhat complicated and confused provisions, as they appear to me to be somewhat relevant, in a greater or less degree.

In effect, however, the argument for the Applicant is that they are hardly relevant at all, as it is not suggested that any Rabbinical Court has in fact attempted to grant a divorce or exercise jurisdiction at all over the parties in this respect.

What is argued is that under Jewish Law and custom, the parties have by mutual consent divorced themselves and have merely been before a Rabbi who, having satisfied himself as to such mutual consent, and on other matters, has given the parties a certificate to the effect that they are validly divorced according to Jewish law. This view is

confirmed by Volkenberg v. Volkenberg to which my brother Frumkin refers in his judgment, and I have nothing to add to his comments in this respect and in regard to the Certificate issued by the Rabbinate.

The Applicant relies on this case and also on the Sasson v. Sasson case (1924 A.C. 1007), which was a case of a very similar nature and in which the Privy Council stated that the Appellant was entitled to the declaration asked for.

For the first Respondent it was submitted that that part of the Volkenberg judgment quoted was obiter, bur this is clearly not so, and also that the Sasson case could and should be distinguished in that the respective Order-in-Council are different. The wording is slightly different, but the effect is the same, and the facts in that case are so similar to the facts in the case before us that we are bound by that decision.

I am not aware of any similar local case as between Moslems having come before this Court but I imagine that the position would be very much the same, and in the Sasson case the following part of the judgment of Lord Dunedin seems to be relevant: — "Divorce by means of the use of the phrase "talak" is not a ground which would be governed by English law. Nonetheless, the British Courts have often given effect to Mahomedan divorces, and an instance may be found in the case of Sarabi v. Rabiabai" (reported in the Bombay Reports, I.L.R. 30, p. 537).

In my view the appeal should be allowed and the declaration asked for should be made the Appellant to have the costs on the lower scale here and below, including LP. 15 attendance fee.

Delivered this 20th day of may, 1942.

Frumkin, J.:

This is another personal status case not free of either interest or difficulty. The facts are simple and not unusual. The appellant was married in Palestine to the respondent, an Egyptian subject. Both parties are Jews and the marriage was a religious one. It turned out to be an unhappy alliance and the woman sought for, and allegedly obtained, a divorce before the religious authorities. She then applied, by way of motion, to the District Court for a declaratory order that she was divorced, and her application having been refused she has now appealed.

A preliminary objection was taken that there is no appeal before this Court because the advocate who signed the application for leave to appeal on behalf of the appellant had no power of attorney at the time. It appears, however, that Mr. Weyl, who signed the application, was an advocate in the office of Mr. Goitein acting upon his instructions. Mr. Goitein represented the appellant all through the proceedings and under the Advocates Ordinance a delegation in writing is only necessary when one advocate represents another in a hearing before a Court. Such delegation is not necessary for a mere signing of an application. The objection must therefore be over-ruled.

On the merits of the case, it is clear that neither the Rabbinical Court nor the Civil Courts in this country have jurisdiction to pronounce a decree of dissolution of marriage of foreigners. The position is therefore such that a foreign Jew or Jewess living in Palestine wishing to obtain a divorce against the will of the other party to the alliance has no direct legal remedy in this country. This is an unfortunate state of affairs, as there are Jews of many foreign nationalities living in this country and in the natural course of events cases are bound to arise when a party has to seek for legal relief from a Court in order to put an end to a broken family life; very often the only effective relief is by way of a dissolution of the marriage. This is a hardship for which, of course, the remedy lies with the legislature, and in fact the Order-in-Council envisages legislation in this respect; pending such legislation however which is still to come, the Courts should not, to my mind, lose sight of such hardship and try, while construing the law, to give it the most liberal interpretation permissible.

Now, while the Rabbinical Court as a Court has no jurisdiction over foreigners, there is nothing to prevent Jews from seeking the help of their religious dignitaries in giving effect to their mutual desire to put an end to their matrimonial relationship by effecting a divorce in the prescribed ritual form. In Volkenberg v. Volkenberg (C.A. 22/34, 2 P.L.R. p. 365) the nature of a divorce under Jewish Law was explained and the distinction was drawn between the function fulfilled by Rabbis in their judicial capacity as Judges of Rabbinical Courts and in their capacity as religious dignitaries. I may here cite the following two passages of that judgment.

> "Divorce under Jewish Law is an act of mutual consent contracted between husband and wife and supervised by Rabbinical authorities only so far as necessary to secure that all requirements of Jewish Law in this respect have been fully observed. In any dispute between husband and wife as regards a divorce the Rabbinical Court can only decide whether or not the husband is bound to divorce his wife and whether or not the wife is bound to accept a divorce from her husband. With the issue of an order to that effect, the jurisdiction of the Rabbinical Court as such ceases. There is no way of enforcing such a judgment except by using moral, religious and social pressure on the parties to obey the Order; and notwithstanding any order of the Rabbinical Court to the effect that a divorce shall take place, there is no divorce and no dissolution of marriage unless and until the husband has by his own will granted the divorce in the form prescribed by religious authorities (a form which has practically not changed for the last 2,000 years), and that the wife has by her own will accepted such divorce.
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> The divorce under Jewish Law is thus on the one hand a contract by mutual consent. On the other hand, however, it is a ritual institution strictly governed by religious rules of traditional methods performed by persons of special qualifications and supervised by recognized Rabbinical authorities acting not in a judicial capacity, but, let us say, in the capacity of a priest.

> Occasionally the Rabbis so acting in a purely religious capacity are also members of a Rabbinical Court, but their functions in the two capacities are distinctly different from one another".

I would add that this applies not only as regards foreigners over whom Rabbinical Courts have no jurisdiction at all, but also as regards Palestinian Jews over whom the Rabbinical Courts have exclusive jurisdiction in matters of divorce. Even in the latter case all a Court, as such, can do is to rule that a divorce should or should not take place, but once the Rabbi ceases to act in his judicial capacity he can exercise his authority as religious head over those Jews who voluntarily seek his help or submit otherwise to his authority, be they Palestinians or foreingers. When, whether by original consent or in obedience to a religious direction imposed upon him, a husband divorces his wife by giving her a bill of divorcement, the couple are, to all intents and purposes, considered divorced under the Jewish Law. This, it may be mentioned, is the only way, as a woman cannot, under Jewish Law, divorce her husband.

Whether such a divorce would be recognised under the Civil Law is quite a different matter. The law of some States including nearly all countries in the Middle East, Eastern Europe and, I think, India, would recognise and give effect to such divorce. Other States like England and other European countries would not. In Volkenberg v. Volkenberg the view was expressed that the Courts of this country should take cognizance of a divorce issued by Rabbinical authorities if such divorce is recognized by the national law of the parties. It has been argued that this view is obiter. Whether that be so or not, I still consider that it is a proper statement of the law.

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. In order to succeed she has to satisfy the Court on two points namely, that under Jewish Law she has obtained a valid divorce and that such a divorce would be recognized by the law of Egypt.

On the first point a certificate of divorce was produced, issued by the Rabbinate of Petah-Tiqva countersigned on behalf of the Chief Rabbi of Palestine, with the seal and signature of the Civil Registering authorities under the Marriage and Divorce (Registration) Ordinance. According to that certificate a divorce was given dissolving the marriage of the parties. That is, to my mind, sufficient evidence to show that the parties in this case are duly divorced under Jewish Law. The allegation that one of them, the respondent, is not a member of the Jewish Community is of no relevance since the Rabbinate in performing its functions in this matter did not act as a Court and therefore no question of jurisdiction arises. The certificate is not only evidence of the divorce but also evidence that the divorce was contracted by consent, as it could not otherwise have been contracted.

On the second point there is also unrebutted evidence that under the national law of the parties, namely the Egyptian Law, a Jewish divorce is recognized. The affidavit of Mr. Abcarius to this effect is supported by the Sasson v. Sasson case (1924 A.C. 1007).

We therefore have reached the point where the appellant has succeeded in producing satisfactory evidence on the two issues involved.

Is she, then, entitled to the declaration claimed by her? I can see no reason to prevent the issue of a declaratory judgment of this nature. The only doubt I had was whether the application, especially since it is the first of its kind so far as I am aware, should not have been made by way of action. But it was open to the respondent, by asking for evidence to be heard, or otherwise, to make the continuation by way of motion impossible. The case having, however, reached a stage where all the law has been explored, and no facts being in dispute, it would be as well to dispose of the matter at once as no useful purpose would be served by protracting the proceedings any longer.

In my view, the appeal should be allowed, the judgment of the District Court set aside and a declaratory judgment issued to the effect that having obtained a divorce valid under Jewish Law and recognized under her national law, Olga Walder (also known as Azgour) was divorced from her husband, Samuel Azgour. The appellant will have costs on the lower scale here and below, and we assess LP. 15 attendance fee for the hearing of this appeal to be paid by the first respondent.

Delivered this 20th day of May, 1942.

Khayat J.:

I agree with the judgment delivered by my brother Frumkin J. I wish to add that the divorce certificate in this case does not require, for the validity thereof, a judgment or decision by a Rabbinical Court, since the divorce took place by the consent of the parties concerned and was confirmed by a Rabbinical authority which does not possess judicial powers; and therefore this confirmation is not contrary to Article 53 of the Palestine Order-in-Council which prohibits Rabbinical Courts from dissolving a marriage between foreigners, and there is no impeachable reason against the validity of adopting this course, since it does not contravene the provisions of the said Article. Likewise the giving of a declaratory judgment on questions of fact, does not in my opinion, clothe this Court with jurisdiction contrary to the provisions of Article 64 of the Order-in-Council which prohibits the Civil Courts from issuing a decree of dissolution of marriage in respect of foreigners.

Delivered this 20th day of May, 1942.

CIVIL APPEAL No. 71/42.

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

Before:— Rose, J. and Abdul Hadi, J.

Salmeh bint Salameh Ibn Salem Abu Naj'i Appellant.

v.

Salman Abu 'Azra of Arab El Tarabin Respondent.

Magistrate's Court sitting as Land Court hearing evidence of an expert that value of land in question LP. 148, *witnesses in rebuttal, not professing to be experts stating value substantially in excess of LP.* 150 — *Magistrate deciding that matter outside his jurisdiction on accepting evidence that value of land exceeds LP.* 150 — *Weighing expert, and other, evidence.*

a) No principle of law or practice that evidence of an expert must be, or should be, accepted in preference to that of other persons.

b) Fact that witness an expert — an element to be taken into consideration in weighing his evidence, but degree of credibility of an expert, as of any other, witness — a matter for trial Court.

S. Es-Saleh for Appellant. *W. Salah* for Respondent.

Appeal from judgment of Magistrate's Court, Beersheba, sitting as a Land Court, dated 15.4.42, in Land Case No. 61/42.

JUDGMENT

This is an appeal from a decision of the Magistrate's Court Beersheba sitting as a Land Court. The sole point for consideration is whether the Magistrate was right in coming to the conclusion that he had no jurisdiction to try the case as the value of the property concerned exceeded LP. 150. It appears that the plaintiff-appellant called an expert, a land valuer, who said that the value of the land was LP. 148. The defendant-respondent called three persons who did not profess to be experts, but were persons living in the neighbourhood who stated that they had practical knowledge of the value of that and neighbouring land, and that the value of the land in question was substantially in excess of LP. 150. The Magistrate accepted their evidence and the appellant now asks us to say that he was wrong in so doing because, as a matter of law or at any rate of practice, the evidence of an expert should be accepted in preference to that of persons who are not experts. There is, so far as I am aware, no principle of law or practice that the evidence of an expert must be, or should be, accepted by a trial Court in preference to that of other persons. The fact that a man is an expert is an element that the trial Court will, no doubt, take into consideration in weighing his evidence, but the degree of credibility attaching to the evidence of an expert, as indeed of any other, witness must remain a matter for the Court of trial. In this case there was clearly evidence which, if the Magistrate believed it, entitled him to come to the conclusion that the value of the land was in excess of LP. 150.

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

Delivered this 17th day of June, 1942.

CRIMINAL APPEAL No. 48/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Gordon Smith, C.J., Rose, J. and Frumkin, J.

In the appeal of:

Attorney-General — Appellant.

v.

Rabbi Itzhak Meir Levin of Jerusalem — Respondent.

Charge under Regul. 4 C(1)(b) of Defence (Finance) Regulations 1940 as amended (making payment by order or on behalf of a person residing outside sterling area) — Trial Court agreeing with submission that no case to answer — Appeal by Prosecution signed by representative of Attorney General — Meaning of "payment" in Regul. 4 C(1)(b) of Defence (Finance) Regulations — Prima facie evidence as to signing telegram and as to residence outside sterling area — When should defence be called on and when is it proper to make submission that no case to answer.

1. Established practice of Appellate Courts to be most reluctant so to construe a statute as to imply that consistent practice of Courts for some substantial period has been incorrect.

2. Duly authorised representative of Attorney General can properly sign criminal appeal, and this right — not abrogated by amendments in 1939 of Criminal Procedure (Trial upon Information) Ordinance.

3. "Payment" in regul. 4 C(1) (b) of Defence (Finance) Regulations 1940 must be given its natural meaning, not limited to payment out of accused's own funds.

4. Telegram — prima facie evidence that signed and delivered for transmission by person by whom it purports to be signed.

5. Fact that person sent a telegram from New York giving detailed instructions to accused in Palestine for disposal of substantial funds raises presumption that person resides in U.S.A. within meaning of regul. 4C(1) (b) of Defence (Finance) Regulations 1940.

Per Gordon Smith C.J.

6 *a.* For defence to be called upon there must be evidence in proof of charge as laid, but at that stage Court has only to consider whether there is any evidence on essential points (not merely a scentilla) or not without considering weight of evidence.

b) Where no evidence at all on a material point essential in proving case for prosecution, Counsel for accused should submit that no case to answer; if Court agrees, it should stop case and acquit. Court can do so even without such submission, on its own initiative.

c) Submission that no case to answer should be made at close

of case for prosecution and before accused is asked whether he desires to make a statement or give evidence in witness box.

d) When accused asked whether he desires to make a statement etc. — not expected nor desirable that his advocate should make a speech on his behalf or address Court on evidence already given, sufficient for him to draw Court's attention to entire absence of such evidence as necessary to secure conviction and submit that no case to answer.

Crown Counsel (*Hogan*) for Appellant.

Eliash and Olshan for Respondent.

Appeal from judgment of District Court, Jerusalem, in Misdemeanour No. 386/41, dated 20.2.1942, whereby respondent was acquitted of offences contrary to Regul. 4C(1)(b) of Defence (Finance) Regulations, 1940, as amended.

JUDGMENT

Rose J.:

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

Mr. Eliash for the respondent raises a preliminary point that no proper appeal is before this Court because under section 67 of the Criminal Procedure (Trial Upon Information) Ordinance only the Attorney General himself can sign the notice of appeal. In Criminal Appeal No. 18/38 *), P.L.R. 1938, at page 183, this Court held that a duly authorized representative of the Attorney General can properly sign a Criminal Appeal, and since that decision there have been numerous appeals by the Attorney General signed by learned Crown Counsel. Mr. Eliash argues that owing to subsequent amendments of the Ordinance in 1939, the inference should now be drawn that only the Attorney General may so sign. It is an established practice of Appellate Courts to be most reluctant so to construe a statute as to imply that the consistent practice of the Courts for some substantial period has been incorrect. In the present instance, following this practice, we prefer to hold that the legislature may have expressed its intention in a slovenly manner rather than that by the amendments referred to the right of a representative of the Attorney General to sign appeals has been abrogated. We think, therefore, that there is no substance in this preliminary point.

The respondent was charged on two counts with making payments to certain persons on behalf of a person resident outside the sterling area, contra regulation 4 C (1)(b) of the Defence (Finance) Regulations, 1940, as amended. At the material date the relevant part of the regulation read as follows:

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*) 3 CtLR p. 137.

> "subject to any exemption which may be granted by order of the High Commissioner, no person shall, except with permission granted by or on behalf of the High Commissioner, make any payment to or by the order or on behalf of any person resident outside the sterling area".

It appears that on the 24th April, a telegram was sent to the respondent by one Goldman from New York instructing him to make certain charitable disbursements on Goldman's behalf. Two of the recipients were Rabbi Weingarten and Rabbi Twersky and there is evidence that on the 29th of April, 1941, and on a day unknown between the 28th April and the 25th of June, 1941, payments were made to these persons as alleged in the first and second counts respectively.

Mr. Eliash argued that for the purpose of this regulation the word 'payment' must mean payment out of an accused person's own funds. We see no reason so to limit the natural meaning of the word, and, as we have already said, we consider that there was prima facie evidence of payment as alleged in the Information.

It is not disputed that at the material date the respondent could not claim the benefit of any exemption and had not obtained the permission of the High Commissioner to make the payments in question. It is urged, however, that the prosecution failed to show that Goldman was resident outside the sterling area. The question as to whether or not a person is resident in a certain place depends upon the particular facts and is often a question of difficulty. The only matter which we have to decide at this stage is whether the prosecution has adduced prima facie evidence of residence outside the sterling area. By reason of section 52 of the Post Office Ordinance (Cap. 115 of the revised Edition) the telegram itself raises the presumption that it was signed and delivered for transmission by Goldman and, after some hesitation, we are of opinion that the fact of Goldman's having sent a telegram from New York giving these detailed instructions to the respondent for the disposal of these substantial funds raises the presumption that he was resident in the U.S.A. within the meaning of this regulation. That being so, we are of opinion that the trial Court was wrong in holding by a majority that the prosecution had failed to establish a prima facie case. The matter must, therefore, be remitted to them to complete and determine according to law.

We would add that we are informed that the respondent has since received the necessary permission from the High Commissioner to engage in similar transactions in the future. If this information is correct and having regard to the fact that, prior to the passing of the relevant amendment only a few weeks before the alleged payments complained of, he had disposed in similar circumstances of substantial sums of money without contravening any regulation, the trial Court may well

come to the conclusion, in the event of an ultimate conviction, that a nominal penalty will meet the case.

Delivered this 23rd day of April, 1942.

Gordon Smith, C.J.:

I concur in the judgment given by my brother Rose on the merits of this case, and I propose only to deal with a suggestion by Counsel that it would be advantageous for this Court to make some authoritative ruling as to a submission by Counsel that there is no case to answer. The procedure to be adopted at the close of the case for the prosecution is that laid down in Section 39 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36, but, unfortunately, the Ordinance is entirely silent on this point or as to at which stage of the proceedings such a submission might be made. Neither does there appear to be any reported case dealing with the point, although this Court has, on various occasions, remitted cases to the District Court to call on and hear the defence, as in the case now before us. It may be that the oft quoted rule, that it is the duty of the prosecution to prove the case against the accused is misapplied at times and in this respect, as this is a matter for consideration by the Court at the conclusion of the whole case and before delivering its verdict.

The general rule is, however, that there must be a prima facie case put forward by the prosecution and which the defence should be required to answer. The difficulty is, what amounts to a prima facie case? This, in my view, means that there must be evidence in proof of the charge as laid. It may be that such evidence may be of a slender nature or that there are essential elements in a charge on which there must be substantial evidence and if there is no such evidence, then there is no case to answer. For example, in a case of larceny or theft of goods, there must be evidence that the goods have been stolen, and similarly in a case of unlawful possession of stolen goods; in a case of false pretences, there must be evidence of the false pretence, and so on. Again, there may be some evidence but very slender evidence of necessary identification.

But, it is not at this stage that the Court has to consider either the weight of such evidence, or the credibility of the witnesses giving the evidence; what it has to consider is whether there is any evidence or not, and by "any evidence" I do not mean a mere scintilla of evidence. If, therefore, the Court considers that there is evidence on these or other essential points, then the defence should be called upon.

The matter is somewhat simplified here in that Judges are also judges of fact as well as of law, and act in the dual capacity of Judge and Jury. It has been held in England, Criminal Appeal Reports, Vol. 8 p. 11, re J. Bennett, that in 'near the line cases' it is better to leave the case to the Jury, but that when there is no evidence, then the case should

be withdrawn from the Jury. It has also been held, Vide C.A.R., Vol I, p. 170, re Abraham George, that at the close of the case for the Prosecution a Judge is not, in law, bound to withdraw a case from the Jury, if the point is not submitted to him, although he may do so on his own initiative. If the defence elects to call evidence, then the Court looks at the case as a whole. In the case of re White, C.A.R., Vol. 13, p. 211, Mr. Justice Darling said, "At the end of the case for the prosecution, counsel for the defence ought to have submitted that there was no case to go to the Jury, and if he had done so, it would have been the duty of the Judge to give effect to the submission. There was no evidence". etc. etc.

From the foregoing it may therefore be adduced that where there is no evidence at all on a material point which is essential in proving the case for the prosecution, Counsel for the accused should submit that there is no case to answer, and if the Court agrees with such submission, then it should stop the case and acquit the accused, and even without such a submission, the Court can do so, on its own initiative.

Another point has also arisen, namely, as to when this submission should be made, but it is clear from the foregoing and from Section 39 (supra) that it should be made at the close of the case for the Prosecution and before the accused is asked whether he desires to make a statement or give evidence in the witness box.

Further, it is not expected nor is it desirable that Counsel for the defence should make a speech on the accused's behalf or address the Court on the evidence already given. As I have said, it is not at that stage that consideration is given to the weight of evidence, and it is quite sufficient for Counsel merely to draw the attention of the Court to the entire absence of such evidence as is necessary to secure the conviction of the accused and submit that there is no case to answer.

I would also observe that not only here but elsewhere have I been asked, at the close of the case for the Prosecution, to permit Counsel to consult his client in the dock and advise him on the point as to whether he should or should not go into the witness box, with the subsequent liability to cross examination. Normally this should not be necessary, and it is only in unusual circumstances that such a contingency might arise, as presumably Counsel has already interviewed his client and advised him thereon. I might perhaps observe that, so it has been said, the late Marshall Hall always required his client previously to state in writing, whether he desired to give evidence in the witness box or not. Admittedly, many accused have, by their own evidence convicted themselves, and no doubt will continue to do so.

I trust that these remarks may be of some help and assistance in the future, both to members of the Bar and the Bench.

Delivered this 23rd day of April, 1942.

CIVIL APPEAL No. 60/42.

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

Before:— Rose, J., Frumkin, J. and Khayat, J.

In the appeal of:

Mizrahi Bank Ltd., Tel-Aviv. Appellant.

v.

1. Alexander Tiraspolsky.

2. Hanna Gezelter. Respondents.

Contract for purchase of land, payment to be made by a series of promissory notes — Purchaser making default in payment, vendor notifying him by letter 3½ years later that he regarded contract at an end on account of purchaser's breach and that he (vendor) himself free to sell the land to a 3rd party — Purchaser not replying to vendor's letter, vendor advising him 6 months later that land in question actually sold — Purchaser raising point that vendor also in breach in that he was not in a position to transfer whole of land contracted for — Trial Court deciding that vendor bound to return moneys received on account of purchase price and not entitled to damages as he was also in default — Effect of trifling diminution in area of land sold — Court of Appeal upsetting finding contrary to unchallenged evidence — Exercise of option under art. 226 of Mejelle.

1. Trifling diminution in area of land, subject matter of contract, does not amount to breach, if no misrepresentation on part of vendor and if he was in a position, at all material times, to fulfil substance of contract.

2. Appellate Court may upset finding of Court of trial, if contrary to only evidence adduced on matter in question and which evidence remained substantially unchallenged.

3. If party to contract wishes to take advantage of option provided by art. 226 of Mejelle (deficiency in area), he must manifest exercise of option by some act; he cannot succeed, if course of proceedings shows that he only raised this point as a pure afterthought.

Olshan (*by delegation*) for Appellant.

Sackheim for Respondents.

Appeal from judgment of District Court, Tel Aviv, dated 31.3.42, in Civil Case No. 254/41 whereby appellant's counter-claim was dismissed.

JUDGMENT

This is an appeal from a judgment of the District Court of Tel-Aviv. By an agreement in writing dated 21st October, 1934, the respondents agreed to buy a certain plot of land from the appellant, one of the terms of the agreement being that payment should be made by a series of promissory notes, the final note maturing on the 21st of October, 1937. On the 21st June, 1936, the respondents failed in their payments, no reason apparently being put forward except financial embarrassment. The appellant appears to have treated the matter with lenience and took no positive action until the 18th of December, 1940, when it wrote a letter to the respondents (Exhibit P/3), stating that it regarded the respondents as having defaulted under the agreement and that the contract was, therefore, cancelled. The appellant further stated that it regarded itself as free to sell the land to a third party.

No reply was received to this letter and on the 10th June, 1941, the appellant wrote a further letter (Exhibit P/4) stating that it had, in fact, sold the plot of land in question. It was not until after the receipt of this letter that the respondents raised the point that the appellant was also in breach in that it had never been in a position to transfer the full area of Land contemplated in the agreement.

The District Court found — and there was no appeal against this finding — that the respondents were entitled to the return of the money which they had paid on account of the purchase price. The Court further held, however, that the appellant was also in breach and was therefore not entitled to recover damages on its counter-claim resulting from the respondents' breach of the contract. In fact — and this is common ground between the parties — the diminution in area was of a trifling, indeed of a purely technical, nature due to the widening of the road by the municipality of Tel-Aviv, probably in its capacity as the Town Planning Commission. The respondents, however, rely upon article 226 of the Mejelle and Civil Appeal 261/40*) Vol. 8 P.L.R. 1941 at page 71, but it seems to me that the present case can be distinguished on two grounds. First, in the present case there was no misrepresentation in the first instance. in that at the time of the entering into the contract the appellant was in possession of the area specified. Secondly, in the present case the appellant was in a position, at all material times, to fulfil the substance of its contract. It is true that the District Court made the following finding on this matter:

> "The contention of the Defendant that it was possible for him to increase the area of the Plot carries no substance because the parcellation had already been approved and no amendments could have been made".

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*) 9 CtLR p. 61.

This finding, however, is clearly contrary to the evidence of Izhak Karzisky and Maximilian Steinpertz, whose evidence was the only evidence adduced on the matter in question and remained substantially unchallenged. Further, if a party to a contract wishes to take advantage of the option provided by article 226 of the Mejelle, it is, in my opinion, necessary for him to manifest the exercise of his option by some act. In this case the exercise of the option was never manifested in any such manner, and it is, in fact, quite obvious from the course of the proceedings that the respondents only raised this point as to the diminution of area as a pure after-thought.

I am therefore of opinion that the District Court erred in coming to the conclusion that the appellant committed a breach of the contract.

In order, however, to be entitled to recover damages for any breach on the part of the respondents, the appellant must show that it was ready and willing at all material times to carry out its own obligations under the contract. As Mr. Olshan, counsel for the appellant, pointed out, the degree of proof required to satisfy a Court that a party is ready and willing to perform his part of the contract varies according to the circumstances of each particular case, and in this case I agree with his contention that the appellant succeeded in establishing that it was ready and willing to perform its part of the contract up to the 18th December, 1940, when it notified the respondents that it regarded the contract as being at an end on account of the respondents' breach.

It follows, therefore, that, in my opinion, the appellant is entitled to recover damages for breach of contract in respect of any loss which it can prove to have flowed from the respondents' breach.

The appeal is therefore allowed and the matter remitted to the District Court to assess the damages, if any, that the appellant has suffered. The costs of this appeal will be in the cause and on the lower scale, and will include the sum of LP. 15 for advocate's attendance fee to the ultimately successful party.

Delivered this 16th day of June, 1942.

CRIMINAL APPEAL No. 151/41.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Copland A/C.J., Edwards, J. and Khayat, J.

Attorney-General — Appellant.

v.

Naftali Herman Brender — Respondent.

Charge under sec. 9(6) of Trading with Enemy Ord. 1939 of failing to comply with order made by Custodian under said section and published in Gazette concerning production of information — Acquittal on ground that notice under para 11 of Trading with the Enemy (Custodian) Order 1939 must be a personal one and not one published in Gazette and that Custodian cannot set a time limit for the required information — True construction of para 11 of Trad. with the Enemy (Cust.) Order — Power of Custodian to fix time within which to furnish him with information or returns.

1. Custodian — not entitled by means of a general notice published in Gazette to require persons to furnish information or returns; words "shall be entitled to require any person to furnish" in para 11 of Trading with the Enemy (Custodian) Order mean a personal notice addressed to particular person.

2. Whilst Custodian not entitled to impose a liability by general notice in Gazette nor to fix a time limit by such means, he can in personal notice to particular person require returns or information within specified time.

Blum for Appellant. *B. Joseph* and *Caspi* for Respondent.

Appeal from judgment of District Court Tel Aviv, dated 16.11.41, in Crim. Case No. 127/41, whereby respondent was acquitted of failing to furnish Custodian with information required under sec. 9 of Trading with the Enemy Ord., 1939, and knowingly or recklessly making a false statement contrary to sec. 10(1) of said Ordinance.

JUDGMENT

This is an appeal by the Attorney-General against an acquittal of one, Mr. Brender, on a charge under Section 9 (6) of the Trading with the Enemy Ordinance, 1939, of failing, without reasonable cause, to produce, in accordance with the requirements of an order made by the Custodian under Section 9 of the Ordinance, information required to be produced or furnished under the Order. There was a second count in the information on which the District Court acquitted on hearing the evidence on that count, and no appeal has been taken against that acquittal. The Attorney-General, however, appeals on the acquittal on the first count because the District Court there held that the notice required under paragraph 11 of the Trading with the Enemy (Custodian) Order, 1939, must be a personal notice and not a general notice published in the Gazette. The District Court further went on to hold that the Custodian did not only publish a notice requiring information but in

that notice had set a time limit of 14 days which he could not do.

The Court is of opinion that, on the true construction of paragraph 11 of the Trading with the Enemy (Custodian) Order, the Custodian is not entitled by means of a general notice published in the Gazette to require persons to furnish information or returns as set out in paragraph 11. To our minds, it is quite clear that the words "shall be entitled to require *any person* to furnish" must mean a personal notice addressed to that particular person. Paragraph 3(1) of the Custodian Order imposes a liability on any person owing money to an enemy to pay it to the Custodian. The persons owing the money therefore are under an obligation to pay it and under paragraph 11 the Custodian, if not satisfied with the information, has power to require that person to give fuller details, but there is nothing in paragraph 11 which authorises a general notice to be made in the Gazette.

With regard to the time limit of 14 days, the Court wishes to make it quite clear that, whilst the Custodian cannot impose a liability by general notice in the Gazette and therefore cannot fix by general notice a time limit, yet he is certainly entitled under the last part of paragraph 11 to require any particular person to furnish him with information or returns within the time to be fixed by the Custodian. Subject to this amendment the appeal is dismissed.

Delivered this 13th day of January, 1942.

HIGH COURT No. 12/42.

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

Before:— Edwards, J. and Frumkin, J.

Leja Sztrajmel — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv.
2. Israel Sztrajmel — Respondents.

Rabbinical Court ordering person to make monthly payments to widow sister-in-law to whom he refuses to give, by act of "Halitza", freedom to remarry — Chief Execution Officer refusing to execute judgment of Rabbinical Court on ground that matter out of their jurisdiction — Nature of payments by brother-in-law awarded under Rabbinical law to widow in need of "Halitza" — Consent to jurisdiction of Religious Court.

1. "Halitza" (ritual act under Jewish law by brother of person dying without issue, which gives widow freedom to remarry) cannot be regarded as divorce for purpose of jurisdiction of Rabbinical Court.

2. Payments awarded under Rabbinical law to sister-in-law of person refusing to give her "Halitza" — included in "maintenance" under that law, hence a matter of personal status within art. 51 and

53 of Palestine Order-in-Council.

3. *a*) While consent to jurisdiction of Religious Court in a matter of personal status must be definite clear and beyond doubt, Court may in proper cases infer it from conduct.

b) Appearing before Religious Court and there setting up counterclaims against relief sought by Plaintiff in a matter of personal status — consent by conduct clothing Court with jurisdiction.

Edit. Note: As to 2 see: HC 22/39 6 CtLR 45 followed; see also CA 62/37 2 CtLR 133. As to 3 see: HC 79/40 8 CtLR 221 followed; see also: CA 127/26 1 P.L.R. 109; CA 12/37 1 CtLR Rep. 44.

Lustig for Petitioner. *Henigman* for Respondent No. 2.

Application for an order to issue directed to 1st Respondent, calling upon him to show cause why execution proceedings in file No. 1006/41 , Ex. Office, Tel-Aviv, should not continue according to application of Petitioner.

ORDER

Frumkin, J.

The brother of Respondent died without issue, leaving a wife, who is the applicant in this case. Both parties are Palestinian Jews. Under Jewish Law the Petitioner cannot remarry unless she obtains a relief from her brother-in-law in the form known as "Halitza". She sued Respondent before the Rabbinical Court, and in the result the Court ordered the Respondent to pay Applicant maintenance in the sum of LP. 2 per month until the performance of the said religious formality which will give the woman her freedom to be married. The Chief Execution Officer refused to execute the judgment of the Rabbinical Court, and hence this application.

The matter is one of jurisdiction. On behalf of Petitioner it was first argued that the Religious Court has exclusive jurisdiction under Article 53(1) of the Palestine Order-in-Council because "Halitza" is to be regarded as divorce, in as much as without it the woman cannot remarry. There is nothing in this argument. The parties never married and there could be no divorce.

Alternatively, counsel for Petitioner argued that the Rabbinical Court has obtained jurisdiction by consent of the parties under 53(2), and the first point which arises is whether the amount awarded by the Rabbinical Court is maintenance, and thus a matter of personal status within the meaning of Article 51 of the Palestine Order-in-Council.

The law on this point has been laid down by Trusted C.J. in Shtark v. Chief Execution Officer and others, H.C. 22/39 *) 6 P.L.R. 323, when after dealing with the previous case in which it was held that alimony and maintenance in the Order-in-Council should be given the English meaning, said:

"As Articles 53 and 54 of the Order-in-Council draw a distinction between alimony and maintenance, I think these Courts are

*) 6 CtLR 45.

bound to enquire into the English meaning of these words, but having ascertained that thereunder alimony is a payment by a husband to a wife in consequence of divorce proceedings, and that maintenance means certain other payments, such payments, when their nature is ascertained, will respectively be governed by the law of the community concerned. I do not think the application of the English meaning goes further than that."

We are told that under Jewish Law a brother refusing to give his sister-in-law the freedom to remarry by under-going the formality of Halitza is liable to pay her maintenance, and the word "Mezonot", which is the Hebrew translation for maintenance, would under Jewish Law include maintenance for a widow sister-in-law in a case of the nature of the present case. It is not for us to decide whether it is so or not, but I had an opportunity of examining the legal position under Jewish Law on this subject, and I found that there is considerable authority to support that view. And so we come to the next point as to consent.

In Leibovitz v. Leibowitz, High Court 79/40 *), where previous decisions on the matter of consent were reviewed, it was held that although "consent must be clear and beyond doubt" and "a definite consent by the parties themselves", in a proper case it is permissible for a Court to infer consent by conduct. In the present case the Respondent appeared before the Rabbinical Court and put up a number of counterclaims for certain property to be delivered to him as a condition for giving the Petitioner the relief required. In the circumstances, we consider that this is consent by conduct, and the judgment of the Rabbinical Court was therefore within its jurisdiction.

The order will therefore be made absolute with costs, i.e. fixed (inclusive) costs of LP. 5.

Given this thirty-first day of March, 1942.

Puisne Judge

I concur. *British Puisne Judge.*

CIVIL APPEAL No. 70/42.

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

Before:— Copland, J. and Rose, J.

Dr. Pinhas Weil — Appellant.

v.

Lutfi Boulos el Hadad — Respondent.

Magistrate sitting as Land Court finding that so-called private road belongs to Plaintiff — Question of sufficiency or otherwise of evidence in support of claim of ownership — Non-interference of Court of Appeal.

Question of whether or not a particular piece of land falls within a particular Kushan — eminently one of fact for trial Court;

*) 8 CtLR 221.

Court of Appeal will only interfere if satisfied that finding absolutely unjustifiable but not where evidence slight.

Edit. Note. See: CA 226/41, 11 CtLR 5 and Edit. Note thereto; see also: CA 237/41, ibid, 125.

Gavison for Appellant. *Cattan* for Respondent.

Appeal from judgment of Magistrate's Court of Safed, sitting as a Land Court, dated 12.4.42, in Land Case No. 278/41.

JUDGMENT

Rose J.:

This is an appeal from a judgment of the Magistrate at Safad sitting as a Land Court. The appellant confines himself quite properly to one main point which is that the finding of fact of the Magistrate that the road in dispute belonged to the plaintiff was not supported by the evidence. The facts are sufficiently set out in the judgment of the Magistrate and need not be referred to here in any detail.

It may be that the evidence as to the ownership of this road, the so-called private road, is slight, but it has to be remembered that the events covered by this case go back for a period of at least 30 years and the plans which were produced to the Court are palpably incomplete and unreliable. As has so often been said in this Court as regards appeals from Settlement Officers, the question of whether or not a particular piece of land falls within a particular kushan is eminently one of fact for the Trial Court, and we are most reluctant to interfere with a finding on such a matter unless we are satisfied that it is absolutely unjustifiable. In this case I see no reason to interfere with the finding of the Magistrate, and I come to this conclusion with the less reluctance in that it seems to be undisputed that the respondent had constructed this road at his own expense. Further it appears from the evidence that, as long ago as some 17 or 18 years, there was actually a conversation between the plaintiff or his representative and the then representative of the appellant in which it was discussed as to whether this road should be paved to a width of two or three metres, and it appears that as a result of representations on behalf of the appellant the width was limited to two metres, for the reason that otherwise it would encroach upon the appellant's ground. That, to my mind, seems to me to be conclusive on the merits of this dispute.

If, therefore, the Magistrate was right in finding that the respondent was the owner of the road in question, the matter of the screen becomes immaterial.

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

Delivered this 19th day of June, 1942.

Copland, J.:

I entirely agree. The appeal has no merits whatsoever. It is a purely technical one. The less said about it the better. It is dismissed.

HIGH COURT No. 56/42.

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

Before:— Gordon Smith C.J. and Frumkin, J.

1. The General Mortgage Bank of Palestine Ltd.
2. Dr. Joseph Rufeisen, Tel-Aviv, in his capacity as Receiver on behalf of the General Mortgage Bank of Palestine Ltd. Petitioners.

v.

President District Court Tel-Aviv, sitting as Chief Execution Officer and 3 others. Respondents.

Chief Execution Officer giving instructions to receiver appointed under Credit Banks Ordinance as to how he should deal with monies coming to his hands — Powers of Chief Execution Officer under Credit Banks Ordinance — Testing validity of appointment of receiver under Credit Banks Ordinance.

1. *a*) Credit Banks Ordinance contains specific provisions as regards receivership, and receiver must carry out his duties in accordance with Rules under that Ordinance.

b) Chief Execution Officer has no power to give instructions to receiver appointed under Credit Banks Ordinance as to how monies coming to his hands should be dealt with.

2. Validity of appointment under Credit Banks Ordinance of receiver can only be tested in accordance with Rules making specific provisions for such testing.

Bilesky for Petitioners. *Gorodissky* for Respondent No. 4.

Return to a rule nisi issued on 1.6.42, directed to 1st respondent calling upon him to show cause why his orders dated 24.10.41 and 15.5.42 in Ex. File No. 261/40, Tel-Aviv should not be set aside.

ORDER

In this case the order nisi must be made absolute, i.e. the orders of the Chief Execution Officer of the 24th October and 15th May, will be set aside. Under those orders, the Chief Execution Officer purported to give instructions to a receiver who had been appointed under Credit Banks Ordinance as to the manner in which the monies coming to the hands of that receiver should be dealt with. There is nothing under the Credit Banks Ordinance which gives such a power to the Chief Execution Officer. All the power that is given to him is that the mortgagee can apply for an order of sale. The Credit Banks Ordinance in its provisions as regards receivership, is a specific Ordinance and the receiver has to carry out his duties under that Ordinance in accordance with Rules that have, in fact, been made. Under Rule 7 of those Rules, provision is made as to how the money that comes to his hands is to be distributed; firstly payment of rates, taxes, etc. and payment

of the commission, premiums of insurance, repairs etc., and then payment of interest under the mortgage, i.e. to the mortgagee who has obtained the appointment of that receiver.

The application has been resisted on the point of the validity of the receiver. The receiver was appointed two years ago, or about then, and the respondent himself applied to the Chief Execution Officer and accepted the order made by him. And, as counsel for the petitioner rightly says, the respondent cannot approbate and reprobate. Moreover specific provision is made in the Rules for testing the validity of the appointment of the receiver. If the respondent questioned the validity then he should have taken steps under the Rules and in accordance with the provision made for testing the validity of the appointment.

I have already stated that the Chief Execution Officer has no power to make the orders he made. This rule will, therefore, be made absolute with LP. 10 inclusive costs against the 4th respondent.

Given this 12th day of June, 1942.

HIGH COURT CASE 58/42.

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

Before:— Copland, J., Edwards, J. and Khayat, J.

Joachim Suchier — Petitioner.

v.

Superintendent of Detention Camp, Mazra'a, near Acre — Respondent.

Habeas corpus application on behalf of person detained as enemy alien — Claim of acquisition of Palestinian citizenship — Onus of proof — Oath of allegiance.

Person who paid prescribed fees upon being informed to call at Immigration Office where Certificate of Naturalisation would be handed to him after oath of allegiance, cannot claim to be a naturalised Palestinian if he fails to discharge onus of proof that he actually took oath.

Weil for Petitioner. *Solicitor General (Griffin)* for Respondent.

Return to an order nisi in nature of Habeas Corpus issued on 1.6.42, directed to Respondent calling upon him to produce the body of Joachim Suchier before High Court for purpose of his release and to await further order of Court.

ORDER

This is a return to an order nisi on a petition in the nature of Habeas Corpus directed to the Superintendent of the Detention Camp Mazra'a, to show cause why one, Joachim Suchier, should not be released from custody. It is common ground that the petitioner is detained under

Regulation 17B, as it is alleged that he is an enemy alien, that is to say, he is still a German national. The whole question turns on whether or not the petitioner has become a naturalised Palestinian. He entered the country in 1935 as a legal immigrant and, in due course, in 1940,, he applied to the Department of Migration for a Certificate of Naturalization. He states, and it has not been denied, that he paid the proper fee for that application. Later on he made enquiries as to when the Certificate would be ready and he was informed to call at the Immigration Office in Tel-Aviv, where he would take the oath of allegiance and the certificate of naturalization would be handed to him. It appears that on the 19th May, 1940, he went to the office for the purpose of taking this oath of allegiance. Either on that day or previously the necessary fee payable on the issue of a certificate of naturalization had been duly paid by the petitioner.

The whole question depends on what, in fact, happened on this particular morning in 1940 with regard to this particular petitioner. Mr. Wolfson, who has been cross-examined on his affidavit before us, says that in 1940 they used to issue these certificates of naturalization on one morning in the week and the average was about 100 and on some morning it rose to 160. That, of course, may mean considerable pressure in the office, but Mr. Wolfson says that it is highly improbable and most unlikely that he would have administered the oath of allegiance to the applicant and, to the best of his knowledge and belief, naturally after a period of two years, he declares that he did not do so. It is a fact that the certificate of naturalization is not signed either by the person named therein or by the Inspector of Migration and neither is the oath of allegiance signed by either of these two persons. The original forms, including the certificate of naturalization with the photos of the applicant and his wife have been produced to us. Mr. Melamede also of the Department of Migration, has given evidence to us that a form is signed immediately after the oath has been administered by the clerk. He himself says he never signs it at the same time as the oath is given.

The petitioner has filed his second affidavit and gives in considerable detail what he says took place on this morning of the 19th May, 1940. In a case of this nature the onus is on the petitioner to prove the facts that he alleges. It is not on the department concerned to prove the negative. Taking the evidence as a whole, the affidavits and the answers which we have heard in cross-examination, we are not satisfied that the petitioner has discharged that onus of proof which is laid upon him.

For these reasons, therefore, the order nisi must be discharged. The Solicitor General does not ask for any costs.

Given this 12th day of June, 1942.

CRIMINAL APPEAL No. 6/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before: Gordon Smith, C.J., Rose, J. and Frumkin, J.

Asa'ad Ibn Haj Said el Khalil — Appellant.

v.

Attorney General — Respondent.

Father, without any motive, abstracting during night his child, aged 17 months, and shooting it and putting its body under a cairn — Postponement of preliminary enquiry owing to accused's insanity — Evidence of prosecution witnesses showing that accused was shortly before and after crime in an abnormal state of mind and incoherent — Evidence of medical experts to effect that accused committed crime "in a state of post epileptic confusion, unable to differentiate between right and wrong" — Accused stating in evidence that death occurred by accident — Assize Court finding that no sufficient evidence that at night of crime accused was suffering from epileptic seizure or effects of such seizure — Test of legal insanity under law of Palestine based on English law — Amount and nature of evidence necessary for establishing defence of insanity — Motive for crime.

1. a) Burden of proof of legal insanity may be stated as not higher than that which rests upon a party in civil proceedings.

b) For defence of insanity to succeed not necessary that such state of mind should be proved affirmatively by the evidence; if on evidence Court finds probable that at time of committing act accused was labouring under such defect of reason from disease of mind, as not to know nature of act or that act wrong, insanity defence established.

c) In insanity cases evidence of ordinary witnesses — often more useful than that of medical experts.

2. Trial Court not to reject evidence of doctors because they drew inferences from past history of person examined by them, this being one of things they must do and are qualified to do.

3. Court of Appeal may reverse conclusion of trial Court on finding that although judgment says no evidence with regard to decisive issue, there was in fact evidence.

4. While not necessary to prove motive for a crime, in proper cases entire absence of motive — a matter for comment and consideration.

Edit. Note:—As to 1 see: CrA 16/39 5 CtLR 174; CrA 8/40 7 CtLR 41; CrA 85/41 9 CtLR 184; CrA 64/41 10 CtLR 50. As to 3 see: CrA 23/42 11 CtLR 112. As to 4 see: CrA 96/ 37 2 CtLR 110.

Cattan and *Nakkara* for Appellant.

Crown Counsel (*Rigby*) for Respondent.

Appeal from judgment of Crim. Assize Court, sitting at Haifa, dated 9.1.42, in Crim. Ass. Case No. 75/41, whereby appellant was

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convicted of murder, contrary to Sec. 216, and punishable under Sec. 215 of Crim. Code Ord., 1936, and sentenced to death.

JUDGMENT

In this case the accused was convicted of murder, the defence being that of insanity, and on the appeal before us we had the benefit of a very lucid exposition of the facts and analysis of the judgment by Mr. Cattan, for the Appellant.

At the conclusion of the case, the Court unanimously allowed the appeal, substituting a verdict of guilty but insane, and the Court stated that it would give its reasons later, as the defence of insanity in murder cases raises matters of importance.

Although there was no real dispute as to the law in this respect, it is desirable to re-state what the law is on the subject. Section 14 of the Criminal Code Ordinance (73/1936) reads as follows:—

> "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission. But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission".

In effect, this statement of the law is a concise re-statement of the law of insanity as laid down in England and is what is known as the law in McNaughton's case, which has been considered over and over again in many leading cases during the last 100 years. It is only necessary to quote one. In R. v. True, XVI C.A.R., page 164, the Lord Chief Justice said:

> "Now the rule that is founded upon the answers given by the learned judges in McNaughton's Case is as follows:—
>
> 'The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong'.

The learned Lord Chief Justice went on to say:

> "That is a sufficient and salutary rule. In order that the accused person may come within it it must first be shown that at the time of the committing of the act he was labouring under a defect of reason, from disease of the mind. Then there is a choice of alternatives. The word is not "and", but "or". It may be shown that, in consequence of defect of reason due to that

disease, the accused did not know the nature and quality of the act he was doing, or did not know that he was doing what was wrong".

In True's case, and in which he was convicted of murder, at least two celebrated alienists stated in the witness box that they were prepared, then and there, to certify that the accused was insane. This sufficiently illustrates the big distinction there is between what amounts to medical insanity and legal insanity.

The defence of "uncontrollable impulse" in insanity cases is one not known to English law, and the only test is that, as stated and laid down in McNaughton's case, which has never been extended or relaxed by authoritative case law or by statute.

It was not and could not be disputed that the burden of proving legal insanity was upon the accused, but it was submitted that the evidence for the accused had discharged this obligation. In this connection Counsel for the accused cited the well known case of R. v. Sodeman, a Privy Council case and also an insanity case, reported in 1936 in 2 All England Reports, page 1138, in which it is stated in the judgment, at page 1140 "but it is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings". It is, therefore a question of probability and if, on the evidence before it the Court (or a Jury) comes to the conclusion that it is probable that at the time the accused committed the act, he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong, then that is sufficient to establish his defence of insanity.

Having stated what, in our opinion, is the law on the subject, it is necessary to consider the evidence in the case and the judgment of the Court below. The difficulty of obtaining affirmative medical testimony in this country was emphasized by Counsel, but, in this connection I would quote Avory J. in R. v. Lloyd, XX Criminal Appeal Reports, at page 140, where he remarked, "The evidence of ordinary witnesses is often more useful than that of experts in these cases".

The bare facts of the killing were that the accused shot his infant daughter aged about 17 months, sometime after midnight about one kilometer from Arara, and he had put her body under a cairn of stones. He had been reunited with his wife the previous day, and apparently both were happy and pleased at the reunion. He had parted from her about 9 p. m. when she had gone to sleep in her father-in-law's house near by, with the child, who slept with her. Apparently the accused entered during the night and abstracted the child without waking his wife. There was no motive whatsoever for the crime, nor did the accused deny that he had killed her but in his evidence stated

that it was an accident. This evidence by the accused was rejected by the Court, ant it remained to consider the defence of insanity.

The accused was school teacher but there is definite evidence that he had, in the past, had a number of epileptic fits and was subject to them. There was definite evidence by the 7th Prosecution Witness, with whom he had left a suit case containing his revolver and other things on the night in question, and of his coming at midnight for his case, of his acting in an extraordinary manner. There was definite evidence of extraordinary behaviour by the accused the next morning and in fact, owing to his insanity the preliminary enquiry had to be postponed, and it was only months later that he was then certified to be sane and the enquiry proceeded.

There was also medical evidence for the defence by Dr. Kurt Blumenthal, a specialist in nervous and mental diseases who had examined the accused and who had heard the evidence given by the prosecution witnesses. Dr. Blumenthal stated that "he committed the crime in a state of post epileptic confusion and he would not be able to differentiate between right and wrong". In cross-examination he confirmed this view and gave the reasons for his conclusions as to the accused's mental condition on the night of the crime. Dr. Michael Shedid Malouf, the Medical Officer in charge of the Bethlehem Mental Hospital, and who had examined accused in December, 1940, also gave evidence and confirmed the views expressed by Dr. Blumenthal. Both doctors gave a considerable amount of evidence as to the conditions and characteristics of an epileptic subject and both were of the opinion that from the evidence of the witnesses and their own observations, the accused had not only been subject to epileptic fits for some considerable time past but that he committed the crime while he was in a state of post epilepsy following such a fit, and that in such state he could not distinguish between right and wrong.

There can be no question therefore that if this medical testimony had been accepted by the Court below the verdict must clearly have been one of guilty but insane. Such evidence was not so accepted apparently for the reasons that the two doctors never actually saw the accused in a fit, and that at the times of their examinations the accused could distinguish between right and wrong, and also because later in the afternoon following the shooting of the child, the accused himself led the Police party to the spot where he had put the body of the child. For these reasons the Court considered that although it might well be that the accused was an epileptic subject, it was quite unable to hold that the defence had proved affirmatively that the accused was legally excused from the consequences of his act and that consequently the defence of insanity failed.

The main grounds of appeal submitted before us were (a) that the Court below failed to direct its mind to all the items of evidence as

to insanity and in particular to that evidence of facts which immediately preceded and followed the shooting; (b) that the Court below erred as to the burden of proof and placed upon the defence a more onerous standard of proof than that required by law; and (c) that the Court below wrongly rejected that part of the evidence of insanity to which it did apply itself or, in other words, misdirected itself in this respect; and (d) generally, that the evidence of insanity was sufficient to bring the accused within the accepted legal principles of excusability.

Mr. Cattan in submitting the case to us grouped the evidence as to insanity, conveniently under six heads, as follows:—

I. Past history and evidence of fits of epilepsy.

II. Acts of accused shortly before the commission of the offence.

III. Acts of accused shortly after the commission of the offence.

IV. Medical evidence by the two doctors.

V. Accused's subsequent certification of insanity and postponement of the preliminary enquiry.

VI. Entire absence of motive.

In its judgment, the Court below sets out a summary of the evidence and quotes extracts from the of some of the witnesses. It deals with items of evidence under Group I, and then jumps to the medical evidence in relation thereto and goes on to state, "There is no evidence that on or about the night of the crime the accused was suffering from any epileptic seizure or from the effects of such a seizure". This is definitely incorrect. No. 1 Prosecution Witness gave evidence in detail of his questioning the accused on the morning of the crime and states that although he looked normal he talked madly or foolishly and that he was incoherent. No. 3 Prosecution witness found accused in his father's house at 7.45 a. m. and asked after the child and accused did not answer. He stated that when accused saw the body, he was "like a fool with a vacant mind". No. 4 Prosecution Witness said that accused was not normal the morning following the crime and gave evidence of his incoherent answers. Similarly the 5th Prosecution Witness gave evidence of his condition early that same morning and in detail. The 7th Prosecution Witness, the woman in whose room the accused's suit case had been deposited, gives definite evidence as to his condition at midnight when he took this bag away, and how she was frightened at his strange behaviour. All this evidence was extremely relevant to the condition of the accused at the time he killed the child, but nowhere does it appear to have been considered in the judgment in relation to the question of insanity, although mentioned in the earlier review of the circumstances and facts of the crime. Neither is the fact mentioned in the judgment that the preliminary enquiry had to be postponed owing to the accused's insanity. It is true that it is not necessary to prove motive for a crime, but the entire absence of motive is a matter for

comment and consideration in a case of this nature.

Apparently the Court below rejected the medical evidence because the doctors drew inferences from the past history of the accused, but surely this is one of the things they must do and are qualified to do. Moreover it was not correct, as stated in the judgment, that Dr. Maloof "merely concluded" that the accused showed signs of dementia praecox because the accused told him that he was "in the habit of seeing visions and hearing voices of people talking". It was on a whole consideration of the case and of observations made in December, 1940, and of the evidence given at the time itself that Dr. Maloof based his conclusions.

There is one other point in the judgment to which I must also refer, and that is that the Court apparently was of the opinion that to succeed in a defence of insanity, such state of mind must be proved affirmatively by the evidence. This is not so, as already stated in referring to the Sodeman case.

Had the Court below kept this in view and had it also directed its mind to those items of the evidence, more relevant than any others, as to the state of the mind of the accused immediately prior to and subsequent to the crime, and had it appreciated the medical testimony in its relation to this and the other evidence, we are irresistably driven to the conclusion that upon a full and proper consideration of these points, there could have been no question but that the proper verdict was "Guilty but insane".

It was for these reasons that we allowed the appeal.

Delivered this 23rd day of February, 1942.

HIGH COURT CASE No. 66/42.

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

Before:— Gordon Smith C.J. and Frumkin, J.

Joseph Arbovitch — Petitioner.

v.

1. District Commissioner, Haifa.
2. Electoral Committee of the Local Community Council, Haifa. — Respondents

Application regarding elections to Local Community Council

High Court will not entertain application regarding elections, if they do not know what are, if any, the rules governing the elections and no allegation that any particular rule infringed.

Goitein for Petitioner. — Ex parte.

Application for an order to issue directed to Respondents calling upon them to show cause why they should not allow candidates of the Anti-Fascist Front to stand for election to Local Community Council.

ORDER

The application for a rule nisi must be refused. We do not know what are the rules, or whether there are any rules at all, and it is not alleged that any particular rule was infringed. The allegations are wholly nebulous and if we grant the rule the effect would be to postpone elections which might cause inconvenience to everybody concerned.

Given this 22nd day of June, 1942.

CRIMINAL APPEAL No. 92/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Copland, J. Edwards, J. and Frumkin, J.

Zwi Leibovitz — Applicant.

v.

Attorney General — Respondent.

Failure to attach protective material to panes of premises as prescribed by orders — Ineffectualness of defence that accused has done something much better for protection of inside of premises than measures prescribed by Government.

No answer to prosecution under Air Raid Precaution (Splintered Glass) Order to say "I have not attached protective material to pane as prescribed but have done something very much better".

Adlerstein for Applicant. *Crown Counsel* (*Rigby*) for Respondent.

Application for leave to appeal from judgment of District Court, Tel-Aviv dated 10.6.42 in Crim. Case No. 63/42, whereby applicant was convicted under Regul. 57 of Defence Regulations, 1939, as amended in P. G. 1084 of 20.3.41, and order made by High Commissioner's Command published in P.G. 1084 of 20.3.41 and Regulation 76(1) of Defence Regulations 1939 and sentenced to a fine of LP. 10 or one month imprisonment.

JUDGMENT

This is an application for leave to appeal against a summary conviction by the District Court, Tel-Aviv, under the Air Raid Precaution (Splintered Glass) Order, 1941, in which the appellant was sentenced to a fine of LP. or one month in default.

The argument used by the applicant's counsel was that the object of the order was merely to protect the inside of the premises and not the outside.

Now, it is quite clear from the order made by the District Commissioner, Lydda District, under the Defence Regulations, that the protective material must be attached to the inside of the pane, and it is no answer to a prosecution to say "we have not attached it to the inside of the pane but we have done something very much better —

we have put a barricade about two metres behind". But regulations are meant to be complied with. The Government, on expert advice no doubt, have come to the conclusion that protective material must be attached to the glass itself. The applicant apparently thinks that his scheme is better and legal; he is wrong.

The application for leave to appeal is dismissed. We would only remark that the penalty imposed — one of LP. 10 — is extremely small. The applicant might well have been sentenced to imprisonment without the option of a fine.

Delivered this 29th day of June, 1942.

HIGH COURT No. 70/42.

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

Before:— Copland, J. and Edwards, J.

Gabriel Mizrahi & 4 others — Petitioners.

v.

1. Chief Secretary, Government of Palestine.
2. Local Council of Bnei-Brak. — Respondents.

Application to High Court against order including certain property in Local Council Area while excluding other — Non-interference of High Court.

Not function of High Court nor have they power to decide what the area under jurisdiction of a Local Council should be.

Hatchwell for Petitioners. Ex parte.

Petition for an order to issue directed to respondents calling upon them to show cause why they should not cancel the order given on 15.4.41, including petitioners' property in Local Council Area of Bnei Braq.

ORDER

In this case the petitioner has asked for an order to the Chief Secretary of the Government of Palestine and the Local Council of Bnei-Braq that the property of the petitioners should not be included within the Local Council area of Bnei-Braq. The proposal to include this particular property was duly made, the petitioners objected to it and their objections were over-ruled. The main ground, apart from the fact that they do not wish to pay the rates to the Local Council, is that other people have been omitted from the scheme whom the petitioners say should have been included. It is not the function of this Court to decide what the area under the jurisdiction of a Local Council should be and there is nothing in the law that says that we have such a power. Neither have the petitioners been able to point to anything illegally done by any or either of the respondents.

The application for an order nisi must therefore be dismissed.

Given this 6th day of July, 1942.

CRIMINAL APPEAL No. 87/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Rose, J., Edwards J. and Khayat, J.

Abraham Yehuda Haimovitz — Appellant.

v.

Attorney-General — Respondent.

Causing grievous harm by throwing acid on face of victim — Confession of accused corroborated by other evidence — Accused trying to retract confession and alleging alibi — Weighing truthfulness of confession.

1. Even where confession unretracted, Court to consider whether there is sufficient evidence to make it reasonably probable that confession in fact true.

2. Where accused trying to retract previous confession corroborated by other evidence fails to adduce evidence in support of his contentions, Court right in accepting confessoin and convicting.

Edit. Note: See CrA 132/41 11 CtLR 148 and Edit. Note thereto.

Meridor for Appellant. *Crown Counsel* (*Hogan*) for Respondent.

Appeal from judgment of District Court Jerusalem, dated 3.6.1942, in Felony No. 47/42, whereby appellant was convicted of causing grievous harm contrary to sec. 235(g) of Crim. Code Ord. 1936, and sentenced to 3 years imprisonment.

JUDGMENT

This is an appeal from a judgment of the District Court of Jerusalem convicting the accused of causing grievous harm to one Shmuel Dov Pinsker contra section 235(g), of the Criminal Code.

The case is a somewhat unusual one in that it depends largely upon a confession of the accused which in fact is not retracted. The cases to which our attention has been called and which relate to the attitude which should be adopted towards retracted confessions are therefore not of very much assistance, but, even in respect of a confession which is unretracted, the Court will consider whether there is sufficient evidence apart from the confession to make it reasonably probable that the confession is in fact true.

The accused himself admits that the statement which was put in against him is substantially accurate and accords with what he himself said. He also does not dispute that some 18 days after this confession was made he was still adhering to the same position, in that he took the police to the shop where he said he bought the acid which he himself alleged that he had thrown at Pinsker. That, of course, is only material in so far as it shows that the attitude he adopted on the

31st of January was not an affair of one day but lasted for a considerable time. When he came to Court he said that, while all that was true, his reason for saying these things and for acting in that manner was that he wished to air certain grievances and in particular to attack the Bristol Hotel, at which Hotel he apparently suspected that his wife was employed as a prostitute.

The Court disbelieved his explanation and the question that we have to consider is whether it had reasonable grounds for that disbelief. Here there are two aspects of the matter to which the Court should have regard. First, the positive evidence of the prosecution and secondly the lack of evidence that was adduced by the defence. The positive evidence for the prosecution is that the unfortunate man Pinsker had acid thrown on his face at about seven o'clock in the morning in question at the Bristol Hotel. That in itself, of course, is very strong support of what is said in the accused's own statement. The Hotel is the same, the time is the same and the method of assault is the same. Also there is the evidence of the doctor who says that this man Pinsker was injured by acid although, not unnaturally, he fails to specify the kind of acid which caused the injury.

Now, in view of this evidence I suppose one of the first matters which would have occurred to the trial Court would be to investigate the question as to how the accused man himself came to know of these events, and in that matter the accused himself says that he heard of them from a man called Kershinsky. He does not say that he heard the details of the matter from Kershinsky but he says that he had heard from Kershinsky that on the Friday (that is the day before he gave himself up to the police) an incident had happened at the Bristol Hotel. Clearly Kershinsky would have been a most material witness had he been able to testify that he told the accused, who was previously ignorant of it, all about the incident. But Kershinsky was not called for the Defence.

Secondly, it would surely be for the accused to call evidence in support of a contention that is now put up on his behalf that in fact he was not in Jerusalem on the morning of the crime, but in Tel-Aviv. No evidence at all was called to support that proposition. The Court, therefore, had the alternative of accepting this unretracted confession, corroborated by the evidence of Pinsker and the doctor on the one side, or this utterly unsupported explanation of the accused on the other. The trial Court decided to accept the former. We, therefore, think that as far as the conviction is concerned that the appeal must be dismissed.

We now come to the question of sentence. The maximum sentence under the section under which the accused is convicted is imprisonment

for life. The evidence of the doctor is that both of this man's eyes were injured and that one of them is, in his opinion, injured permanently. He says that the second one is now better and that the man made a better recovery than he expected.

In these circumstances we cannot possibly say that a sentence of three years imprisonment is in any way excessive, for what we regard as particularly cowardly and objectionable form of crime. The appeal is, therefore, dismissed and the conviction and sentence affirmed. Sentence to run from date of arrest i. e. 31.1.42.

Delivered this 25th day of June, 1942.

CIVIL APPEAL Nos. 133/41 and 136/41.

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

Before:— Rose, J. and Edwards, J.

Civil Appeal No. 133/41.

Zaki Bey Ricabi, in his capacity as beneficiary and as Mutawalli of the Waqf of Qutb ed-Din el Khudeiri. Appellant.

v.

The Keren Kayemeth Leisrael Ltd. Respondent.

Sanders for Appellant. *Eliash & Ben-Shemesh* for Respondent.

Civil Appeal No. 136/41.

The Keren Kayemeth Leisrael Ltd. Appellant.

v.

Zaki Bey Ricabi, in his capacity as beneficiary and as Mutawalli of the Waqf of Qutb ed-Din el Khudeiri Respondent.

Eliash & Ben-Shemesh for Appellant. *Sanders* for Respondent.

Claim before Land Settlement Officer by beneficiary and mutawalli of Waqf for declaration that land a Waqf sahih and for dispossession of Defendant and cancellation of his deed — Tenure of land described in old Sharia Court judgment as "mashad al maska" alleged by Plaintiff to be a vague non-registrable right — Defendant claiming that land Waqf ghair sahih (Tahsissat) and "mashad al maska" a fixed annual payment in accordance with usual Waqf practice — Land Settlement Officer deciding that land Waqf sahih and that Defendant had a registrable and transferable interest in it — Appeal and cross-appeal from Land Settlement Officer's decision — Question of proof of Waqf sahih — Facts showing that Waqf ghair sahih (Tahsissat).

1. Where no incidents and no documentary proof of Waqf

sahih, mere existence of Mutawallis, fact that land mentioned in certain documents as Waqf so and so and common knowledge that Waqf of great antiquity — insufficient to prove Waqf sahih.

2. If Turkish Administrative Authorities, after enquiry found that possessors of land were owners thereof paying from olden times werko and tithes and in Budget of Imperial Awqaf Ministry land mentioned as "mevqufe', Waqf — a Tahsissat.

3. Question of nature of rent payable on land — not within jurisdiction of Land Settlement Officer.

Edit. Note: CA 107, 108/41 10 CtLR 104 distinguished; CA 70/39 6 CtLR 73 referred to.

Appeals from Decision of the Land Settlement Officer, Safed Settlement Area, dated the 25.5.1941, in Case No. 1/Khiyam-el-Walid.

Edwards J.: JUDGMENT

These are an appeal and a cross appeal from a decision of the Land Settlement Officer, Safad Settlement Area (Mr. Kenyon), whereby he found that certain lands known as Khiyam al-Walid, which were purchased by the respondents, the Keren Kayemeth Leisrael Ltd., on 14th February, 1939 were of the class of land known as "waqf Sahih" and that the respondents had a registrable and transferable right in "mashad el maska" The facts are fully set out in paragraphs 4 and 5 of the careful and comprehensive decision of the L.S.O. and there is no need for us to repeat them in this judgment.

The appellant, in his capacity as beneficiary and also as Mutawalli of the Waqf Qutb el-Din el Khudeiri, now appeals against the decision of the L.S.O. and there is also a cross-appeal by the respondents. The main contention of the appellant is that the waqf is a true waqf and that, accordingly, all the transactions whereby the respondents acquired title were illegal and that, at most, the respondents acquired only a rather vague right of "mashad al maska", that is, a right which may be enforced by the Sharia Court but which is not registrable, not being a right known to the Land Law of Palestine. The appellant's advocate (Mr. Weston-Sanders) says that this right of "mashad al maska" is a vague sort of leasehold right and asks that respondent's title deed as registered in the Land Registry be cancelled because of fraud and abuse of office and as being contrary to law. The contention of Dr. Eliash (advocate for the respondents) is that the Land Settlement Officer was correct in holding that the respondents had a valid registrable title but that he was wrong in holding that the Waqf was a true Waqf (waqf sahih) and that he should have held that the waqf in question was of the Waqf Ghair Sahih category i. e. a Tahsisat Waqf (see Messrs. Goadby and Doukhan's "Land Law of Palestine" pages 75 and 76). Dr. Eliash also contends that the archaic tenure of mashad

el maska, which (he argues) is entirely unknown in Palestine, is not only fully consonant with a tahsisat waqf of miri land but is made to apply by the Hanbali School of Moslem Law to miri land only. He also contends that there was evidence before the Settlement Officer that a Hanbali Qadi had dealt with this tenure, this being a further indication that the land is Tahsisat Waqf. The argument proceeds that, in the absence of a wakfieh or any other written evidence to show that the land was Waqf Sahiha, the L.S.O. should have resolved the doubt to which he refers in paragraph 9 of his decision in favour of the majority class of waqf land in Palestine, namely, a Tahsisat Waqf of Miri land. Dr. Eliash further complains that the L.S.O. erred in holding that the so-called rent, which was payable to the Syrian Treasury was anything other than a fixed annual payment in accordance with the usual waqf practice and that he also erred in construing the introduction of an overbidder in the waqf lease as anything more than the ordinary legal fiction in Sharia Waqf procedure which requires the introduction of an element of withdrawal into a waqf deed to be refuted by the Qadi for the purpose of further strengthening the value of the deed. Dr. Eliash, therefore, asks this Court to vary the decision of the L.S.O. to the extent of holding that the land in question is an untrue waqf and that the rent thereon is a fixed annual rent, or, alternatively, that the question of the rent was not within the jurisdiction of the L.S.O. This Court sat for two whole days hearing exhaustive and learned arguments by both Mr. Weston-Sanders and Dr. Eliash in support of those main contentions which I have just set out. Nevertheless, I feel that the points falling for decision are capable of being set out very briefly. The main point is whether the L.S.O. was correct in holding that the respondents had acquired a registrable title. If he was wrong, then the matter would at once seem to be concluded in favour of the present appellants. I, however, consider that he was correct for the following reasons, viz:— all the evidence goes to show that the family of Rikabia, i. e. the predecessors in title of the person from whom the respondents purchased the land, were the owners of Mevqufa land which they sold to the Buzu family. The Rikabia, in addition to being the owners of the land as individuals, were also administrators of charitable funds which they received from the Treasury. The mere fact that this family were administrators of those charitable funds did not alter the fact that they, as individuals, owned the land. In support of this statement I quote from Messrs. Goadby and Doukhan's book at page 76:—

> "It (i.e. an untrue waqf or ghair sahiha waqf) is merely a dedication of the interests which the State has in the produce of the land and in the fees arising therefrom",

At the hearing of this appeal we allowed Dr. Eliash to produce an original copy of the Minutes (Record) of proceedings of a Turkish Commission of Enquiry into the registration of the land in question together with the conclusions of the Commission and also a copy of the official budget of the Imperial Awqaf Ministry for the year 1327 (Fiscal Year) which contains entries concerning the land in question. This we allowed by virtue of the provisions of Rule 344(1)(b) Civil Procedure Rules 1938. A perusal of the former clearly reveals that the Rikabi family were the original owners and used annually to pay to the Finance Office title and werko amounting to 188 piastres and that then these lands were transferred to Mahmoud Bey Buzu who later transferred them to his son, Ali Bey. The subsequent history of the transaction, so far as the respondents' title is concerned, is fully set out in paragraphs 4 and 5 of the L.S.O.'s decision. From the whole history of this land and from a perusal of all the documents produced I am satisfied that the L.S.O. was correct in holding that the respondents had a registrable interest in the land and I generally agree with his conclusions as set out at the end of paragraph 7 of his decision. I am, however, of opinion that he erred in concluding that the waqf was of the waqf sahiha category. As he himself pointed out in the first sentence of para 8 of his decision, the appellant had no documentary proof that the land was waqf sahiha. According to Messrs. Goadby and Doukhan (see page 75 of their "Land Law of Palestine") — "The only true waqf (Waqf Sahiha) is that of land which, at the time of dedication was the mulk of the dedicator". Now, there is no evidence at all as to the dedication, and it follows therefore none as to the time of dedication.

The main argument advanced on behalf of the appellant at the hearing of the appeal was that the four members of the Rikabi family were Mutawallis of the Waqf and that they improperly disposed of the waqf interest. There is, however, no evidence of the establishment of a waqf as a true waqf and it is therefore impossible for us to hold that the waqf was a true waqf — still less to hold that anything that the Rikabi family did was unlawful.

The main grounds (beyond those which I have already stated) on which I incline to the view that the waqf is not waqf sahiha are the following, namely,

(i) There is no evidence of creation or of dedication. In this connection I agree with the L.S.O.'s reasoning as set out in para 8 of his decision. I do not ignore the effect of the decision of this Court in C.A. 107 and 108 of 1941*) P.L.R. Vol. 8, August and September 1941 page 402. In that case this Court found present all the incidents

*) 10 CtLR p. 104.

of a waqf sahih extending over a very long period. The facts in this case, however, are different.

(ii) The conclusions reached on 15th August, 1303, by the Acting Kaimakam of Kuneitra, the Mudir el Mal, the Chief Secretary and the Tabu Registrar, as a result of the enquiry held by them on 17th August, 1302, and subsequent days (Financial Year 1302) which conclusions were that the "said lands were owned and cultivated by the Rikabi family without any dispute from olden times and they used to pay the yearly taxes in the amount of 188 piastres and also the tithes. And during the last 15 years Ali Bey, the son of Mahmoud Bey, pays werko and tahmiss and the tithe every year to the Finance Office and it is in his ownership without any dispute. This was established. It follows, therefore, that according to Section 78 of the Royal Land Law (Land Code) and the instructions as to the issue of Tabu Deeds Section 8 ownership under "Haq Karar" was proved in the most satisfactory manner and the Tabu Deed issued to the said owner will remain valid". All this is consistent with the waqf being Takhsisat when one remembers that the word "Mevqufe" appears in the excerpt of the Budget of the Imperial Awqaf Ministry for the year 1327 (see the citation from the law of 6 Rejeb, 1292, at p. 79 of Messrs. Goadby & Doukhans' book).

(iii) The fact that the Rikabi family used from olden times to pay 188 piastres every year as werko (see report of 13 Tamuz, 1303, from the head of the Finance Office, Kuneitra Sub-district).

(iv) All the facts, coupled with the mention of the word "Mevqufe", tend to show that the land was an untrue waqf such as is described in the last eight lines of page 8 of Messrs. Goadby & Doukhans' "Land Law of Palestine", and the first eight lines of page 9.

(v) It seems clear that there was never a dedication of the "Tessaruf" itself (see line 9 of page 9 of Messrs. Goadby & Doukhan). The exhibit D/1 gave authority for the Tessaruf to be transferred to Ali Bey Mahmoud Buzu.

(vi) In Omer Hilmi's "Law of Evqaf" (translation of Messrs. Tyser & Demetriades 2nd Edition, Cyprus 1922, p. 115) we find in the example to Article 468, "If the ownership of the possessor is based on a ground regarded in law as a means of acquiring ownership, such as purchase, gift and inheritance, then hearsay evidence about the original dedication is not admissible, but the proof of the judicial sanction (tesjil vaqf) is required, and, in respect of that, hearsay evidence is not admissible". The ownership of the possessor in the present case is clearly based on purchase. Now it was advanced on behalf of the Respondent that it was common knowledge that the waqf was of great antiquity. This seems scarcely sufficient to prove that it was a true waqf.

(vii) In Civil Appeal 84/38 (Palestine Law Reports 1938, p. 356) this Court held that there was no evidence that the Appellant, a registered owner, knew that the property in question was waqf and this Court consequently held, following Land Appeal 173/26 (Vol. I, P.L.R., p. 269) in favour of the Appellant. That case, although not on all fours with the present case, has one similar feature in that, in the present case, no knowledge that the waqf was a true waqf could be imputed to the present Appellants.

(viii) Mr. Weston-Sanders says that the category of the land is set out in exhibits D/3 and D/4. An examination of exhibit D/4, however, merely shows that the category is "Waqf Sidna Kutb Eddin el Khudeiri", i. e. waqf in favour of one Kutb Eddin el Khudeiri; but does not mention what kind of waqf.

(ix) Mr. Weston-Sanders cited Civil Appeal 70/39*) (P.L.R. Vol. 6, July, 1939, p. 397) as being in his favour. That case, however, is no authority on the question of what amount of proof is necessary, in the absence of a waqfieh, to determine whether a waqf is true as distinct from untrue waqf.

(x) Had it been a true waqf, the Administrative Authorities would never have reached the conclusions set out in their decision of 15th August, 1303, because the effect of a true waqf or dedication is to render the land inalienable (Goadby & Doukhan, p. 71).

For all the foregoing reasons I am of the opinion that the contention of Dr. Eliash that the land is of the category known as Takhsisat Waqf is sound. As regards the question of the nature of the rent, I hold that this was not within the jurisdiction of the Land Settlement Officer.

The appeal will therefore be dismissed and the cross-appeal allowed to the extent that the decision of the Land Settlement Officer be varied by declaring that the land is of the category known as "Takhsisat Waqf" and by declaring also that the question of the nature of the rent is not within the jurisdiction of the Land Settlement Officer.

The Appellant will pay to the Respondents the costs of this appeal to be taxed on the lower scale to include an advocate's attendance fee of LP. 15, no costs of the cross-appeal.

Delivered this 24th day of February, 1942.

British Puisne Judge.

I concur

British Puisne Judge.

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*) 6 CtLR p. 73.

CRIMINAL APPEAL No. 15/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before : Gordon Smith C.J., Edwards J. and Khayat. J.

Jules Khattar — Appellant

v.

Attorney-General — Respondent.

False entry in printed form of Immigration Department leading to issue of certificate of arrival which would not have otherwise been issued — Ingredients of offence of obtaining goods by false pretences — Duty of prosecution to prove all ingredients of offence and effect of failing to do so.

a. Ingredients of offence of obtaining goods by false pretences: 1) false pretence by accused, 2) his knowing its being false, 3) intent to defraud, 4) obtaining goods.

b. Unless prosecution proves each and every ingredient of offence, accused entitled to acquittal, thus if no evidence of intent to defraud and obtaining, conviction cannot stand even where false pretence made knowingly and deliberately.

Edit. Note: see CrA 44/42 11 CtLR 136.

Goitein for Appellant

Junior Government Advocate (*'Akel*) for Respondent

Appeal from judgment of District Court, Nablus, dated 12.1.42, in Felony No. 69/41, whereby Appellant was convicted of inducing by false pretences, delivery to another person of something capable of being stolen, contrary to Sec. 301 of Crim. Code Ord. 1936, and sentenced on 27.1 1942, to 3 years' imprisonment.

JUDGMENT

The accused was convicted by the District Court sitting at Nablus on the 12th January last of contravening Section 301 of the Criminal Code Ordinance, 1936, in that on or about the 26th July, 1939, he, together with one Freedman, with intent to defraud, induced the Government of Palestine to deliver to Hersch Herman Schrenzel a certificate of arrival by falsely pretending that he, the said H. H. Schrenzel, had arrived in Palestine on the 27th August, 1933, and passed through the immigration control at Haifa.

On the 27th January, 1942, the accused was sentenced to three years' imprisonment.

Against this conviction and sentence he has appealed.

At the conclusion of the arguments on this appeal we were unanimously of the opinion that the conviction could not stand and we allowed the appeal, discharching the accused, and we stated we would give our reasons, subsequently.

It is unnecessary to go into all the details of these protracted proceedings and it is sufficient to state that originally the accused and

the said Freedman were charged together but have been tried separately, and it would appear that Freedman was the principal actor in the piece, but is now behind the scenes, and that the accused had only a minor part to play. It is however necessary to state that the accused was also simultaneously charged on 28 other counts, ranging from forgery, conspiracy to commit forgery, inducing by false pretences and corruptly receiving rewards, on all of which he was either found not guilty or they were withdrawn. It is not surprising that with this multitude of charges and connecting exhibits, it was extremely difficult to sift the necessary evidence on this one remaining charge out of a mass of admittedly unreliable evidence by admitted accomplices. It is also desirable to keep in mind the necessary ingredients of the offence charged, and as they are extremely relevant I do not apologise for setting them out. (1) There must be a false pretence made by the accused. (2) The accused must know it to be false. (3) There must be an obtaining of money's worth by means of such false pretence. And (4) there must be an intent to defraud. If the prosecution fails to prove each and every one of these ingredients, then the accused is entitled to be acquitted.

It was submitted to us that there was no evidence at all to support the intent to defraud, and also that there was not only no finding but no evidence at all as to the obtaining.

The alleged false pretence was in respect of particulars endorsed, admittedly by the accused, on the back of Exhibit H.S. 1 under paragraph E., which gives certain details taken from the face of the form and a number, H.A./4539, was given as referring to a registration number assigned to the particular immigrant on his arrival. This number was, admittedly, incorrect. From this fact the prosecution alleged that it must be inferred that therefore it was a false pretence made by the accused knowingly, with intent to defraud. The basis of this is that because of the accused submitting this form to a higher authority with this incorrect detail, a certificate of arrival was subsequently issued to the applicant which would not have otherwise been issued.

The accused's explanation was that he might have made a mistake or that the file from which he got the number was itself wrong. No file was produced in this respect and apparently many files are missing. Moreover, since the applicant's arrival in 1933, the system of registering and filing entry forms has been changed. It is true that the number H. A./4539 referred to another immigrant, and the accused admitted that he must have had some supporting document from which he took this number. The fact remains that it may have been made genuinely by mistake and through carelessness, or that the supporting document in itself was wrong. Assuming however that it was made falsely and deliberately and knowingly by the accused, this does not obviate the necessity for proving the other ingredients of the offence.

There is no evidence whatsoever of the intent to defraud nor of obtaining by the accused any money's worth, and these cannot be inferred merely from the fact that a person known to the accused has been convicted of various offences in connection with illegal immigration.

Schrenzel's evidence did not, in itself, implicate the accused, and it is an extraordinary fact that the Immigration Authorities at Tel-Aviv enquired specifically into Schrenzel's bona fides as an immigrant, and on finding them satisfactory wrote Exhibit J. K. 1 to the Assistant Commissioner. Apparently they also made a bona fide mistake, and it is not unreasonable to think that the accused also made a bona fide mistake in putting in this wrong number. It must also be remembered that at the time of this man's entry in 1933 the system of registration was different, and there were no No. 10 forms then in existence. The learned Relieving President comments on the absence of this form.

As I have said there was no evidence from which either the necessary intent to defraud or the obtaining could be properly inferred, even assuming that the entry was knowingly false, and it may well be that the entry itself was made by mistake.

For these reasons, the conviction could not stand and the accused was discharged.

Delivered this 18th day of March, 1942.

CRIMINAL APPEAL No. 93/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before : Gordon Smith, C. J., Edwards, J. , and Abdulhadi, J.

Saleh Sa'id Saleh — Appellant

v.

Attorney-General — Respondent.

Police constable convicted of manslaughter and sentenced to 20 years imprisonment — Evidence of accomplice corroborated by other evidence — Expert evidence as to bullet that killed deceased.

If Court mindful of fact that witness an accomplice and if his evidence corroborated by that of other witnesses, Court entitled to draw inferences and convict.

Edit. Note: see CrA 124/41 11 CtLR 229 and Edit. Note thereto.

Darwish for Appellant

Crown Counsel (*Rigby*) for Respondent

Appeal from judgment of Court of Crim. Assize sitting at Jerusalem dated 13.6.42, in Crim. Assize Case No. 22/42, whereby appellant was convicted of manslaughter, contrary to section 212 of Crim. Code Ord., 1936, and sentenced to twenty years' imprisonment.

JUDGMENT

In this case, counsel submits that there was no sufficient evidence to support the conviction, and in support of that submission he states that there was no evidence except that of the accomplice. Admittedly the accomplice gave a certain amount of evidence, but this was not the only evidence — there was the evidence of Ziporah.

The Court below took into consideration the fact that Abed Suleiman was an accomplice of the accused, not in the actual commission of this crime, but possibly in other crimes.

As regards the expert evidence, it naturally follows that his evidence is circumstantial. Of course, he was not an eye-witness but his evidence proves definitely that the bullet that killed the deceased was fired from the pistol issued to the accused, and the Court below was quite entitled, on the evidence before it, to say that it was the accused who was present there, who had this quarrel with the deceased, and it was the accused who shot the deceased. It is true that on the evidence there was a quarrel, but it was the accused himself who started it and addressed words to the deceased which the deceased apparently resented, and it does appear that some sort of struggle ensued. If it had not been for these facts, the accused would have been found guilty of murder.

There is ample evidence to support the conviction.

As regards the sentence, this is a very bad case of manslaughter committed by a policeman, one of those very people, who, instead of killing the public, are supposed to protect it.

Although admittedly the previous conviction was in 1923, that also was for attempted murder, and the surprising thing is that a person who has already had a conviction for attempted murder should be taken on in the Police at all.

As regards sentence, the sentence will stand, but I would draw attention to the fact that under the Prison Regulations every sentence of ten years or more comes up for review at the end of six years and subsequently after every 2 years, but so far as we are concerned the sentence of 20 years is a proper sentence and it will stand.

Delivered this 27th day of June, 1942.

CRIMINAL APPEAL No. 85/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Gordon Smith, C.J., Frumkin, J. and Khayat, J.

Zaki 'Assaf — Appellant.

v.

Attorney-General — Respondent.

Information charging with possession of dangerous drugs with-

out specifying nature of possession — Test of sufficiency or otherwise of Information — Evidence of witness possibly an accomplice — Corroboration.

a) Ground of appeal that Information insufficient must fail, if Court of Appeal finds that accused could not have been misled as to details with which he was charged.

b) Information charging with possession of dangerous drugs — not vitiated by omission to state whether possession actual and physical or constructive, this being a question of fact which would transpire during hearing.

Asfour and *Eisenberg* for Appellant.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court, Jaffa, dated 3.6.42, in Crim. Case No. 85/42, whereby Appellant was convicted of being in possession of dangerous drugs, contrary to Sec. 7 of the Dangerous Drugs Ord. 1936, (as amended in 1941) and sentenced to 18 months' imprisonment.

JUDGMENT

We have already intimated that on the first point, i. e. the technical point as to the information being insufficient, we were against the counsel for the accused in that respect. It is quite impossible to believe that the accused was misled as to the details with which he was charged. He was charged with possession and that might be actual and physical or constructive, and, as was pointed out at the commencement of the trial, that was a question of fact which would transpire during the hearing.

As regards the other grounds, it is mainly on the question of corroboration — whether there was sufficient corroboration of the story told by Mureifeh. The Court did not find as a fact that he was an accomplice, but took the wise course of saying that, even if he was, there was sufficient corroboration in the evidence of two other witnesses. It is true that the last witness, Suleiman Mizzid, did not specifically identify the accused as being one of the two men who carried the sacks out of the lorry. He says, "I saw Sulmi and another carrying something from the truck", but on the other hand we have the definite evidence of Darwish Biltagi that the accused had got into this lorry and drove off. We think that the evidence of Suleiman Abu Mureifeh is sufficiently corroborated to identify the accused as being one of the two who did carry the sacks out of the lorry, even if Mureifeh was an accomplice, a fact that the lower Court did not definitely find.

The appeal must therefore be dismissed.

Delivered this 6th day of July, 1942.

CIVIL APPEAL No. 77/42.

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

Before:— Copland, J. and Edwards, J.

1. Binem Zalcman
2. Shalom Heprz — Appellants.

v.

Custodian of Enemy Property, Jerusalem
continuing the action originally filed by Polsko-Holenderskie Towarzystwo Importu i Exportu Skór Surowych "Polhoskor" Spolka z Ograniczona Odpowiedzialnoscia, of Gdynia, Poland. — Respondent.

Action originally filed by a firm now enemy — Order of Court adjourning case by consent of parties until after war — Court later on allowing Custodian Enemy Property to continue proceedings as representative of enemy firm — Powers of Custodian Enemy Property.

1. Decision adjourning case until after war — an order of Court.
2. Custodian Enemy Property — not bound by act occurred or consent given by enemy firm prior to his intervention.
3. To proceed or not to proceed with action on behalf of enemy firm — a matter entirely for discretion of Custodian Enemy Property.

Elkayam for Appellants. *Linderman* for Respondent.

Appeal against Order of District Court, Tel-Aviv, given on 1.4.42, in Civil Case No. 322/38.

JUDGMENT

We need not hear you Mr. Linderman.

This is an appeal from an order made by the learned President of the District Court, Tel-Aviv, allowing the Custodian to continue certain proceedings in a matter in which the Custodian had taken part as the representative of an enemy firm.

Only one point was raised and that was that there was no power to vary a consent order except by consent and that the decision of the learned Judge adjourning the case until after the war was an order. The so called consent order was made on the 9th of January, 1940. Later on the office of the Custodian of Enemy Property intervened and the Custodian applied under the powers given to him by the Custodian Order to carry on with the case.

We are of the opinion that the decision adjourning the case until after the war was, undoubtedly, an order of the Court. The learned Judge was, therefore, wrong in his saying that it was not an order, but we, at the same time, are of the opinion that the Custodian is not bound by an act which has previously occurred and is not bound by a consent given by the enemy firm which he now represents. We

are definitely of the opinion, as I have said, that the Custodian is not necessarily bound by the consent given by the present enemy he now represents. It is a matter entirely for his discretion whether he will proceed with the action or not. He may, of course, have very good reasons to proceed.

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

Delivered this 2nd day of July, 1942.

CIVIL APPEAL No. 62/42.

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

Before : Frumkin J. Khayat J. and Abdul Hadi J.

Abdul Rahman Ibn Muhammad el Khaldi Appellant

v.

Mahmud Ibn Ali el Khaldi Respondent

House of 2 rooms constructed on land not registered in Tabu and purchased by uncle from nephew by private deed — Nephew occupying for many years one room bringing an action claiming ownership thereof — Oral evidence in action between relatives — Magistrate's Court sitting as Land Court finding that room within ownership of nephew and ordering registration thereof in his name without making clear order as to registration of land occupied by room — Application of art. 906 of Mejelle to registration of land on which room constructed.

1. Where person who erected building on unregistered mulk land found to be owner of building, land owner's consent to construction, hence "legal justification" within art. 906 of Mejelle, must be inferred.

2. Legal owner of building erected on mulk land with land owner's consent and worth more than spot occupied by it — entitled to registration in his name of both building and land, but not before paying price of land.

Elia for Appellant *Kamleh* for Respondent

Appeal from judgment of Magistrate's Court, Ramleh sitting as a Land Court dated 18.4.42 in Case No. 926/41.

JUDGMENT

The appellant in this case is the uncle of the respondent. Some ten years ago a house consisting of two rooms was built on land admittedly purchased by the appellant, by virtue of a private deed. The land is not registered and is situated within the boundaries of Inaba village. Since the construction of the house, the western part of it which consists of one room was occupied by the respondent. No rent or compensation whatsoever has been paid during that period. The present action was brought by the respondent claiming ownership of the room occupied

by him. Evidence was heard, and it is not disputed that in view of article 82 of the Ottoman Code of Civil Procedure, oral evidence was admissible. As a result of such evidence heard, the Magistrate came to the conclusion that the room in question was built by the respondent, paid for by him and is consequently within his ownership. We are not prepared to interfere with this finding of fact. The Magistrate, in view of this finding, ordered the registration of the room in question in the name of the respondent without, however, there being any clear order as to the registration of the land occupied by the rooms. On this point the learned Magistrate says :

> "As regards the land upon which the building is erected, the Defendant would have the right to claim its value in the legal way, should he so desire."

The first question of law which arises is whether, under the Land Law (Amendment) Ordinance, 1937, the registration of buildings could be directed without, at the same time, ordering the registration of the land upon which it is built. True there is a qualifying proviso in the said Ordinance, but it refers only to buildings already registered in the Land Registry at the time the said Ordinance came into operation. This is not the case here, because although the room was already erected in 1937, the land is not registered at all.

We have, therefore, to see who, under the law, is entitled to the land. There seems to be no doubt that the land is mulk. Article 906 of the Mejelle is therefore applicable. Having come to the conclusion that the respondent is the owner of the room we cannot come to any other conclusion but that the construction was made with the consent of the appellant, and hence with what is termed in the Mejelle 'legal justification'. The second part of 906 is therefore to be invoked.

From the data submitted before us as to the area of the land and its value as well as the value of the room, there seems to be no doubt that the value of the land is much less than the value of the room occupied on that particular portion of the parcel. It follows that the respondent, who is the legal owner of the room, is entitled to have both the room and the land occupied by it registered in his name.

It would, however, be unfair to direct the registration of the land in his name before his paying its price. The parties could not come to an agreement as to the value of the land occupied by the room, and we have, therefore, no alternative but to remit the case to the Magistrate to assess the value of the land and order the registration of both the land and the room in the name of the respondent, upon payment of the assessed value by the respondent to the appellant, and we order accordingly.

The respondent will have his costs which we assess at an inclusive sum of LP. 5.

Delivered this 7th day of July, 1942.

CIVIL APPEAL No. 89/42.

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

Before:— Gordon Smith C.J. and Copland, J.

Itzhak Pines — Appellant.

v.

1. Eugenie Pines
2. The Estate of the late Dr. Leon Pines, through its administrator Boris Kriss — Respondents.

Loan of LP. 1000 made by Plaintiff through agent to a person representing Defendant — Question of admissibility of Plaintiff's evidence to prove alleged loan — Interpretation of art. 80 of Ottoman Civil Procedure Code — Non-compliance with Rule 118 of Civil Procedure Rules.

1. Calling opponent as witness with a view to prove own case or defence by extracting from him an admission in no way conflicts with strict application of art. 80 of Ottoman Civil Procedure Code (Inadmissibility of oral evidence in specified cases).

2. Defence against a document can only be proved by documentary evidence, opponent's admission, or entries in opponent's books.

3. Plaintiff's evidence unsupported by any documentary proof — of no avail to substantiate his claim of a loan exceeding LP. 10 allegedly made by him.

4. Plaintiff's evidence that certain person was his agent for making loan, subject matter of claim, — admissible.

5. Failure to set out in statement of claim terms of document relied upon can be remedied by amendment.

6. Rule 118 of Civil Procedure Rules — waived by Court, if dealing in its judgment with document whose terms not set out in statement of claim.

Edit. Note: — As to 1—4 judgment of Frumkin, J. in CA 87/37 and CA 168/41 followed; see also cases cited in CA 168/41 11 CtLR 214 and Edit. Note thereto.

B. Joseph and *Kost* for Appellant *Goitein* and *Ayon* for Respondent

Appeal from judgment of District Court Tel-Aviv, dated 28.4.42, in Civil Case No. 89/41.

JUDGMENT

We have already announced that in our opinion this appeal should be allowed, and we now proceed to give our reasons for so holding.

The claim in the District Court was for LP. 1000, the amount of a loan alleged to have been made by the present Appellant to the Respondents. The loan is stated to have been made by a Mrs. Goldberg at the request of the Appellant to a Mr. Kriss, who is alleged to have been the agent of the Respondents, see the letter of 13.5.37. Nine issues were framed, but when the action came on for trial before the learned Judge, after the Appellant had opened his case, his (the Ap-

pellant's) advocate applied to call his client as a witness. Thereupon objection was taken by Mr. Goitein for the Respondents that the Appellant's evidence was inadmissible, and after a somewhat lengthy argument, the further hearing was adjourned on 12.2.42. Without any further hearing, on 28.4.42 the learned Judge proceeded to give judgment dismissing the Appellant's claim on the ground that the Appellant had no documentary evidence of the alleged loan within Article 80 of the Ottoman Code of Civil Procedure. The learned Judge further held that the letter of the 13.5.37 and the receipt endorsed thereon could not constitute documentary evidence of the loan and that oral evidence that Mrs. Goldberg was the Appellant's agent for the making of the loan was inadmissible. By implication it would seem that he held that the Appellant's evidence was inadmissible, though he does not specifically say so : this would appear from paragraph 2 of the judgment.

The appeal raises again the question of the proper interpretation of Article 80 of the Ottoman Code of Civil Procedure. Under the old Ottoman Law neither party to an action was a competent witness, but in 1924 the Evidence Ordinance, Cap. 54, was passed, by which, inter alia, such evidence was made admissible. For many years afterwards the Courts of this country consistently allowed the parties to a civil action to be called as witnesses, following Section 14 of the Ordinance.

I agree with the remarks of Frumkin J. in Blumenfeld v. Imperial Chemical Industries (Levant) Ltd., C.A. 87/37 *), where he says in paragraph 11 —

> "On this point (i.e. admission or books of the opponent) the Evidence Ordinance is very useful, as it gives the party an opportunity to abstract an admission from the other side by calling him as a witness. It is for this reason that this Court was always in favour of giving an opportunity to a party to call the other party as a witness so as to give them a chance of proving their case or defence by admission — in which case judgment would be given based not on oral evidence but on the admission of the other side."

As I have said, this was the course consistently adopted, and it in no way conflicts with the strict application of Article 80. It was not until the Blumenfeld case (supra) that any serious inroad was made on this strict application, and we are informed that there is no later reported case on this point. In Tibi v. Dasouki and Another, C.A. 168/41**) (8 P.L.R. 563) Rose J. said that the Blumenfeld case concerned a promissory note, to which special consideration applied, and if and in so far as it conflicted with the rule that a defence against a document can only be proved by documentary evidence, the admission of the opponent, or entries in the opponent's books, he was not prepared to follow it. I respectfully agree.

In my opinion, in this case the learned Judge should have allowed

*) P. Post 3.8.37; 2 CtLR 19 (majority judgment). **) 11 CtLR 214.

the Appellant to present his case. It seems to me impossible to say that the Appellant's evidence was inadmissible, before it was known what that evidence was going to be. The Appellant's evidence of the loan, unsupported by any documentary proof, would of course have been useless, but the Appellant's evidence need not of necessity have been on that point at all. Part of the Appellant's case was that Mrs. Goldberg was his agent for the purpose of making the loan, and evidence to that effect would, in my opinion, clearly have been admissible and relevant. Also he should have been allowed to produce such documents, if any, which he had, in order to prove the loan. The books of the defendants would also have been admissible in evidence to prove the loan, and the defendants themselves could have been called to give evidence. It is true that the Appellant did not comply with Rule 118 by setting out the terms of the letter of 13.5.37 in his statement of claim, but this could have easily been remedied by amendment, and the learned Judge himself waived this rule by dealing with the letter in his judgment.

For these reasons I think that the appeal should be allowed, the judgment of the District Court set aside, and the case remitted for retrial.

The Appellant should have the costs of this appeal on the lower scale to include the sum of LP. 15.— advocate's attendance fee on the hearing of this appeal.

Delivered this 23rd day of July, 1942.

CIVIL APPEAL No. 104/42.

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

Before:— Copland, J., Khavat, J. and Abdul Hadi, J.

Hanifa widow of Yusif Abdulla Azzam and 2 others Appellants.

v.

Fatmeh Abdullah Yusif Azzam and 2 others Respondents.

Action between co-heirs in Magistrate's Court sitting as Land Court regarding ownership of land — Magistrate dismissing Plaintiffs' claim on finding that Defendants in undisputed possession of land for 38 years and upwards — Rebuttable presumption in connection with possession between co-heirs.

Very great length of possession of land by co-heirs without any interference by other co-heirs — sufficient to rebut presumption that possession of one heir is on behalf of other co-heirs.

Edit. Note:— CA 197/41 10 CtLR 205 followed; see also cases cited in CA 197/41.

Nahavi for Appellants *Hijazi* for Respondents

Appeal from judgment of Magistrate's Court, Safad, sitting as a Land Court, dated 24.5.42, in Land Case No. 416/41.

JUDGMENT

This is an appeal from the Magistrate of Safad sitting as a Land Court. The case was heard at considerable length and a large number of witnesses gave their testimony. The case depended very largely on the appreciation of their evidence. The learned Magistrate heard the evidence and he says as a result that the witnesses for the defendants, that is, respondents, were speaking the thruth and he did not believe the evidence of the plaintiffs (appellants). From that evidence it was quite clear that for 38 years and upwards the respondents had been in undisputed possession of this piece of land claimed by the appellants. In view of the judgment of this Court, Nijim & others v. Nijim and others, Civil Appeal 197/41*), 8 P.L.R. p. 499, possession of that kind, without any interference by the other co-heirs, is sufficient to rebut the presumption of co-ownership, that is to say, the presumption that possession by one co-heir is on behalf of the other co-heirs. Quite irrespective of the validity of the hujjeh, the Magistrate came, in our opinion, to a correct conclusion.

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.

Delivered this 28th day of July, 1942.

CRIMINAL APPEAL No. 42/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Copland, J., Edwards, J. and Khayat, J.

Mahmud Ali El-Odeh — Appellant.

v.

Attorney General — Respondent.

Conviction of murder based essentially on evidence of eyewitness who definitely identified accused — Affidavit by witness subsequent to conviction stating that his evidence in trial Court was false — Court of Appeal hearing evidence of witness who went back on his evidence in trial Court — Effect on conviction of recantation of witness.

Where a witness, without whose evidence trial Court could not possibly have convicted makes a sworn affidavit stating that his evidence in Court was false and also gives evidence in Court of Appeal confirming his statement in his affidavit Court of Appeal will quash conviction.

Abcarius and *Saleh* for Appellant.

Crown Counsel (*Rigby*) for Respondent

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*) 10 CtLR 205.

Appeal from judgment of Court of Crim. Assize sitting at Nablus in Crim. Assize Case No. 68/41, dated 10.3.42, whereby Appellant was convicted of murder contrary to sec. 214(b) of Crim. Code Ord., 1936, and sentenced to death.

JUDGMENT

The appellant was convicted at the Nablus Assizes of murder, on the 11th of October, 1941, of one Salim Ibn Hassan el Rahhal and was sentenced to death. One of the principal witnesses against him was one Abdul Aziz el Assad. That witness definitely identified the appellant as having been present at the scene of the crime and having fired shots. On that evidence, which is referred to in the judgment of the Assize Court, and the evidence of Abdul Aziz's brother, Zuhdi, the Court convicted the appellant. That evidence, if true, was amply sufficient to support the conviction. Subsequent to the conviction, the witness Abdul Aziz gave an affidavit sworn to before the Magistrate in Jerusalem, that his evidence given at the Assize Court was false. He said in his affidavit that whilst he had sworn in the Assize Court that he definitely recognised the appellant, yet in fact he did not recognise him but only suspected him because he had a Hourani accent. And he further said that his brother Zuhdi's evidence was based upon what he, the witness, had told him.

In this case the appeal originally came before us on the 31st March and was then adjourned for the witness Abdul Aziz to be produced before us. Abdul Aziz has now given evidence before us confirming his statement in his affidavit.

The case was an unsatisfactory one because another witness went back on his evidence at the preliminary inquiry, actually at the Assize Court trial itself. The case seems to us to be on all fours with the case of Rex v. Catherine Hullet, 17 Criminal Appeal Reports p. 8. In that case a witness who had given evidence at the trial later on went back on that statement and said that she had not heard certain remarks made by the accused which in the trial Court she said she had heard. The Court of Criminal Appeal, thereupon, quashed the conviction.

Now the principal evidence against this appellant was, as we have said, that of Abdul Aziz and his brother Zuhdi. Besides his recantation to-day, the witness Abdul Aziz has made a statement on oath withdrawing really the effective part of his evidence against the appellant. He is, therefore, an unsatisfactory witness and as without his evidence it cannot be said that the Court must have convicted, the conviction must be quashed. In fact I think we can go so far as to say that without his evidence no Court could possibly have convicted. Mr. Rigby informs us that he cannot support the conviction.

The appeal is therefore allowed and the conviction is quashed.

Delivered this 15th day of April, 1942.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE

Before: Jordan Smith C.J. Edwards J.

Karl Scherer Petitioner

v.

Superintendent of Detention Camp, Mazra' Respondent

German subject detained as enemy alien since June 1940 — Order under Regulation 17 B of Defence Regulations — Petition to High Court for release from detention — Claim that Regul. 17 B ultra vires and, alternatively powers therein contained not properly or lawfully exercised — Proper person to make affidavit in reply to petition.

1. Regulation 17B of Defence Regulations 1939 (detention of enemy aliens) — not ultra vires powers conferred by sub-sec. (1) and (2) of sec. 2 of Emergency Powers (Defence) Act 1939.

2. Directions by High Commissioner to Inspector General of Police under Regul. 17B need not state reasons, nor necessary to inform person detained that he was on prescribed list.

3. Person in charge of Detention Camp and in charge of Petitioner detained and to whom Petition addressed — qualified person to make affidavit in reply to Petition.

Cases Noted:— see HC 7/42 11 CLR 86; and Edit. Note thereto. HC 8/42 11 CLR 81 and Edit. Note thereto.

Counsel for Petitioner *Crown Counsel* (*Hogan*) for Respondent

Application for a summons to issue directed to Respondent calling upon him to produce the body of Karl Scherer, Petitioner, on a date named by Court and to show cause why said Karl Scherer is being detained in Detention Camp, Mazra', near Acre, and why he should not be released from custody.

ORDER

This was an application to make absolute, a rule nisi issued by the Court on the 20th March, 1942. At the conclusion of the hearing we ordered the rule to be discharged and stated that we would give our reasons in writing later.

So far as is relevant to these proceedings, the Petitioner states in his petition, dated the 10th March, 1942, that he is detained unlawfully at the Mazra' Detention Camp; that he came to Palestine at the end of 1937 as a legal immigrant; that he had previously lived in the Saar Territory and that after the Saar plebiscite his passport was exchanged for a German passport. He states that he had been an active member of the Social Democrat party and in consequence thereof and in view of threats against his life by the Nazis, he and his family left the Saar Territory and came to Palestine.

It is clear that he was and is a German subject, and therefore an

The affidavit of the Acting Deputy Superintendent of the Detention Camp, Mazra', in reply, dated the 30th March, 1942, states that the Petitioner is an enemy alien and is detained in pursuance of directions issued by the High Commissioner to the Inspector-General of Police under Regulation 17 B. of the Defence Regulations, 1939, to detain all enemy aliens other than those excepted by the said directions, of whom the Petitioner was not one, and that he was informed of such facts on the 27th March, 1942. A copy of these directions was attached to the affidavit and the original was produced in Court. It is signed by the Chief Secretary and is dated the 22nd March, 1942, although deemed to have come into operation on the 5th March, 1942.

The Petitioner has been detained since the 13th June, 1940, and although it was not disputed that since the Olles case (H. C. No. 7/42)* and prior to this new Regulation 17.B. coming into force, and the directions issued thereunder, his detention might have been irregular, it was submitted that, anyhow at the date of the hearing, his detention was lawful and in order.

The various submissions made by Counsel for the Petitioner may conveniently be combined and grouped under two heads, namely, (a) that Regulation 17B. is itself ultra vires, and (b) that if intra vires, then the powers therein contained have not been properly or lawfully executed.

As regards the first point, in the Olles case (supra) the Emergency Powers (Defence) Act, 1939, the Emergency Powers (Colonial Defence) Order-in-Council, 1939, and the regulations made thereunder, were all exhaustively discussed, and in particular as regards Regulation 17(1) I stated: "It is somewhat difficult to envisage a more comprehensive or all-embracing power to interfere arbitrarily with and restrict the liberty of the subject, that that contained in this regulation", and I would add that it was not suggested in that case that this Regulation 17(1) was ultra vires. It is equally clear, in my opinion, that Regulation 17B. is not ultra vires the powers conferred by sub-sections (1) and (2) of Section 1 of the Emergency Powers (Defence) Act, 1939.

As regards the second point. Regulation 17B., which came into force on the 5th March last, reads as follows :

> "When the High Commissioner is of opinion that it is expedient in the interests of public safety or the defence of Palestine so to do, he may, by special or general directions addressed to the Inspector-General of Police, direct the detention of all or any enemy aliens in Palestine, and such enemy aliens may thereupon be detained in such place and under such conditions as the High Commissioner may from time to time determine and they shall, while so detained, be deemed to be in legal custody."

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*) 11 CtLR 86.

From the wording of this regulation it is clear that such directions may be general or special, and they may refer to all aliens generally as a class or to individual aliens.

A general direction was issued by the High Commissioner to the Inspector-General of Police which had effect as from the 5th March last, in the following terms :—

> "In exercise of the powers vested in him by Regulation 17B. of the Defence Regulations, 1939, the High Commissioner directs you to detain all enemy aliens in Palestine other than those in respect of whom directions have already been given or may hereafter be given that they be not detained.."

This is a general direction as regards all enemy aliens but envisages limitations, past or future.

It is under this regulation and under this direction that the Petitioner is detained, and he has been informed to such effect, and that he does not come within the limitations or exceptions.

Various submissions were put forward as to the interpretation of this regulation and as to the manner in which such directions should be given and carried out. It was suggested that either all enemy aliens must be detained or none at all could be detained — that is must be stated in the directions that it was in the public safety or in defence of Palestine that such direction was given — that a person detained must be informed that he was on the prescribed list — etc., etc. but there is no substance in any of such submissions. It was also submitted that the affidavit in reply to the Petition was by an unqualified person, but he was the person in charge of the Detention Camp and in charge of the Petitioner, and to whom the Petition was addressed. It was further submitted that the discretion as to who should be detained was vested in the High Commissioner and must be exercised by him. It is clear from the directions themselves that this discretion has been so exercised.

Various recent English authorities were quoted to us in relation to the English Regulation 18B., but although the principles enunciated therein may have some relevance, as they refer to a regulation very different in detail, they have no real relevance.

It was for these reasons and that as it was not disputed that the Petitioner was an enemy alien, we were clearly of the opinion that the Petitioner was lawfully detained under the regulation, and that therefore the rule nisi should be discharged.

We fix the costs of the Respondent at LP. 10 to include advocate's fee.

Delivered this 20th day of April, 1942.

CRIMINAL APPEAL No. 91/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Rose, J. Edwards, J. and Khayat, J.

Naser Yousef Mansour — Appellant

v.

Attorney-General — Respondent.

Conviction of murder based mainly upon statements of accused — Rule of procedure as to statements taken by Police separately from two or more persons charged with same offence — Confession by accused following confrontation with other accused found to have been made upon invitation to reply and not free and voluntary — Statement of accused not represented by counsel taken without cautioning.

1. *a*) When two or more persons charged with same offence and statements taken separately from them, Police should not read statements to other persons charged but should furnish each of them with copy of such statement and do nothing to invite a reply.

b) If A, charged with a crime, states it was B who committed it, words accompanying confrontation by Police with B: "There is the man you said committed the crime" — tantamount to invitation to reply and confession made thereupon by A — not free and voluntary, so inadmissible.

2. If a piece of inadmissible evidence wrongly admitted influenced Court's mind and one cannot say result would be same had it been excluded, conviction cannot stand.

3. Statement to Magistrate by accused appearing before him on application to remand — properly receivable in evidence, even if no caution administered, although better practice in such case, particularly when accused not represented by counsel, for Magistrate to caution.

4. Where, in a murder case depending mainly upon statements of accused, no caution administered and accused not represented by counsel, Court should be slow to attach weight to any such statement.

5. Better that occasionally a guilty man should escape penalty of his crime than that there should be any relaxation of necessity of high standard of proof required from prosecution in a murder charge.

Edit. Note: As to 1 see: CrA 87/42 12 CtLR 37 and Edit. Note thereto.

F. Atalla for Appellant — *Crown Counsel* (*Hogan*) for Respondent

Appeal from judgment of Crim. Assize Court sitting at Haifa, dated 5.6..1942, in Crim. Assize Case No. 25/42, whereby appellant was convicted of murder contrary to sec. 814 of Crim. Code Ordin. 1936, and sentenced to death.

JUDGMENT

This is an appeal from a judgment of the Court of Criminal Assize

sitting at Haifa, convicting the accused of murder. The case for the prosecution, as the trial Court pointed out in its judgment, depended in the main upon two statements by the accused, one having been made to the Police and the other to the Magistrate before whom the accused appeared on an application for remand.

To deal first with the alleged confession to the Police. The trial Court appreciated that the matter was not free from difficulty, but came to the conclusion that the statement was admissible. It appears that when this statement was made the accused had already been charged with this murder, so also had a second man, one Abdallah Fayes el Hassan. The accused had previously made a statement to the Police in which he said that Abdallah Fayez el Hassan had committed the murder.

In considering whether a statement made to the Police by a person in custody is free and voluntary, it is useful to have regard to the Judges Rules, which were formulated many years ago by His Majesty's Judges in England for the guidance of the Police themselves and the Courts, and which it is the practice of the Courts of Palestine to follow.

Rule 8 of the Judges Rules reads as follows :

> "When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the Police should not read these statements to the other persons charged, but each of such persons should be furnished by the Police with a copy of such statement and nothing should be said or done by the Police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered."

In the present case the statement under consideration followed immediately upon a confrontation of the two accused persons. Inspector Salem Ishhaiber described the matter as follows :

> "When the accused was brought in, I told him 'There is Abdallah Fayes Hassan, the man you said committed the murder'. The accused then said 'I did say that Abdallah Fayes Hassan committed the murder, but in fact the truth is that I committed it.' I then got a paper and recorded what accused said and I told him he was free to make any statement, and I recorded the circumstances under which he made the statement."

The statement which the accused then made was most detailed and of a highly incriminating nature. We have now to consider whether it was properly receivable in evidence.

In explaining the confrontation of these two persons, Inspector Calem Ishaiber said, in answer to a question from the Court :

> "I did not bring accused in in order to confront him with Abdallah. It is not usual to confront accused persons with each other. I have not done it before.„'

It seems to us that what was in the mind of the Police Officer in confronting the accused with Abdallah is not the point. What we have to consider in the effect on the accused himself, having been charged with this murder and having previously stated to the Police that it was

Abdallah who had committed it, of being confronted with Abdallah with the words "There is Abdallah Fayes Hassan, the man you said comitted the murder". Was that, in fact, tantamount to an invitation to reply? After the most careful consideration, we have come to the conclusion that it was. From the point of view of the accused, his confrontation with this person with whom he was already well acquainted was pointless unless he was, in fact, expected to make a statement in reply. The position, in our opinion, is not effected by the subsequent caution, which was only administered to the accused after he had admitted his guilt and therefore, from his point of view, after the damage had been done. We are of opinion, therefore, that this statement was not free and voluntary and was therefore inadmissible.

That being so, can the conviction stand. In a recent case, which has so far not been reported, Criminal Appeal No. 14/42, this Court held that it is permissible to have regard to the subsequent course of the trial and particularly to the judgment itself to see whether the evidence which was wrongly admitted influenced the mind of the Court. In that case the judgment was long and exhaustive and, in fact, contained no mention at all of the piece of inadmissible evidence. This Court therefore thought it safe to draw the inference that the trial Court was not influenced by that piece of inadmissible evidence and that, had it not been admitted, the trial Court would have come to the same conclusion.

In the present case, however, the judgment begins by saying :

> The case for the prosecution turns largely on two pieces of evidence concerning which we have had a considerable amount of argument and also evidence."

And later it goes on

> "As I have said, the case for the prosecution hinged largely on the confession Exhibit P. 6 and the statement in the Magistrate, and had the confession P. 6 stood alone, it might well be that we might have hesitated to convict the accused solely on this statement made to the Police, but not only has that been supported by other evidence of facts and circumstances. but it has been very strongly reinforced by the evidence of the Magistrate under the circumstances I have detailed."

It must be noted that the trial Court says that the evidence contained in the confession to the Police is supported by other evidence and reinforced by the statement to the Magistrate. In other words, the confession to the Police was the peg upon which the remainder of the case for the prosecution hung. That being so, if that peg is removed, the case for the prosecution falls to the ground. It follows that we cannot possibly say that the mind of the trial Court was not influenced by that confession and that had it not been received in evidence the Court must inevitably have convicted on the strength of the corroborative evidence.

We are therefore of opinion that the wrongful reception in evidence of this confession is fatal to the conviction.

This is sufficient to dispose of the appeal, but we feel that we should say a word about the second alleged statement which was made to the Magistrate and about which considerable argument took place both in the trial Court and in this Court. Having considered the authorities, which were adduced before us by Mr. Hogan in the course of his able argument, and having regard to the limited application of subsections, 6 and 7 of section 15 of the Criminal Procedure (Trial Upon Information) Ordinance, Chapter 36 of the revised edition, we are of opinion that the statement to the Magistrate was properly receivable in evidence, even although no caution was administered. We would add, however, that, in our view, the better practice in such a case, particularly when the accused is not represented by counsel, is for the Magistrate to administer a caution. Further, where, in a case such as the present one, a caution is not administered and the accused is not represented by counsel, we think that a Court of trial should be slow to attach weight to any such statement.

The result may perhaps be regarded as unfortunate, but in our opinion it is better that occasionally a guilty man should escape the penalty of his crime than that there should be any relaxation of the necessarily high standard of proof that is required from the prosecution in a murder charge.

For these reasons the appeal must be allowed and the conviction quashed.

Delivered this 3rd day of July, 1942.

CIVIL APPEAL No. 83/42.

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

Before:— Gordon Smith, C.J. and Rose, J.

David Moyal — Appellant.

v.

'Abdul Wahhab Salem Abu 'Asqul — Respondent

Application to Settlement Officer under sec. 22 of Advocates Ord. — Settlement Officer dismissing application on holding that he had no authority to order enforcement of contract — Certifying fair and reasonable remuneration as preliminary step precedent to enforcement of agreement between advocate and client — Who and how to assess advocate's remuneration.

a) Application by advocate, attaching written agreement with his client, to Settlement Officer under sec. 22 of Advocates Ord. (certifying fair and reasonable remuneration of advo-

cate) — not an application for enforcement of contract.

b) On application under sec. 22 of Advocates Ord. to Settlement Officer regarding legal services rendered partly before his predecessor, partly in Land Court in its appellate capacity Settlement Officer to look into facts and circumstances, and, if necessary get Land Court record and decide what would be fair and reasonable remuneration of advocate.

Abcarius for Appellant — *A. Akel* for Respondent

Appeal from decision of Settlement Officer, Ramleh Settlement Area, dated 26.3.1942, in Application No. AF/1/42.

JUDGMENT

This is an appeal against the judgment of the Settlement Officer in respect of proceedings before him in case No. 19/32. In his judgment the Settlement Officer said that he had no authority to make an order for the enforcement of the contract which had been put in by Mr. Moyal in support of his claim, but the Settlement Officer was not asked to do that. What, under the law, it appears that he should have done was to certify whether, in accordance with Section 22 of the Advocates Ordinance, the agreement for remuneration was fair and reasonable. If he had been of the opinion that it was not fair and reasonable, then he is authorised under that section to reduce the amount payable to any sum which he thinks is justified according to the circumstances of the case. That is the preliminary step which must be carried out before the question of enforcing the agreement or carrying out of the agreement can be entertained by any Court.

We propose, therefore, to send it back to the Settlement Officer for that purpose. He is in the better position than anybody else to say what would be a reasonable sum or fee for the application to his predecessor for leave to appeal, and the subsequent application to the Land Court in its appelate capacity on the refusal by the Settlement Officer to give leave to appeal, and then when that leave was granted, the subsequent hearing which Mr. Moyal attended on behalf of his client and in which he was partly successful in getting the previous judgment of the Settlement Officer set aside. It seems to us fairly simple. He can look into the facts and circumstances, and if necessary, he can get the record of the appeal in the Land Court and assess what would be a fair and reasonable remuneration to Mr. Moyal.

As regards the costs of this appeal, we think that the costs should be on the lower scale to include the sum of LP. 5 for advocate's attendance fee to the Appellant.

Delivered this 7th day of July, 1942.

CIVIL APPEAL No. 116/42.

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

Before : Copland J., Khayat J. and Abdulhadi J.

Hanneh Jabran el Kassis in her personal capacity and on behalf of the estate of her late husband Aziz Hanna Daoud. Appellant.

v.

1. Suleiman Saleh Tarif on behalf of the Estate of his mother sheikha bint Kreitem Alma.
2. Afifeh bint Kreitem Yusif Alma Respondents.

Presumption that no adverse possession between co-heirs and facts rebutting presumption.

1. a) That no adverse possession between co-heirs — only a presumption and like other presumptions can be rebutted.

b) Where land for long period in possession of co-heir, Court to see whether during this period other co-heirs ever took any share in produce, and, if not and no interference with possession, determine whether such non-interference rebuts or not presumption regarding possession between co-heirs.

2. (*Obiter*) Unregistered purchaser of land cannot have any equitable title against a third party; if he has any equitable title he must claim it against his vendor.

Edit. Note: As to 1 see CA 104/42 12 CtLR 55 and Edit. Note thereto.

Elia for Appellant *Shukeiri* for Respondents.

Appeal from judgment of Magistrate's Court Acre, sitting as a Land Court, dated 1.6.42 in Land Case No. 6/41.

JUDGMENT.

This is an appeal from the learned Magistrate of Acre sitting as a Land Court. Apart from the difficulty which I myself have felt in understanding the judgment of the Magistrate, due partly to the fact that the Magistrate in his judgment seemed to have used the words 'plaintiff' and 'defendant' as anonymous terms, we think that this appeal will have to be allowed.

The whole question, in our opinion, turns upon this, whether the possession of Neifeh, and her purchasers after her, constitute such adverse possession as would bring the case within the terms of Civil Appeal No. 197/41 *) reported in 8 P.L.R. p. 499. From the record before the Magistrate, it would seem that the father of Naifeh, Afifeh and Sheikha died rather over twenty years ago, that is, a date, of course, which should be proved rather more definitely. The Magistrate should also go into the question whether during these twenty years or more, the heirs of Sheikha, who died after her father, and Afifeh herself have ever taken any share in the preduce of this particular land. If it would appear that during these twenty years or more the heirs of

*) 10 CtLR 205.

Sheikha and Afifeh have not taken any part of the preduce and have not, in any way, interfered with either the possession of Neifeh or of her purchasers, then the Magistrate, paying attention to this case which I have just quoted, must determine whether such non-interference constitutes or not a rebuttal of the presumption that there can be no adverse possession between co-heirs.

We would call the attention of the Magistrate to the fact that this is only a presumption and like other presumptions can be rebutted in the ways that are open for such rebuttal.

For these reasons we must allow the appeal, set aside the judgment of the learned Magistrate and remit the case to him to find out whether there was any adverse possession by Neifeh to the exclusion of her sisters after the death of her father, which took place twenty years ago or more until the time she sold to the present appellant, and whether there has been any adverse possession since then, and to give judgment accordingly.

We wish to add that it is immaterial whether the document of purchase is produced or not because the appellant cannot have any equitable title against a third party. If she has any equitable title she must claim it against her vendor.

The appeal is therefore allowed. Costs to be in the cause and we certify the sum of LP. 10 advocate's attendance fee on the hearing of this appeal.

Delivered this 28th day of July, 1942.

HIGH COURT No. 65/42.

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

Before:— Edwards, J., Frumkin, J. and Khayat, J.

Baseel Shami in his capacity as attorney of G.K. Fernainé and Freres of Beirut — Petitioner.

v.

The Controller of Hides & Leather — Respondent.

Rule nisi to Controller of Hides and Leather to show cause why he should not consent to export to Lebanon of certain machinery imported by petitioner's principal — Proper person to issue export licence — Effect of failing to make proper person respondent to petition to High Court.

1. Proper person whose function to issue export licences — Director of Customs, Excise and Trade.
2. Where proper person not made respondent to petition to High Court, order nisi, if granted, will be discharged.

Edit. Note: See HC 94/36 1 CtLR Rep. 56.

A. Nashashibi for Petitioner *Crown Counsel* (*Hogan*) for Respondent

Return to a rule nisi issued on 29.6.42, directed to respondent com-

manding him to show cause why he should not consent to export to Lebanon of machinery marked G.K.F.F. Beirut No. 2676 imported by principals of petitioner and now in custody with said principals' agents, Messrs. Homsi and Salameh, Jaffa.

ORDER

The order nisi must be discharged. It seems that the proper person whose function it is to issue export licences is the Director of Customs, Excise and Trade. He should have been made the respondent to this petition.

No costs.

Given this 27th day of July, 1942.

HIGH COURT No. 41/42.

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

Before: Copland, J. and Edwards, J.

Hava Friedrich — Petitioner.

v.

1. The Director of Land Registration
2. Land Registrar, Jerusalem. — Respondents

Transfer fee demanded in respect of plot together with building thereon, although building erected by transferee — Correct procedure for person faced with request to pay transfer fees which he thinks is wrong.

Correct procedure for person faced with request to pay transfer fees*) which he thinks is wrong — not petition High Court but pay fees demanded and then sue under Crown Actions Ordinance for refund.

Edit. Note: Compare HC 85/40 9 CtLR 10.

Levanon and *Mazower* for Petitioner. Ex parte.

Application for an order to issue directed to respondents calling upon them to show cause why order in file 1537/41, Land Registry, Jerusalem, requiring petitioner to pay transfer fees not only for land to be transferred to her but also for building which she erected thereon should not be set aside and transfer fees ordered to be collected only in respect of land.

ORDER

This order must be refused. We think that the correct procedure is for the petitioner to pay the fees demanded and then to sue under the Crown Actions Ordinance for that sum which he says was wrongly collected. The application for a rule nisi is refused.

Given this 4th day of May, 1942.

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*) Edit. Note: or, semble any other Government fee.

CRIMINAL APPEAL No. 18/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before : Gordon Smith C.J., Edwards and Frumkin J.

1. Safieh Abed Omar
2. Fatmeh Ahmad el Haj — Appellants.

v.

The Attorney General — Respondent.

Charge with and conviction of manslaughter based mainly on statements by deceased — Accused denying in their statements to Police their presence on and in neighbourhood of scene on day crime was committed but giving no evidence and calling no witnesses for defence in Court — Dissenting opinion of Judge as to admissibility of deceased's statement to Police and unanimosity of Court that it was made "shortly after" injuries received — Question of admissibility of dying declaration — Discrepancies in statements of deceased.

1. A Judge, although holding that document or statement inadmissible, may when his opinion as to this over-ruled by majority, consider contents of document or statement and found a verdict thereon.

2. Asking dying person some questions without actually recording them in statement taken from him does not make statement inadmissible or in any way objectionable as dying declaration.

3. Discrepancies between declarations of dying person in describing certain details of crime committed on him — immaterial if explained by attending circumstances.

4. Details of dying declaration need not be corroborated.

Goitein and *Mogannam* for Appellants.

Crown Counsel (*Hogan*) for Respondent.

Appeal from judgment of District Court, Jerusalem, dated 6.2.42, in Crime No. 206/41, whereby Appellants were convicted of manslaughter, contrary to Sec. 212 and 213 of Crim. Code Ord., 1936, and sentenced to 10 years' imprisonment.

JUDGMENT

As this appeal raised several questions as to admissibility of statements made by a deceased, and also the weight to be attached to such statements, if admissible, we reserved judgment in the matter.

The two accused were charged jointly with and convicted of the manslaughter of Mohammad Hassan Hamad by stabbing him with a dagger and striking him with stones. The date and place of the offence was given as being the 6th May, 1941, at Givat Sha'ul locality, and although the actual time of day is somewhat uncertain, it is clear that the deceased received these injuries sometime between 3 p.m. and 6 p.m., and died the following morning in hospital. The cause of death was shock and internal poisoning due to ruptures of stomach and rectum

whereby the contents of stomach and rectum were spilled into the abdominal cavity. He had also received a stab wound on the lower right side of the chest penetrating to the cover of the lung and upper surface of the liver. There were, in addition, eleven small skin wounds on the head and scratches on the hands and knees. There was no external injury on the surface of the abdomen. Neither the head injuries nor the stab wound were the cause of death.

The facts very briefly are as follows:—

The deceased and his wife were, that afternoon, sitting by a Biscuit Factory when the two accused passed and greetings were exchanged. Shortly afterwards the wife went home and the deceased followed or went off in the same direction as the second accused, which was towards some waste and rocky ground.

A witness, Sallah, who worked at the Diskin Orphanage and lived at Aim Karim, left his work as usual at 5 p.m., proceeded home to his village and when, presumably, taking a short cut amongst this rocky ground, saw two women, one standing on a rock and the other near the corner of a shed. He did not identify them as the two accused but said they had ordinary peasant dress on, and he saw no one else there and was not accustomed to see women amongst these rocks.

Another witness Niman Mohammad who knew deceased, was also going home accompanied by Mohammad Ahmad, the son of the elder accused when they met the two accused by the Diskin Orphanage walking down the hill where it was all rocky land called Givat Sha'ul Quarter, one or other, or both the accused, spoke to Mohammad Ahmad and told him, "Go back, your uncle Jamil has fallen", and for some reason or other they cursed him. Anyhow, Mohammad Ahmad returned with the second accused *towards* the main road. This witness then went towards the main road and seeing a small boy running spoke to him, as a result of which he went back to Givat Sha'ul and found a number of people gathered round the deceased who was wounded. He stated that when he met the two accused they were at a spot about one kilometre from the place where deceased lay.

Apart from subsequent statements made by the deceased this is practically all the evidence against the two accused, but it is significant that both the accused made statements to the Police, each denying that they were in that neighbourhood at all that day, did not see the deceased at all that day but were at home, and gave the names of witnesses who could substantiate their statements. Neither of the accused gave evidence nor were any witnesses called for the defence.

The first witness called in the Court below was P.C. Deeb Rashid. He was the first policeman on the scene, having been summoned, and he stated that he reached the injured man about 5.35 p.m., and he spoke to him. The Court ruled by a majority that the deceased's reply was inadmissible, as there was nothing at that stage of the proceedings

to show that the statement had been made *shortly* after the act of violence had taken place and within Section 8 of the Evidence Ordinance.

Subsequently, deceased was removed to hospital in a taxi and on the way he made a statement to P.C. Spiegelstein, who recorded it at the time and obtained deceased's thumbprint to it on arrival at the hospital.

According to the doctor the deceased arrived at the hospital at 6.20 p.m. unconscious, but it is in evidence that a statement was obtained from the deceased at 7.30 p.m. by P.C. Jamil. I will refer to this last statement as the dying declaration.

Now, as I have stated, that first statement made to the first witness, P.C. Deeb Rashid, was rejected at that stage by a majority of the Court below, nor was it admitted at any subsequent stage, and we do not know the contents.

The dying declaration was, after an adjournment, admitted by a majority of the Court, and similarly the statement to P.C. Spiegelstein was admitted, but unanimously, in view of a ruling in Crim. A 14/1938 *), Vol. 5, P.L.R. p. 129, and in view of the facts, as being "*shortly after*" the injuries were received.

Although it was argued before us that a ruling by a two-third majority was not a ruling by the Court, we had no hesitation in rejecting this submission, and there is nothing illogical in a member of the Court, although dissenting on a point of admissibility of a document or statement, considering the contents of such document or statement and founding a verdict thereon, when his opinion as to its admissibility has been over-ruled by a majority.

Every conceivable argument was put before us most strenuously as to why this dying declaration was inadmissible both because of the recorded details and words used, and as to the manner and circumstances in which it was obtained and recorded. It was argued that the witness who recorded it was unreliable — that there had been cross examination of the deceased and that the interpretation was also unreliable, and that the deceased had not that settled hopeless conviction of death sufficient to render the statement admissible. I would observe that Section 8 of the Evidence Ordinance reads, "...or made when the person was, or believed himself to be, dying as a direct consequence of the act of violence...". The doctor stated that he told the deceased, "Your condition is very dangerous — you may die any time, and here is a Policeman coming to take your statement." As recorded, the deceased replied, "I see that I am in danger and I am —" and deceased used the words "Ana mistwi". Considerable discussion took place before us as to the colloquial and literal meaning of "mistwi", and whether it meant 'exhausted', 'finished', 'ripe' or 'ready', as in cooking or

*) 3 CtLR 246.

whether there are other words in Arabic that can be used for "death" or "dying". We are quite satisfied, as was the Court below, that in fact the deceased was not only dying but believed himself to be dying. We are also satisfied that there was nothing in the nature of cross examination, although questions must have been asked the deceased, as is clearly indicated by the statement itself in regard to the dagger and to Jamil Kafieh, but we see nothing objectionable in not having recorded the actual questions asked, in this instance. We are satisfied that the statement was properly admitted as a dying declaration.

As regards the statement made to P.C. Spiegelstein, we also agree that the Court below properly admitted this statement and for the reasons then given. Such statement is, under Section 8 (supra), admissible "if made at the time or shortly after the act of violence was committed or so soon after as he had an opportunity of *complaining of* it...". In my opinion the earlier statement to P.C. Deeb Rashid was also admissible, but there was no subsequent attempt to bring this one in at a later stage. It is quite impossible to fix definitely the actual minute of the act of violence, particularly in view of the complete absence of any eye witness, but it is reasonable to suppose that it was not earlier than 4.30 p.m. and not later than 5.30 p.m., and this statement was made by the deceased when being taken to hospital by the Police, about 6.10 p.m. In my view that comes within the expression shortly after, having regard to all the circumstances.

Then, so it was argued, the two statements are themselves inconsistent with each other and with other evidence, for example that in the one statement he stated he was stabbed in the belly, in the dying declaration he said in the abdomen whereas according to the medical evidence, although seriously injured in the abdomen or belly, the actual stab wound was in the lower right side of the chest. Taking into consideration the nature of the injuries, it is not surprising that the deceased did not describe in anatomical terms the exact spots or the exact manner in which he was injured.

Similarly, in the statement he refers to both accused and Jamil as having stabbed him, whereas in the dying declaration he gives clearer details and even goes so far as to say that he did not know whether Jamil struck him or not. And, moreover, it is more than likely that in the car the Police Constable asked him who had stabbed him, as there were no visible and external signs of the injuries to the abdomen, and it was the chest wound that was bleeding. In reply he probably meant to convey that it was all three who had assaulted him. But it is significant that Jamil must have been there, as disclosed by the women themselves to the witness Niman, on whom the Court below placed great reliance.

Further, it was submitted that there was no corroboration of these statements and that it would be wholly unsafe to convict on such evidence.

I know of no rule of law or of practice that requires the details of a dying declaration to be corroborated. In the absence of eye witnesses, evidence must necessarily be circumstantial, and the presence at least of these two women at this rocky place is amply substantiated, in spite of their denials, and there is a motive certainly suggested by the widow of the deceased and by other circumstances of the actual injuries. All these facts were closely considered by the Court below and there was justification for the Court drawing attention to the fact that all these statements were uncontradicted on oath by the very persons best qualified to do so if their statements to the Police were true. The Court below found that there was no reasonable doubt about the guilt of the accused, and we are quite unable to say that the Court has erred in this respect.

There is nothing to distinguish between the guilt of the two accused, and the appeal is dismissed.

As regards the sentence, although we feel that the whole story as to the relations between the younger accused and the deceased have not been brought before the Court for obvious reasons, and that by reason thereof the accused may have given some just cause for feelings of resentment and ill-will, the deceased was killed by these women in a brutal manner and we are unable to say that the sentence is too severe. Sentence to run from date of hearing of appeal, i.e. 25th February, 1942.

Delivered this 18th day of March, 1942.

CIVIL APPEAL No. 110/42.

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

Before:— Copland, J., Frumkin, J. and Khayat, J.

1. Benyamin Z'ev Malal
2 Zvi Rosenfeld — Appellants.

v.

Zvi Arye Pensak — Respondent.

Lease of room for several months for purpose of "leather works" — Subsequent lease of same room together with other one for one year as "Office" — Action for eviction mainly on ground that premises used for purpose other than that set out in contract of lease — Magistrate dismissing case on finding, inter alia, that lessor agreed to use made by lessee — District Court on appeal reversing Magistrate's findings on holding that "Office" cannot mean "factory for manufacture of leather goods" and that lessor's consent not proved — Interference of appellate Court with findings of fact — Effect of lessor's knowledge and consent.

1. An appellate Court should not ordinarily interfere with findings of fact of trial Court, if findings supported by evidence

and not clearly wrong, even though appellate Court, had it been trying the case, might have come to other conclusion.

2. Change in use of lease as stated in contract of lease — immaterial, if proved that change made with lessor's knowledge and consent, specific or implied.

Edit. Note:— As to 1 see CA 70/42 12 CtLR 25 and Edit. Note thereto; As to 2 see CA 138/41 10 CtLR 83.

Reuss for Appellants. *Ginsburg* for Respondent.

Appeal from judgment of District Court, Tel-Aviv in its appellate capacity, dated 21.5.42, in Civil Appeal No. 67/42, on appeal from judgment of Magistrate's Court, Tel-Aviv, dated 22.3.42 in Civil Case No. 9341/41.

JUDGMENT

This is an appeal by leave from an appellate judgment of the District Court of Tel-Aviv on a judgment issued in the first instance in the Magistrate's Court. The facts are quite short. Originally the present respondent let one room to the appellants by a written contract from the 6th December, 1940, to the 6th March, 1941. In March, 1941, this same room together with an additional room were let by the respondent to the appellants for a year. The purpose of the hiring of the premises in the first contract was stated to be 'leather works' and in the second it was stated to be 'office'. In September, 1941, a third room was let but not on any written contract. In November, 1941, the respondent asked for an eviction order against the appellants on several grounds, the main one being that the premises were being used for a purpose other than that set out in the contract of lease. There was also a subsidiary point that the business maintained by the appellants was making an excessive noise to the annoyance of other people.

The learned Magistrate found in favour of the appellants holding that it was proved that there was a factory in the building, that it was not proved that the appellants were deteriorating the premises in any way, that there was no excessive noise, and that there was no doubt that the respondent had agreed that the appellants should conduct the leather trade in the rooms lessed by them. On appeal the District Court reversed these findings and held that the meaning of the word 'office' was quite clear but that whatever it did mean it did not mean a 'factory for the manufacture of leather goods'. The District Court also held that the respondent's consent to the use of the premises for the leather trade had not been proved. The appellants now come to this Court.

The whole case turns in effect upon whether there was evidence to support the findings of fact made by the learned Magistrate. It is quite clear from the record before the Magistrate that in March, 1941, when he consented to the second lease, the respondent knew the use to which these premises had been and would be put. It is equally clear that in September, 1941, when the respondent let the third room to

the appellants, that he knew that at that time the same leather trade was being carried on in the two rooms then held by the appellants. It is also clear, and all this comes from the evidence of the respondent himself, that, after September, 1941, that is, after the letting of the third room, he knew that the three rooms were being used for the purpose of the leather trade. It is, therefore, a little difficult to see how on this appeal his advocate can argue that he never knew that there were these leather works there.

As to how far an appellate Court should interfere with the findings of fact made by a lower Court, the rule is perfectly clear. An appellate Court should not ordinarily interfere with findings of fact made by a lower Court if those findings are supported by the evidence, and are not clearly wrong, the appellate Court, if it had been trying the case, might not have come to the same conclusion. In this case, there was sufficient evidence, more than sufficient evidence, before the learned Magistrate, to support his findings of fact that the continuation in the use of the premises for the purposes of the leather trade was with the knowledge of the respondent himself, and that being so, the District Court should not have interfered with the Magistrate's findings of fact. The change in the object of the lease as stated in the first and second leases is of no materiality whatever, since it has been proved that the alteration in, or the contiunation of, the use was made with the implied consent and knowledge of the lessor himself.

The appeal must therefore be allowed, the judgment of the District Court set aside and the judgment of the learned Magistrate restored. The appellants are entitled to all their costs here and below, in this Court on the lower scale and to include the sum of LP. 10 advocate's fee on the hearing of this appeal.

Delivered this 22nd day of July, 1942.

CIVIL APPEAL No. 80/42.

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

Before : Copland J., Frumkin J. and Khayat J.

1. Muhammad Ali Abd el Qadir Abu Ramadan.
2. Rablha Abd el Hafez Ali el Ifrangi. Appellants.

v.

1. Hassan Abdallah Hassan Afani
2. Ibrahim Abdallah Hassan Afani Respondents.

Settlement Offcier finding that although land in dispute part of registered masha' of village yet never cultivated as such and for prescriptive period in Plaintiff's undisputed possession — Believing and disbelieving whole or part of evidence.

Settlement Officer (trial Court) — not bound to believe or disbelieve whole of party's evidence; thus he may find, in favour

of Defendant, that land part of registered village masha' but, in Plaintiff's favour, never cultivated as such and for long period in Plaintiff's undisputed possession.

Elia for Appellants. *Nasser* for Respondents.

Appeal from decision of Settlement Officer, Gaza Settlement Area, dated 26.3.42, in case No. 1/36/Sawafir Charbi.

JUDGMENT

We need not trouble you, Mr. Nasser.

This is an appeal from the Settlement Officer, Gaza Settlement Area. Before the second trial, the case had been sent back to the Settlement Officer by this Court on grounds which do not now concern us, and at the second trial the Settlement Officer found that the land in dispute was part of the registered masha' lands of the village. He found that they were registered as part of the masha' lands but were not cultivated as part of the masha' and that the lands had been put in cultivation by the plaintiffs, the present respondents, who had retained undisputed possession of them for such time as would bar any action for recovery by the registered owners. The Settlement Officer also found as a fact that the plaintiffs (respondents) were speaking the truth when they said that this land was improperly included in a partition deed which they and others signed and that they, being illiterate, did not know that this land was so included. On those grounds he ordered the land to be registered in the names of the respondents.

On appeal, Mr. Elia for the appellants, has strongly urged that, first of all, the land was claimed to be mewat and, therefore, no title could be obtained to it by cultivation. Secondly, that there was no evidence to support the finding of fact that the respondents did not know that the land was included in the partition, and thirdly, he refers to another case, Case No. 2/36 of Land Settlement Gaza of Sawafir Charbi. This second case, as a matter of fact, has no bearing because there there had been an admission by one of the parties that his opponents were entitled to thirty dunams and this Court on appeal gave effect to that admission.

There was evidence to support the findings of the Settlement Officer. A Settlement Officer is not bound to believe the whole evidence of one party or disbelieve the whole of it. In this case, he found in favour of the appellants that the land in dispute was registered as part of the masha' but he found in favour of the respondents that it was never cultivated as part of the masha'. As we have said, there was evidence to support those findings of fact. That being so, we see no reason to interfere.

The appeal will be dismissed. The respondents are entitled to their costs on the lower scale and to include the sum of LP. 10 for advocate's attendance fee on the hearing of this appeal.

Delivered this 22nd day of July, 1942.

CRIMINAL APPEAL No. 14/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before : Rose, J. Edwards J. and Frumkin J.

Mahmoud Hassan Yasin Alias Afouneh Appellant

v.

Attorney General Respondent

Fugitive accused arrested in Syria and handed over to Palestine Authorities a month before arrival of extradition papers — Application re composition of Assize Court signed by advocate without power of attorney — Information remaining alive and good as regards apprehended accused whose name appearing with that of other accused was deleted — Production of evidence tending to show accused's bad character — Effect upon judgment of wrongful admission of evidence.

1. a) If agreement exists between two countries and a request for extradition made, for Government to whom request made and for them only to satisfy themselves that formalities of agreement complied with.

b) Accused once handed over to requesting Government cannot avail himself of plea that Government to whom request was made should not have extradited him because certain irregularities of procedure occurred.

c) A fugitive brought back by kidnapping or other irregular means and not under extradition treaty, although such treaty exists, cannot set up in answer to indictment unlawful manner in which he was brought within Court's jurisdiction.

Edit. Note:— As to 2 see: CA 237/40 9 CtLR 201; CrA 134/40 ibid 41 and Edit. Note thereto; as to 5 see CrA 91/42 12 CtLR 61.

2. a) Application re constitution of Court signed by advocate later pleading at trial without he or accused taking any objection to constitution of Court will be regarded as having been made with accused's consent and in order, although when signing application advocate had no power of attorney.

b. (Obiter) Court officials should require signature of accused instead of, or in addition to, that of advocate in any application under sec. 10. of Courts Ord. (Constitution of Court).

3. If Information charged two accused and, one escaping, trial proceeded against other on deletion, without initial or comment of former's name, Information remaining upon file survives as replacement within meaning of sec. 28(8) of Crim. Proc. (Tr. Upon Inf.) Ord. and good for trial of fugitive when recaptured.

4. Evidence tending to show that accused committed criminal acts other than those covered by indictment — inadmissible.

5. Admission of wrongful evidence, if found not to have influenced trial Court's mind, no ground to upset judgment.

Cattan for Appellant *Crown Counsel* (*Rigby*) for Respondent

Appeal from judgment of Court of Criminal Assize sitting at Jerusalem, dated 22.1.42, in Crim. Assize Case No. 36/40, whereby appellant was convicted of murder contrary to sec. 214(b) of Crim. Code Ord. 1936, and sentenced to death.

JUDGMENT

This is an appeal from a judgment of the Court of Criminal Assize sitting at Jerusalem convicting the accused of murder. Mr. Cattan, who appeared for the appellant and to whose able argument the Court is indebted, raised various legal points. First, he says that the requirements of the Extradition Agreement between this country and Syria were not complied with. Mr. Rigby, who appeared for the Attorney General put in an affidavit signed by the appropriate officer, setting out what actually occurred, and it appears that the accused had escaped to Syria where he was arrested on the 20th October in Damascus by a British Sergeant Holman. It is to be remembered that at this time the occupation of Syria by the Allied Forces had already taken place. By the 23rd of October he had been conveyed from Damascus to the frontier, handed over the frontier, and arrested on the Palestine side of the border by Assistant Superintendent Campbell. Both these officers, incidentally, are members of the Palestine Police Force. There is no doubt that the passage of the accused from Damascus to the frontier and his arrest were against his will. There is no suggestion to the contrary on the part of the Crown.

Extradition papers had, in fact, been prepared by the Palestine Authorities and forwarded to Syria, but they only arrived after the events which I have just described and were returned on the 1st of November by Lieutenant Colonel Prosser, attached to the British Security Mission with an endorsement to that effect.

We now have to consider the legal position. If there is an extradition agreement between two countries and a request for extradition is made, the Government to whom the request is made must satisfy themselves that the formalities of the agreement have been complied with. It is a matter for them and not for the Government which is making the application. When once the accused person has been handed over to the requesting Government, the position would seem to be that, subject to the limitation that he cannot be tried for an offence other than that for which he was extradited, he cannot avail himself of the plea that the Government to whom the request was made should not have extradited him at all because certain irregularities of procedure had occurred. Authority for this view is provided by the old case of *Ex Parte Scott* (1829) 9, *B & C* 446.

Counsel on neither side was able to refer us to any direct authority covering a case such as the present where a person has been irregularly apprehended not as a result of extradition proceedings at all. In our opinion, the law is correctly stated in volume 4 of Moore's Digest of International Law, at page 311. The authority cited is an American (State) case which, of course, is not binding on this Court. Nevertheless we adopt the language used, which is as follows —

"Where a fugitive is brought back by kidnapping, or by other

> irregular means, and not under an extradition treaty, he can not, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner in which he was brought within the jurisdiction of the court. It belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights."

Accepting that view of the law we think that there is no substance in the extradition point.

The next point taken by Mr. Cattan is highly technical and, were this not a capital charge, we should have said that is was not a worthy point to take. It is contended that the Court of Trial was improperly constituted in that the learned Chief Justice sat alone. What occurred was that a few days before the trial an application was made by Mr. Nazzal, advocate for the accused, that the case should be tried by a British Judge sitting alone. The matter is covered by the proviso to Section 10 of the Courts Ordinance, 1940 and Mr. Cattan argues that the accused himself must make the request and not his advocate. He further says that at the time of the application Mr. Nazzal did not hold a power of attorney authorizing him to act for the accused, although he was provided with this a day or so later and before the commencement of the trial. Mr. Nazzal actually appeared for the accused at the trial and neither he nor the accused himself made any protest against the constitution of the Court. In these circumstances we think that we should hold that the application was made on behalf of the accused and with his consent and is therefore in order. We would add that it might be a convenient practice in future, in order to avoid any such question, for the Court officials to require the signature or thumbprint of the accused, instead of or in addition to that of his advocate in any such written application.

Thirdly, Mr. Cattan contends that the Information is defective. In the first instance, the accused was charged with another person on an Information filed on the 5th October, 1940. Before the case came on for hearing, the present accused escaped and the trial was proceeded with against his co-accused alone. The name of the present accused in the original Information was deleted in ink, although such deletion bore no initial or comment. Mr. Cattan argues that the first Information must be regarded as dead and the second Information, filed on the 31st December, 1941, was therefore out of time and bad in view of Section 28(5) of the Criminal Procedure (Trial Upon Information) Ordinance.

The first Information, however, remained upon the file until the beginning of the second trial and Mr. Nazzal actually made an application at the trial for the Information to be withdrawn. We think, therefore, that the first Information was still alive and that the second Information was, as Mr. Rigby contends, a replacement within the meaning of Section 28(8) of the Ordinance.

This point therefore also fails.

That disposes of the preliminary technical points, but we now come to a much more serious matter, concerning certain inadmissible evidence, Sergeant Moody of C.I.D. was called by the prosecution as a witness and produced certain photographs which included the accused, dressed in rebel uniform, carrying a rifle and in company with other armed and uniformed rebels. There is no suggestion that these photographs had any relevance as regards this particular crime. Mr. Cattan says, and we agree with him, that this is almost a "copy-book" example of inadmissible evidence. Mr. Rigby frankly admits that the evidence is inadmissible but urges that the matter did not influence the Court. Oddly enough it does not appear from the record — and Mr. Cattan agrees that the record is correct on this point — that counsel for the defence objected to the admission of the evidence.

One of the most ungrateful tasks that any judge has to perform is to criticize advocates, especially in a murder-case where the strain and responsibility upon counsel on either side is very great, but it seems to us that in this matter the Court of Trial did not receive from either counsel that assistance which it is entitled to expect and without which the due administration of justice is most difficult. Not only should this evidence, in our opinion, never have been adduced by the Crown but. having been adduced, it should certainly have been objected to by counsel for the defence. Had objection been taken, we have no doubt that the evidence would have been rejected. The principle is set out in a well-known passage in Archbold's Criminal Pleading 28th Edition at page 566 which reads as follows :

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of Criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried."

That, of course, is an elementary rule of evidence which has been acted upon by British Courts for many years. Mr. Cattan contends that no reasonable person could fail to be influenced against the accused by evidence of this nature, and relies on an equally famous passage in the same volume of Archbold at page 340 which reads —

> "Where it is established that evidence has been wrongfully admitted the Court will quash the conviction unless it holds that the evidence so admitted cannot reasonably be said to have affected the minds of the jury in arriving at their verdict, and that they would or must inevitably have arrived at the same verdict if the evidence had not been admitted. In considering this question the nature of the evidence so admitted and the direction with regard to it in the summing-up are the most material matters."

Had this case been tried before a jury we think that there can be no doubt that unless the summing-up had contained an express direction

to the jury to disregard this evidence, the appeal would have had to be allowed ; but the considerations are not the same when a case is tried by a bench of judges or by a judge alone. In considering whether the mind of a judge is influenced by a certain piece of evidence it is, we think, permissible to look at the subsequent course of the trial. It does not appear from the record that any mention of this point was made either by Mr. Hogan or by Mr. Nazzal in their final speeches, although the matter is adverted to in the cross-examination of the accused by Mr. Hogan. Further, there is no mention of the matter in the judgment, which is careful and exhaustive. Instead, the Court directs its mind to what is clearly the principal relevant issue as to the credibility of the witnesses as to identity. Mr. Cattan argues that the fact that this prejudicial evidence was admitted may have influenced the Court in making it more ready to believe the eye-witnesses for the prosecution. That is a powerful argument, but after giving the matter the most anxious consideration we are of opinion that the Court was not influenced by this matter, regrettable as it was, but applied its mind clearly to the proper considerations with which it dealt in considerable detail.

We are of opinion therefore, that the wrongful admission of this evidence is not fatal to the conviction.

The remainder of the case raises pure questions of fact, on which there is undoubtedly evidence on the record which, if believed, entitled the Court to come to the conclusion to which it did.

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

Delivered this 11th day of February, 1942.

CIVIL APPEAL No. 121/42.

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

Before:— Gordon Smith, C.J., Frumkin, J. and Khayat, J.

Abraham Finkelstein — Appellant.

v.

Moshe Gonioch — Respondent.

Rent attached in favour of 3rd party — Tenant, while otherwise paying instalments regularly, deducting a petty sum for expenses incurred — Eviction order by Magistrate on ground of nonpayment of rent and subsequent payment by tenant of sum deducted by him — Trivial matter not amounting to failure to continue to pay rent.

Tenant's delay in paying comparatively small part of rent due may under circumstances be regarded as trivial and not failure to continue to pay rent warranting an eviction order.

Edit. Note:— See CA 55/41 9 CtLR 142.

Goitein and *Shaoni* for Appellant — *Sandler* for Respondent

Appeal from judgment of District Court, Tel-Aviv, in its appellate

capacity, dated 21.5.42, in Civil Appeal No. 73/42, on appeal from judgment of Magistrate's Court, Tel-Aviv, dated 26.3.42, in Civil Case No. 191/42.

JUDGMENT

In this case the Appellant had obtained an eviction order before the Magistrate against the Respondent, and the Magistrate granted the same on the ground of nonpayment of rent. On appeal by the Respondent to the District Court, that Court allowed the appeal, and on appeal before us, at the conclusion of the hearing, we dismissed the appeal and intimated that we would give our reasons in writing.

Section 8(1) of the Rent Restrictions (Dwelling Houses) Ordinance, No. 44 of 1940, provides that no judgment or order for the eviction of a tenant shall be made so long as the tenant continues to pay the rent, except for certain other breaches specified in the section.

In this case, there was no such failure to continue to pay the rent. An attachment of the rent had been made and in fact and in accordance therewith the tenant paid his rent monthly to the District Commissioner. In April 1941, he deducted LP. 1 from this rent of LP. 3.500 per mensem in respect of some whitewashing, which he alleged was as per agreement with the Appellant.

Earlier in this year, the Appellant hearing of this deduction sued for an eviction order. On the Magistrate finding that the tenant (Defendant) had failed to prove the alleged whitewashing and agreement by the landlord to pay for it, he made the order for eviction, whereupon, or shortly afterwards, the tenant paid the LP. 1 in dispute. The matter was wholly trivial and obviously an attempt by the landlord to eject the tenant and get possession of the premises by whatever means he could. No objection at the time was made by the District Commissioner, who accepted the deduction, and in our opinion there was no failure to continue to pay the rent. We therefore agreed with the decision of the District Court, and dismissed the appeal, with costs on the lower scale to include the sum of LP. 10 advocate's attendance fee.

Delivered this 17th day of August, 1942.

CIVIL APPEAL No. 105/42.

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

Before:— Gordon Smith, C. J. and Edwards, J.

1. Dr. Benedikt Lieberman
2. Mrs. Cilly Kupferman .. .. Appellants.

v.

1. The Anglo-Palestine Bank, Ltd.
2. Dr. Henryk Kupferman
3. Ela Lieberman .. Respondents.

Application by Bank by way of interpleader concerning dispute in regard to moneys deposited with them — Disputing parties asking for application being dismissed with costs — Court dismissing interpleader application and ordering one set of respondents to pay other set of respondents their costs — Discretion of Court in matter of costs — Non-interference of Court of Appeal.

1. As no specified rules dealing with costs applicable to interpleader applications, costs — in discretion of trial Court. Court of Appeal will not interfere unless it finds that discretion exercised improperly.

2. Court may in its discretion, while dismissing application of taking out summons by way of interpleader, order one set of respondents to pay costs of other respondents.

Edit. Note:— See HC 88/41 11CtLR 189.

Werner for Appellants. *Levin* and *Lipshitz* for Respondent No. 1. *Cross* for Respondents Nos. 2 & 3.

Appeal from judgment of District Court, Haifa, dated 29.5.42, in Civil Case No. 130/41.

JUDGMENT

This is an appeal regarding the costs of an action filed in the District Court, Haifa.

The proceedings were started by the Anglo-Palestine Bank taking out a summons by way of interpleader concerning an alleged dispute in regard to securities and moneys that had been deposited with them. The Respondents 1 and 2 were represented by Dr. Gross, and Respondents 3 and 4, who are the present Appellants, were represented by Dr. Werner.

The Court of trial heard the application, and after a preliminary objection the Bank took no further part in the proceedings. In the claims filed by the various Respondents there was a long claim filed on behalf of the fourth Respondent Dr. Schreuer, and there was a long notice filed by the first Respondent, that is Dr. Gross's clients in which they asked that the application should be dismissed, and the Applicant — that is the Bank — should pay the first Respondent the costs. The second Respondent also filed a long notice asking that the application be dismissed and that the Applicants, that is the Bank, should pay the costs. The third Respondent, that is Dr. Werner's client, filed a long notice and asked that the Respondents 1 and 2 jointly and severally should pay the costs to the present Appellants. There was a further statement filed by Dr. Werner, similarly asking that the Respondents 1 and 2 jointly and severally should pay the costs. The application was dismissed after a lengthy hearing.

Apparently the Court considered the various arguments as to the disputes between the four Respondents, and they gave judgment dismissing the application, ordering, in effect, that the Bank should pay its own costs on the application, because presumably they were unsuccessful Ap-

plicants. Apparently they had failed, but there was some justification for going to the Court, although eventually the application was dismissed. Then the Court ordered the 3rd and 4th Respondents, that is Dr. Werner's clients, to pay the costs of the 1st and 2nd Respondents.

As regards the law on the matter, without any specified rules dealing with costs applicable to interpleader applications under Rule 278, costs are in the discretion of the Court. The Court of trial appears to have exercised this discretion in that respect, and it is very difficult on appeal to induce a Court of Appeal to say that the Court below has exercised this discretion improperly. It is almost as difficult as getting the Court of Appeal to reverse the Court below on points of fact, and we can by no means say that is has exercised this discretion improperly, and it is on this ground alone we order that this appeal must be dismissed with costs to be on the lower scale to include LP. 10 advocates' attendance fees to each advocate representing each set of the Respondents.

The appeal is dismissed.

Delivered this 20th day of July, 1942.

CIVIL APPEAL No. 73/42.

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

Before : Gordon Smith C.J. and Copland J.

Joseph Weinberg — Appellant.

v.

1. Zerubabel Bank, Cooperative Society, Ltd.
2. Jacob Lider — Respondents.

Appellant failing to file non-enemy declaration — Mandatory character of provisions of Reg 2 of Defence (Courts Applications) Regul. 1940.

Failure to file non-enemy declaration prescribed by Reg. 2 of Defence (Courts Applications) Regulations, 1940—fatal to appeal.

Kehaty (by delegation) for Appellant.

Krongold for Respondent No. 1.

Appeal from judgment of District Court, Jerusalem, dated 16.3.42, in Civil Appeal No. 59/41, on appeal from judgment of Magistrate's Court, Jerusalem, dated 10.4.41 in Civil Case No. 344/41.

JUDGMENT

We are of the opinion that as the provisions of Regulation 2 of the Defence (Courts Applications) Regulations, 1940, which are specific and mandatory, have not been complied with, the appeal must therefore be dismissed, with costs on the lower scale to include LP. 10, advocate's fees.

Delivered this 9th day of July, 1942.

CIVIL APPEAL No. 33/42.

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

Before:— Copland, J. and Edwards, J.

Emile Bey Boghous and 2 o.
all executors of the will of the late Iskander Saykali, on behalf of the estate of Iskander Saykali.

Jamil Ibn Nakhleh Jamal and 2 o.
all heirs of the estate of Iskander Saykali, for themselves and on behalf of the late Iskander Saykali. Appellants.

v.

The Palestine Land Development Co. Ltd. Respondents

Action before Turkish Court re ownership & possession of land — Land under dispute sold by Dfdt to 3rd person as nominee of a Co. — Turkish Court adjudging land in favour of Pltf — Delivery of land to J/C some 12 years later through Palest. XO — Order of XO to L Reg. to register land in J/C's name objected to by Co. in whose name land registered — Action by J/C claiming land from Co. struck out — Civil case in DC against Co. for value of land in question — Proper party to claim for value of land misappropriated & sold to 3rd person — Effect of admission by party's advocate — Incompatibility of taking delivery of land through XO & subsequent claim for its value — Action barred by limitation — Meaning of weight of evidence.

1. If A bought land from B which latter misappropriated from C, A cannot be said to have misappropriated it and therefore on same footing as B.

2. Party cannot say his advocate's admission was not a true one and should be disregarded.

3. Where XO delivers land to J/C, up to latter to make delivery and possession effective; if he fails to do so, he cannot subsequently sue for value of land.

4. Weight of evidence — not superior number of witnesses; Court may believe two witnesses for one party and disbelieve scores of witnesses of other.

Edit. Note:—As to 2 see CA 237/41 11 CtLR 125; CA 174/37 2 CtLR 159. As to 4 see CA 80/42 12 CtLR 76; CA 143/41 11 CtLR 210 and Edit. Note thereto.

Cattan and *Abdul Hadi* for Appellants.

Eliash and *Ben Shemesh* for Respondents.

Appeal from judgment of District Court, Jaffa, dated 8.1.42, in Civil Case No. 236/35.

JUDGMENT

This is an appeal from a judgment of the District Court of Jaffa, dismissing the claim by the present appellants for the value of certain land which it was alleged the respondents had wrongfully appropriated.

The case is a difficult one and its main difficulty will be appreciated when it is stated that the dispute, of which this present appeal is the last stage, for the moment at any rate, began in the year 1909. The dispute concerns a piece of land in Tel-Aviv on the seashore, upon part of which the present San Remo Hotel is built. In 1909 this land was composed of sandhills with a few meagre vineyards in various places on it. Now it is, one might say, in the very heart of Tel-Aviv and is completely built over with urban property and is extremely valuable property.

Now, I propose to deal shortly with what Mr. Cattan has called the 'sequence of events' and the first event occurred actually in the year 1885, when the land was bought by Fareedy Tannus. In 1909 she sold this land to her son Mussa Tannus. In 1909 an action was filed by Iskander Saykali who was the original plaintiff in this case, but who has died during these proceedings, and they have been continued by his heirs the present appellants. This action was filed by Saykali against one Amin Nassif alleging encroachment upon his (Saikaly's) land. This action was before the local Turkish Court. In 1910 Nassif sold the land to Mr. Aintebi who, it is not disputed, was a nominee of the Palestine Land Development Company, the present respondents. In 1911, that is to say, after more than two years of proceedings, the Turkish Court delivered judgment, declaring Saikaly's ownership to the land and ordering Nassif to restore it. In 1912 Nassif's opposition was dismissed. In 1922 judgment was given by the Land Court in Jaffa declaring that Aintebi was a nominee for the respondents. On November 11th, 1922, this Court dismissed Nassif's appeal against the Turkish judgment and in 1923 the registration of the land of Ainteby was ordered to be made into the name of the respondents by way of correction. In 1923 there was a second judgment of this Court dismissing Nassif's appeal against the Turkish judgment. In 1923 December 6th, the properties which were then in three plots were combined and correction of area and boundaries was made by the respondents. In 1923 execution proceedings were commenced by Saykali to execute the Turkish judgment and in 1925 the Execution Officer went on the land, and, as the appellants say, attempted to execute the Turkish judgment, and, as the respondents say, actually executed it. On 31st August, 1925, an order was made by the Chief Execution Officer Jaffa to the Land Registry to register this land in the name of Saykali. On 6th September 1925, the respondents objected to this execution on the ground that the same land was registered in their names. On February 23rd, 1926, an action was entered by Saykali in the Land Court of Jaffa against the present respondents, claiming the land. This case was struck out in 1929. On 12th May, 1935, this present action was entered as a Civil Case in the Jaffa District Court by Saykali against the present respondents. The case was tried at very considerable length and with exemplary care and

patience by the learned Judges of the District Court and they found against the appellants on five grounds.

The first point was that, assuming the land to be located at the place indicated by the appellants, the Court found that the misappropriation was made by Nassif in 1909 prior to the purchase of the land by Aintebi. As the respondents had sold the land prior to the filing of this action in 1935, they were no longer in possession and they were not the persons who misappropriated the property. This is ground A of the judgment.

Ground B was that according to the record of proceedings in the Turkish Court which have been filed in this case as Exhibit 27 Saykali's advocate had told the Court that he was not claiming the land which Aintebi had bought, and therefore that, as the respondents had bought the land from Aintebi, they (appellants) could not now claim the land as to do so would be a complete volte face on their part.

Ground C was in connection with the execution proceedings. The Court held that according to the evidence of the Execution Officer he had delivered this land to Saykali on 22nd June,, 1925; that Saykali therefore ought to have taken such steps as were open to him to make his possession effective: that he cannot therefore take both delivery of the land and sue for its value.

Ground D was on the question of prescription; that as the land had been sold to Aintebi in 1910 and Saykali had not brought the land action against the respondents till 1926, the action was prescribed the property being miri, and prescription in respect of miri land being 10 years. They held that the action for compensation a fortiori, having been brought in 1935, was equally barred by limitation.

Ground E was that on the evidence the Court was not satisfied that the land had been correctly located by the appellants.

Now, I propose to deal as shortly as possible with these various grounds. If one dealt in detail with all of them this judgment would run to an inordinate length and I am afraid would be none the clearer.

Take ground A first — misappropriation by Nassif in 1909 prior to the purchase of the land by Aintebi. The appellants argue that Aintebi brought a lis pondens and was therefore on the same footing as Nassif who, Saykali alleged, had misappropriated the land. I do not think that that is so. From the Mejelle Articles 1635 and 910 I am satisfied that the misappropriator was Nassif, and Nassif alone. Aintebi did not misappropriate but he purchased from Nassif and the Palestine Land Development Company cannot be held either to have misappropriated. I think that the District Court rightly decided that particular point.

On ground B it is argued that what Saykali's advocate said cannot affect the actual situation and that the admissions make by his advocate are rebutted by documents. Now, it is perfectly clear from the Turkish judgment (Ex. M7) that all the way through the proceedings the appel-

lants distinctly stated that they were not claiming the land at Krakerah bought by Aintebi. That statement, as I have said, was repeated several times and I do not think that it is open now for the appellants to say that that admission, which was made by an advocate representing them, was not a true admission and that the Court should go behind it and disregard it. Admissions made by an advocate in a case must obviously bind the parties otherwise in every case we would have parties coming forward and saying "Oh yes, my advocate said so and so but that was not true; he was a stupid advocate."Well, quite possibly the advocate may have been stupid. The remedy, of course, is not to employ advocates who are stupid.

With regard to the third point — delivery of the land. That depends largely on the evidence of I. Turjman who was the then Execution Officer. If we turn to pages 18, 19 and 20 of the typed record of proceedings, we find it definitely stated by this witness that he delivered the whole land with the houses as shown in the map and in accordance with the judgment of Turkish Court, to the judgment creditor Iskander Saykali. He goes on to say:—

> "I did deliver to the judgment-creditor the 10496 odd pics and he was satisfied. The judgment was for restitution of possession and I restored the possession".

It is true that he says in re-examination that he found three houses on the land but he did not turn the occupiers out — he merely notified them that the land belonged to the judgment-creditor and, in fact, the delivery was not fully effective. But to the Court later on towards the end of this evidence he said:—

> "The order which I was executing was for the delivery of the piece of land and not the eviction of occupiers".

And the evidence of Mahmoud Mheisin at page 36 is also very clear. He says: —

> "When I went with the Execution Officer and Mr. Chasin to the land I found buildings on part of Saykali's land. With the exception of two or three rooms the other buildings were off Saykali's land. I am sure that when I went with the Execution Officer I only found two or three rooms on Saykali's land".

He says: —

> "When I say a room I mean a room and not a house. Those rooms which were on Saykali's land formed part of the building the rest of which was not on Saykali's land".

From that it appears that delivery of the land was effected to Saykali and it was up to him, therefore, to make that delivery and possession effective. I think therefore, that the learned Judges of the District Court were right in finding as they did that it was Saykali who should have taken the necessary steps to making the possession effective — that the land was delivered to him and he cannot now sue for its value.

With regard to point D — the question of prescription. The original

action in 1909 was brought against Nassif and no action was ever brought against Aintebi who purchased the land from Nassif. And not only is that so but during the proceedings Saykali's advocate insisted that the land which he was claiming was not the land which Nassif sold to Aintebi. This action for the value of the land was not brought until 1935,and I am of opinion that this action was clearly barred by limitation. Even if one takes into account the 1926 proceedings which were abandoned, it would still be barred by limitation, since no action was brought against Aintebi or the present respondents until 1935 and misappropriation was by Nassif in 1910.

The last point is E — the location of the land. Now, it is quite true as was perhaps to be expected, that when this case was heard in 1941 there was considerable difference of opinion as to what had happened in 1909 and 1910 and even 1922 or 1923. It has been argued that the judgment of the District Court on this point was contrary to the weight of evidence. Now, sometimes I think that it is argued that a judgment is contrary to the weight of evidence because a Court believes say three or four witnesses for one party and disbelieves ten witnesses of the other. The weight of evidence does not mean a superior number of witnesses. It is for the Court of trial to assess the value to be attached to the evidence of witnesses and if they find that three or four witnesses called by one party are to be believed in preference to the statements made by 10, 20 or 50 witnesses called by the other party, it cannot possibly be stated that judgment is contrary to the weight of evidence. What happened, of course, in 1910 must now be very largely a matter of conjecture. The District Court, I think would have been better advised if they had not referred only to two witnesses, that is to say, Mr. Noble and Mr. Lipshitz, who were called by the respective sides as experts; but I think it is quite clear from that judgment that they must have considered the evidence as a whole. As the District Court remarked none of the difficulties and differences would have arisen if either the Kcushan or the judgment had been accompanied by a plan. It is impossible nowadays in 1942, to say what the actual boundaries of land were, or the location of it in 1909 or 1910. Though doubtless a great deal can be said for both sides, on the materials before me and on the record of the evidence, I am not prepared to say that the District Court came to a wrong conclusion in this matter with regard to the location of the land. Some reference has been made to Ex. M35 which it is said is an admission by the appellants that this Turkish judgment referred to this land. On reading it I am not prepared to give it this interpretation. I think that it is a protest by the respondents against the Land Registry assuming that the land dealt with in the Turkish judgment was the land owned by Aintebi. Neither are Exhibits 23 to 31 of any help to the appellants. On the evidence, as I have said, I think that the judgment of the lower Court can be supported. I would only make

one further remark that perhaps it was an unsuitable use of the phrase 'reasonable doubt' by the District Court because that is not really the point here, reasonable doubt' applies in a Criminal case not in a Civil case, but there was evidence to support the findings of the District Court; and I think, therefore, that this appeal should be dismissed.

The respondents are entitled to costs on the lower scale to include the sum of LP. 25 advocate's attendance fee on the hearing of this appeal.

Delivered this 19th day of June, 1942.

HIGH COURT No. 80/42.

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

Before:— Copland, J., Khayat, J. and Abdul Hadi, J.

Nazmi Bey Ben Khallil Rami Badrakhan Petitioner.

v.

1. Chief Execution Officer, Jaffa.
2. Yumna Michael Nassar. Respondents.

Jurisdiction and law applicable in matter of custody of children of marriage between Moslem and Christian solemnised according to Moslem Law.

1. To custody of children of marriage between Moslem husband and Christian wife solemnised according to Moslem Law Sharia Law applies.

2. *a*) Sharia Courts have no jurisdiction to deal with matters other than those affecting Moslems.

b) Where one of parties a Moslem and one a Christian, Sharia Court has no jurisdiction to deal with matter in dispute; judgment issued in such case for one or other party — incompetent and uninforceable.

c) Tribunal competent to decide difference where one of parties a Moslem and other a Christian — Civil Court.

Edit. Note:— As to 2 see CA 98/27 1 PLR 273 followed.

Dajani for Petitioner. *Siksik* for Respondent No. 2.

Return to a rule nisi issued on 24.7.42, directed to 1st respondent calling upon him to show cause why he should not execute judgment of Sharia Court, Jaffa, dated 15.12.41, and confirmed by Sharia Court of Appeal on 13.3.42, whereby second respondent's children Siham and Yusef were ordered to be taken away from her custody and handed over to their father, present petitioner.

ORDER

This return to an order nisi is in connection with an application by a husband to obtain the custody of the two children of his marriage. The husband is a Moslem, the wife is a Christian, and the marriage was solemnised according to the Moslem Law. I am advised by my Mos-

lem colleague that in such a case the Sharia Law is the law applicable to the children of the marriage and in fact it is not disputed by the respondent that the correct law to apply to this question of custody is the Sharia Law, but what the respondent disputes is the competence of the Sharia Court to deal with a case in which a non Moslem is involved.

Now, in Sakiya v. Estate of Joseph Moyal, Civil Appeal 98/27, reported in 1 P. L. R. p. 273, which was actually a case for civil bankruptcy, it was held that such a question was within the jurisdiction of the Sharia Courts when all parties are Moslems, but that it was within that of the Civil Courts when one was a non Moslem, and the Order-in-Council Art. 52 as amended gives the Moslem Religious Courts exclusive jurisdiction in matters of personal status of Moslems only. It is clear that the Sharia Courts have no jurisdiction to deal with matters other than those affecting Moslems. Where, in a case such as this, one of the parties is a Moslem and one is a Christian, the Sharia Court has no jurisdiction to deal with the matter and the judgment issued by it is therefore incompetent. This, however, brings us to a further difficulty and that is the order of the learned President on appeal from his Deputy. In that order he stayed execution for one month to give the applicant, that is the present respondent, time to go to the Chief Justice and ask for the appointment of a Special Tribunal. In our opinion whilst the order of stay was correct, that part of the order which gave leave to the respondent to go to a Special Tribunal was incorrect. In a case such as this where one of the parties to the marriage is a Moslem and the other is a Christian, the Tribunal to decide their differences is a Civil Court. The order of the Chief Execution Officer, therefore, must be varied accordingly and subject to that variation the rule will be discharged.

The second Respondent is entitled to disbursements together with the sum of LP. 5 advocate's attendance fee.

Given this 28th day of July, 1942.

CIVIL APPEAL No. 244/41.

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

Before : Copland J. and Rose J.

Asher Shatzman and 4 others. — Appellants.

v.

The Palestine Jewish Colonization Association, Haifa. — Respondents.

Appeal by way of case stated from decision of Special Commission under Cultivators (Protection) Ord. — Land Court on appeal failing to deal with main point referred to it, viz. whether some rela-

tionship of tenancy not a condition precedent to protection by Cultivators (Protection) Ord.

If Land Court failed to deal with decisive point expressly raised in appeal under sec. 19(2) of Cultivators (Protection) Ord. and covered by question of law referred for decision, case will be remitted to it.

Weinshall for Appellants. *Solomon* for Respondents.

Appeal from judgment of Land Court, Haifa, dated 13.11.41, in Civil Appeal No. 81/41, on appeal from decision of Special Commission sitting at Haifa, dated 24.7.41.

JUDGMENT

This is an appeal from a judgment of the Land Court of Haifa relating to an appeal by way of case stated under section 19(2) of the Cultivators (Protection) Ordinance. The question of law referred for decision is in the widest terms and reads as follows :—

"The question of law for the opinion of the Land Court, Haifa, is whether on the above statements of facts, we came to a correct decision in point of law".

Unfortunately the time of the Court below and also of this Court, when the case was heard before us, was taken up almost exclusively by the question, which does not now seem to be the decisive point, whether an unsuccessful claim to ownership debars the claimant from subsequently claiming to be a statutory tenant under the ordinance. It became apparent during the course of argument that the main point is really whether, having regard to the definitions of "statutory tenant" and "holding" in the ordinance, some relationship of tenancy is not a condition precedent to a person being able to claim the protection of the ordinance at all.

This point, while it was expressly raised in paragraph 13(c) of Mr. Solomon's application dated 25th July 1941 and is clearly covered by the referred question, does not appear to have been dealt with at all by the Land Court. As this matter came before the Land Court by way of case stated, I feel that it is for that Court in the first instance to come to a decision upon what seems to me, and upon consideration also to the advocates concerned, to be the principal and relevant point in this case. Therefore, although not without regret in view of the loss of time involved, I feel that the proper course is to remit the case to the Land Court to give its decision upon this and any other matter which may be relevant to the question referred. Costs will be in the cause.

Delivered this 22nd day of April, 1942.

INCOME TAX APPEAL No. 13/42.

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

Before:— Edwards, J.

X. Appellant.

v.

The Assessing Officer, Haifa. Respondent.

Assessing Officer refusing to regard assessee as resident in Palestine for purposes of sec. 15 of Income Tax Ord. — Appeal under sec. 53(1), Inc. Tax Ord. — Appellant's advocate not ready with any evidence because mistakenly thinking that facts would not be denied — Application for adjournment to produce evidence — Advocate's duty to be ready with evidence at first hearing.

1. In Income Tax Appeals Respondent need file no answer in writing to notice of appeal, which is only document required to be put before Judge.

2. Appellants in Income Tax Appeals must be ready at first hearing with evidence, both oral and documentary.

Levy for Appellant.

Levin and *Wittkovsky* for Respondent.

Appeal from assessment by Respdt dated 1.8.42, for 1942/43 in assessment No. 34—0/132.

RULING

This is an appeal under section 53, sub-section 1, Income Tax Ordinance, 1941. The main grievance of the appellant seems to be that the Assessing Officer refused to regard the appellant as being resident in Palestine for the purposes of section 15 of the Ordinance, whereas the appellant contends that he is. It is not disputed that the appellant is, at the moment, not in Palestine. The onus would appear therefore to be primarily on the appellant to prove that he is resident in Palestine for the purposes of this Ordinance. When the appeal came on for hearing before me under the Rules of Court (Income Tax Appeals), 1941, Rule 9(a) and Rule 9(b), the appellant's advocate merely made an opening speech (See Civil Procedure Rules, 1938, Rule 189(1)) and then said that he took it that the advocate for the respondent would not deny the facts which he, the appellants advocate, alleged and that, in consequence, he was not ready with any evidence, because he thought that such would be superfluous and unnecessary. The respondent's advocate thereupon informed the Court that he could not, on behalf of the Crown, admit all the facts alleged by the appellant. The appellant's advocate thereupon applied for an adjournment to enable him to produce the evidence contemplated by Rule 189, sub-Rule 1. The res-

pondent's advocate stated that he objected to an adjournment.

Now, this is the thirteenth appeal brought under section 53, Income Tax Ordinance. It is high time that advocates realised that they must be ready at the first hearing with the evidence, both oral and documentary, contemplated by Rule 189, sub-Rule 1. They cannot lightly assume that an adjournment will be granted simply because the respondent's advocate is not prepared to admit facts. It should be noted that, at the hearing of these appeals, the onus is upon the appellant (See Rule 9(a)). It should also be noted that, although Rules 187—200 of the Civil Procedure Rules, 1938 apply, yet Rule 82 of those Rules does not apply. In fact, the respondent need file no answer in writing to the notice of the appeal contemplated by Rule 4, Rules of Court (Income Tax Appeals) 1941. Indeed, that notice of appeal is the only document required to be put before me, except such documents as I myself may require the appellant to furnish under the second proviso to Rule 9(b). As there may have been some misapprehension on the part of advocates as to what is required of them, I shall, in the present case, exercise my discretion under Rule 10 and grant an adjournment to enable the appellant to produce the evidence required by Rule 189, sub-Rule 1 of the Civil Procedure Rules. It must not, however, be assumed that applications for adjournments will always be granted in the future.

The respondent's advocate has asked for the costs of to-day in any event. I order that the appellant do pay to the respondent fixed costs of to-day, LP. 5.—, in any event.

The hearing of the appeal will be adjourned to a date to be fixed by the Chief Clerk of this Court.

Delivered this 15th day of October, 1942.

CIVIL APPEAL No. 84/42.

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

Before : Copland J. and Edwards J.

Mohammad Shamir — Appellant.

v.

Izzat Fateh Jaber — Respondent.

Action on promissory notes — Allegation of alteration in figures of notes — Onus of proof — Expert evidence adduced by both sides contradicting each other — Definite finding by Court that Defendant failed to discharge onus of proving the alterations.

1. Where no alteration apparent on face of document, for party alleging alteration to prove it.

2 *a*) Expert — only in position of adviser to Court, but Court not entitled to disregard experts' evidence entirely, where nothing

to contradict it, without giving reasons for so doing.

b) Court faced with contradictory evidence of experts for each side has to weigh it and determine what authority should be attached to this or that evidence.

Cattan for Appellant

Hanna for Respondent

Appeal from judgment of District Court, Jaffa dated 1.5.42, in Civil Case No. 100/41.

JUDGMENT.

This is an appeal from a judgment of Judge Bodilly sitting alone in the District Court of Jaffa. The action before him was on two promissory notes, one alleged to be for LP. 325 and the other for LP. 75. The defendant alleged that the LP. 325 note, when he signed it, was for LP. 25 only, and that the LP. 75 note was for LP. 70 only. The learned Judge heared the evidence of two other gentlemen who were put forward as experts, one by each side. The learned Judge found in favour of the plaintiff in the case saying that he was not satisfied that there had been the alterations alleged and he found that the defendant, that is the present appellant, had failed to discharge the onus upon him.

Two points have been taken by Mr. Cattan on this appeal. The first one is that the onus of proof was wrongly laid by the learned Judge on the defendant, and secondly that the evidence of Mr. Shukri Fiani, one of the so called experts, was inadmissible.

With regard to the first point that the onus of proof was wrongly laid and should have been laid upon the plaintiff in the Court below, the argument is that the notes had been altered and that it was, therefore, for the plaintiff to account for these alterations, that is to say, for him to prove that the alterations had been properly made. An expert's business is to give evidence as to what the writing, or whatever the subject may be on what he is called, shows. But an expert is really only in the position of an adviser to the Court and the judgment is the judgment of the Court and not the judgment of the expert; that is not to say that a Court is entitled to disregard the evidence of experts entirely where there is nothing to contradict them without giving reasons for so doing. Now, if one looks at these notes, as one must presume the learned Judge himself did, quite frankly we cannot say that there are alterations apparent on the face of them. That being so we think that the onus of proof was rightly laid on the defendant to prove that the notes had in fact been altered. Two experts, as I have called, were called, one for each party. Neither of them, I suppose, would be really experts in the strict sense of the word as it is used in England, but we cannot altogether disregard the evidence of Shukri Fiani. It is merely for the Court to determine what weight it should attach to this evidence just in the same way as the Court should determine what aut-

hority should be attached to the evidence of Abdul Khader Shehadeh. The learned Judge said that it was a difficult case and that it was difficult to decide whether the promissory notes had been altered or not but he makes a definite finding of fact that he is not satisfied that there have been the alterations alleged which we have detailed at the beginning of this judgment and he found that the defendant, that is the appellant, had failed to discharge the onus of proving the alterations, which onus in our opinion, was properly laid upon him.

In these circumstances we cannot say that the learned Judge went wrong. It is impossible to say that the judgment was against the weight of the evidence. The evidence was weighed up, such as it was on both sides, and the learned Judge found for the present respondent. We see no reason to interfere with those findings and the appeal must, therefore, be dismissed with costs on the lower scale to include the sum of LP. 15 advocates attendance fee on the hearing of this appeal.

Delivered this 8th day of July, 1942.

CIVIL APPEAL No. 21/42.

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

Before: Gordon Smith, C.J. Edwards, J. and Frumkin, J.

Shimon David and a. — Appellants.

v.

Dr. Siegfried Moses and a. — Respondents.

Claim by advocate for balance of remuneration — Dispute between parties as to whether agreement was for a specified sum of $ (or LP.) or such sum plus other debits in Geman marks as part of remuneration — Letters written by & on behalf of Pltf stating that agreement was for specified sum of $ (or LP.) as inclusive fee for whole work — One of Pltfs giving evidence to effect that the documents are no such admission — Court accepting explanation of admission.

If, while wording of written admission negatives claim, claimant in his evidence explains it not to be an admission and Court accepts his evidence, admission — explained and unavailing.

Levanon for Appellants *Smoira* for Respondents.

Appeal from judgment of DC, Jerusalem in its appellate capacity in Civil Appeal No. 18/41, dated 28.11.41, whereby appeal of appellants against judgment of Magistrate's Court, Jerusalem in Civil Case No. 4279/40, dated 31.1.41 was dismissed with costs and advocate's fees.

JUDGMENT.

This case, which occupied the Magistrate's Court days and days on

end, was the subject of a long and exhaustive judgment of the Magistrate. It then went to appeal to the District Court, and in a brief judgment, the learned R/President District Court, upheld the judgment of the Magistrate, which has now come to appeal before us. Actually the points in the appeal lie within a very narrow compass. It is a question as to what was the original agreement made between the plaintiffs and defendants. It is a question as to whether the original agreement was for $ 500, in other words, LP. 100, plus (German) marks in addition. There has been evidence by both the plaintiffs, that is Dr. Moses and Dr. Gotlieb, (the latter having gone to Chechoslovakia to fix up the terms of the agreement) to the effect that the agreement was for a specific sum of $ 500 and that there would be other debits made in marks. The defendants allege that subsequently, in correspondence, there had been admissions that the LP. 100, i.e. $ 500 fee was inclusive and that the amounts debited by the plaintiffs in their accounts should be deducted, in other words, that there should be an account taken.

The evidence of Dr. Gotlieb is to the effect that the documents are no such admission, as he explains that the only matter then in dispute really was the LP. 100.— that the marks had already been debited and there had been no claim made in respect of those marks.

That explains the admission, and that explanation, together with the explanation of other points in the evidence, was accepted by the Magistrate. He was the judge of fact and he has very clearly indicated whose evidence he places the greater reliance on, i. e. the evidence of the plaintiffs.

That really concludes the matter. The Magistrate delivered a careful judgment and we see no reason whatsoever to disturb the finding of the Magistrate.

The appeal is therefore dismissed with costs.

Delivered this 24th day of March, 1942.

CRIMINAL APPEAL No. 118/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before:— Gordon Smith, C.J. and Khayat, J.

Muhammad Salameh Abu Zeid — Appellant.

v.

The Attorney-General — Respondent.

Charge of rape with married daughter "on diverse dates" during specified period — Indefinite and embarrassing form of charge as regards date of alleged offence — Failure to call examining doctor as witness — Court of Appeal finding facts and circumstances of alleged offence arousing suspicions as to its genuineness.

1. Charge should not be indefinite and embarrassing to accused as regards date of alleged offence.

2. In a case of rape doctor who examined person allegedly raped should always be called as witness.

3. Where Court of Appeal, in addition to certain defects of procedure, finds facts and circumstances of alleged offence such that inevitably arouse suspicions as to its genuineness, it will quash conviction.

Crown Counsel (*Rigby*) for Respondent.

Appeal from judgment of DC, Jaffa, dated 6.7.42, in Crim. Case No. 176/42, whereby Appellant was convicted of rape, contrary to Sec. 152(1)(a) of Crim. Code Ord., 1936, and sentenced to 10 years' imprisonment.

JUDGMENT.

At the conclusion of the hearing of this appeal, which we allowed, the accused was discharged, and we intimated that we would give our reasons later. We now proceed to do so.

The accused was charged with rape of his daughter "on diverse dates during the month of March, 1942", in his house. Rape is one of those offences a charge of which it is very easy to make and which, although entirely innocent, an accused may find it very difficult to refute. It is particularly necessary therefore to examine and scrutinize the facts and circumstances with the greatest care.

In this case the accused was undefended and therefore the exercise of such scrutiny and care was all the more necessary. Had he been represented by Counsel one can well imagine that a preliminary objection might have been successful in regard to the charge which is, as regards the date of the alleged offences, indefinite and embarrassing to the accused for lack of particularity in this respect. How is it possible for an accused to meet a charge of this nature when the offence alleged may be imputed as having occured on any one day during a whole month? A particular date, if it was known, should have been selected and then the allegation made that it had occurred also on diverse other previous occasions during such month. If such specific date could not have been ascertained, then the charge should have been dropped. Actually the medical report of Dr. Feinstein attached to the record states that at the request of the Police he examined the complainant on the 30th March, 1942, and that she alleged intercourse by force on the previous night, so that a specific date could have been alleged in the information.

In a case of this nature the Doctor making such examination should always be called as a witness, and in this instance his evidence was of the utmost value to the defence. Apparently, and without the benefit of having this evidence before us but from the reports of the examinations made by him of the complainant, her husband and the accused, one can only conclude that the complainant was suffering from gonorrhoea

but that there were no traces of this disease either in her husband or in the accused. There were other factors disclosed by the medical examination of the complainant which, if subjected to further questions and enquiry, would probably have resulted greatly in favour of the accused.

Apart from all this there were only three witnesses called for the prosecution, namely, the complainant, her mother (i. e. the wife of the accused) and the complainant's husband. Not even the Police Inspector, to whom a complaint must have been made, was a witness, and evidence of such complaint and the details would have been admissible. Further, as a result of cross-examination of the mother by the Court, answers, extremely damaging to the accused, were elicited and which answers were of very doubtful admissibility.

Both before the Court of trial and before us, the accused intimated that the charges brought against him were fabricated and were the result of a conspiracy by the two women to get rid of him, and he alleged before us that both of them were "loose" women. There appeared to be some justification for his suspicions, which this Court certainly shared with him. In fact, the whole facts and circumstances of the alleged rape, or rapes, as alleged by the two women, were such that inevitably aroused one's suspicions as to the genuineness of them.

For all these reasons it was abundantly clear that the conviction could not stand.

Delivered this 30th day of July, 1942.

CIVIL APPEAL No. 76/42.

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

Before:— Copland, J., Khayat, J. and Abdul Hadi, J.

Abdel Qader Ali Badah — Appellant.

v.

Ali el Jaghlit and a. — Respondents.

Property ordered by main contractor of building delivered on premises but not to a particular person — Loss of part of property delivered — Question of liability.

If property ordered by A is delivered on his premises or on premises for finishing of which he was main contractor, even though not delivered to any particular person, it becomes property of A; if subsequently lost, loss lies where it falls, i.e. A is the loser.

Z. *Eddin* for Appellant. *Elia* for Respondents.

Appeal from judgment of DC, Jaffa, sitting as a Court of Appeal, dated 3.3.42, in Civil Appeal No. 12/42.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, which reversed a judgment from the Magistrate's Court and remitted the case to the Magistrate to act in accordance with certain principles laid down by the District Court.

The present respondents, who were the plaintiffs in the Magistrate's Court, sued the present appellant for a sum of LP. 115.230 mils being the balance of price of certain woodwork constructed by them for the appellant. Apparently the work did not proceed very smoothly because the riots, which disturbed the country some few years ago, interfered with the process of construction, and the work stopped. What happened was that the woodwork and the various other articles required were placed upon the premises but part thereof at any rate, was stolen from the premises involved. The appellant was the main contractor for finishing off this building and the respondents were his sub-contractors and the real dispute centres round this very simple point who is liable for the stolen property. As I have said, the major part, if not all, the woodwork, and the accompanying articles were delivered on the premises. It is said that they were not delivered to any particular person. That may well be true but it makes no difference as to the legal liability. They were delivered on the premises and a very large part of them were actually fixed in their proper position in the premises. If the property was delivered on the premises the property became the property of the appellant on whose account this work had been done. If it was lost after delivery then, as I said during the argument, the loss lies where it falls, in other words, it is the appellant who must be the loser. For these reasons we think that the District Court came to a correct conclusion.

We have been asked to give final judgment for the balance but this we do not wish to do for this reason. The contract as perhaps one might expect in this country, was an oral one and not written. On that account, of course, there are naturally always various versions put forward by the contending parties. It seems to have been accepted by the Court below that some of the iron and some of the paint work had not been done which had been contracted to be done in this oral contract. That being so we are unable, unfortunately, much as we should have liked to have done, to give a judgment which finally determines the rights of the parties in this case. The appeal must be dismissed and the case will go back as ordered by the District Court to the Magistrate to deal with it in the light of the District Court judgment and in the light of the further remarks made by this Court on the appeal. The respondent is entitled to his costs on the lower scale together with the sum of LP. 10 advocate's attendance fee.

Delivered this 24th day of June, 1942.

CIVIL APPEAL No. 7/42.

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

Before:— Gordon Smith C.J. and Rose J.

1. Kamel Jeday of Jaffa (both personally and as attorney for and on behalf of Mrs. Lily Jeday of Jaffa and Cairo.)
2. Henry Roch of Jaffa (both personally and as attorney for and on behalf of Rose Jeday widow of Dimitri Jeday, and of Nina Fravia widow of Dr. Aziz Jeday, and of Nuzha, Sultana, Hiyam, Widad and Fayza Jeday, daughters of the late Dimitri Jeday, and of Aouni Jeday son of the late Dimitri Jeday).
3. Arthur Roch of Jaffa. Appellants.

v.

E. L. Kravelskis. Respondent.

Agreement for sale of land as to which land appeal pending — Condition in agreement that land should be transferred free from any encumbrances or claims — Purchaser accepting renunciations from parties interested in the land but subsequently changing his mind — Question of waiver or otherwise of condition — Repudiation of agreement — Recovery of sum paid as part of purchase price — Award of damages on uncontradicted evidence of claimant.

1. Where agreement contains condition that land should be transferred free from all encumbrances or claims, acceptance by purchaser of renunciations from interested parties — not a waiver of condition; purchaser may change his mind as long as land not actually transferred to him.

2. Where vendor's conduct shows that he regarded agreement as at end, he cannot claim that purchaser was not entitled to repudiation.

3. If both parties regarded agreement as terminated, purchaser entitled to recover sum paid by him as part of purchase price.

4. If claimant giving evidence not cross-examined by other party nor challenged on any of figures to which he testified — too late for that party to allege in Court of Appeal that claim excessive.

Malak for Appellants *Seligman* for Respondent

Appeal from judgment of District Court, Jaffa in Civil Case No. 81/37, dated 15.12.41.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa. The facts are sufficiently set out in the judgment of the learned President and need not be referred to here in any detail.

The matter relates to an agreement for the sale of certain land to the respondent by the first and second appellants. By clauses 4 and 5 of

the agreement the vendors undertook to transfer the land in question to the respondent in the Land Settlement at Jaffa not later than the 7th of March, 1937, and free from all encumbrances or claims.

On the 4th and 6th March, 1937, it having become apparent that the appellants would not be in a position to comply with clause 5 of the agreement by the material date, the respondent was asked, and agreed, to accept renunciations from the interested parties, although he knew that the case was subject to appeal. In order that the matter should be completed it was, of course, necessary for the Land Settlement Officer to approve the renunciations, but on the 11th March Mr. Lees the officer in question, apparently advised the respondent against accepting these renunciations. The respondent thereupon reconsidered his acceptance of the 4th and 6th of March, and on the 12th of March wrote a letter to the appellants informing them of his change of attitude. Further, on the 17th of March, his advocate addressed a registered letter to the appellants stating that the respondent repudiated the agreement as the appellants were in breach. No answer being received, a second registered letter to the same effect was written to the appellants on the 8th of April. No reply was received to this second letter.

On the 24th of April, the appeal was decided in favour of the appellants. No further material correspondence seems to have taken place between the parties, however, and on the 17th of May the appellants suffered the land to be registered in their names, without recording any protest.

The appellants contend that the respondent, by his acceptance of the renunciations on the 4th and 6th of March, waived the condition in the contract that the land should be transferred free of encumbrances or claims. In my opinion the learned President was right in coming to the view that no waiver had taken place and that the respondent was at liberty to change his mind, as he did, on the 11th March. Had the land actually been transferred to him as a result of his acceptance of the renunciations and consequent conversation with the Land Settlement Officer on that date, the matter might well have been different and, in the event of his subsequently endeavouring to repudiate the contract, the appellants then might successfully have contended that by accepting transfer with knowledge of the pending appeal he had waived clause 5 of the agreement.

It is further urged by the appellants, in the alternative, that even as late as the 24th April when the appeal was decided in their favour, the respondent should then have accepted the transfer of the land, the fact that the appellants were late in transferring being a matter at the most for damages and not for repudiation of the agreement. It is true that in the agreement itself there is no express provision that time should be of the essence of the contract. In considering, however, the

intention of the parties, it is relevant to have regard to their conduct after the repudiation of the contract by the respondent. Not only did the appellants refrain from answering any of the three letters of the 12th and 17th of March and the 8th of April, but after the termination of the appeal on the 24th April they made no demand upon the respondent to accept transfer. Finally on the 17th of May, as I have already mentioned, they allowed the land to be transferred into their own names. In these circumstances I am of opinion that the learned President was correct in drawing the inference that the parties themselves at that time regarded the agreement as having come to an end owing to the appellants' failure to comply with clauses 4 and 5 of the agreement, and that that correctly represented the legal position.

It follows, therefore, that the respondent is entitled to recover the sum of LP. 5,000 which he paid to the appellants as part of the purchase price.

There is also a cross appeal. Clause 6 of the agreement provides that in the event of either party being in default the sum of LP. 7,000 shall be paid to the other party as agreed and liquidated damages, The learned President was, in my opinion, right in coming to the conclusion that this sum of LP. 7,000 was a penalty and did not represent a genuine estimate on the part of the contracting parties of the damages which were likely to ensue from a breach of contract. The Trial Court, therefore, the appellants being in default, was bound to consider what, if any, damages the respondent had genuinely suffered. He gave evidence to the effect that he had incurred expenditure to the extent of LP. 545 in respect of lawyers' fees, brokerage commission, survey fees and the erection of boundary stones. It may be that this figure is on the high side, but, as the learned President pointed out, there was no cross-examination of the respondent on these matters, nor was he challenged on any one of the figures to which he testified. That being so, I think that the appellants are now too late in alleging that the sum is excessive, and I am of opinion that the respondent is entitled to judgment for the amount in question.

In the result, therefore the appeal is dismissed and the cross appeal is allowed with costs on the lower scale, to include in respect of both matters an inclusive sum of LP. 15.— for advocate's attendance fee.

Delivered this 23rd day of April, 1942.

HIGH COURT No. 68/42.

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

Before:— Edwards, J. Frumkin, J. and Khayat, J.

Reuben Scheinfeld — Petitioner.

v.

Assistant Inspector General, C.I.D., Jerusalem. — Respondent

Refusal to grant exit permit for Turkey — Calling upon Public Officer to do what he is under no statutory obligation to do — What necessary when making an order under Reg. 27 of Defence Regulations, 1939.

1. Where nothing in law requiring Public Officer to do what petitioner asked him to do, High Court will not interfere if Officer refused petition.

2. In making an order under Reg. 27 of Defence Regulations, 1939 High Commissioner has only to be satisfied that it is properly made under Emergency Powers (Defence) Act, 1939.

3. No reason need be given for refusing exit permit.

Goitein for Petitioner. *Crown Counsel* (*Hogan*) for Respondent.

Return to a rule nisi issued on 2.7.42, directed to respondent calling upon him to show cause why he should not grant a departure permit to petitioner.

JUDGMENT.

This is the return to an Order Nisi calling opon the Assistant Inspector General, C.I.D. Jerusalem, to show cause why he should not be ordered to grant a written permit allowing the Petitioner to depart from Palestine with a view to entering Turkey. Crown Counsel (Mr. Hogan) has shown cause and in so doing has submitted that under paragraph 3(1)(c) of the Defence (Entry and Departure of Persons) Order, 1942, published in the Palestine Gazette No. 1164, Supplement No. 2, of 22nd January, 1942, the Respondent is under no obligation to issue a permit and Crown Counsel accordingly contends that there is nothing in the Order requiring the Respondent to grant an exit permit. In support of this contention he has referred to H.C. No. 51/32, P.L.R. Vol. 1, page 733, H.C. 78/39, P.L.R. Vol. 7, page 35, and to a Privy Council Appeal, reported in Appeal Cases (1931), page 652. The Petitioner's advocate (Mr. Goitein) contends that if one looks at the original Order, i.e. the Defence (Entry and Departure of Persons) Order, 1939, one finds the words "unfettered discretion". He argues that because those words do not appear in the 1942 Order, the discretion is not now unfettered. We, however, think that this reasoning is fallacious. We agree with the contention of Crown Counsel and we also agree with Crown Counsel when he says that in making an order under Regulation

27 of the Defence Regulations, 1939, all that is necessary is for the High Commissioner to be satisfied that the order which he is making is properly made under the Emergency Powers (Defence) Act, 1939, but that it is not necessary in every case to show that everything done under these Regulations must have been done for the purpose of the due prosecution of the War. All that is necessary is for the High Commissioner to be satisfied that the Regulations which he makes are necessary for the purposes enumerated in Section 1(1) of the Act.

The substantial complaint of the petitioner seems to be that the real reason given for the refusal was that, over a year ago, the Petitioner made four small payments from motives of kindness to a small circle of friends in Turkey to be repaid by those persons in Palestine, and he alleges that the Respondent is not prepared to come to Court and give that as the true reason. Crown Counsel, however, says that no reason was given to the Petitioner for the refusal to grant him an exit permit. We must accept this. Mr. Goitein himself has admitted that he would have had no answer if the Respondent had refused to give a reason for the refusal. We agree with Crown Counsel in his submission that the Respondent was under no obligation to issue a permit.

The Rule Nisi must therefore be discharged with costs which we fix at fixed or inclusive costs of LP. 5.

Delivered this 27th day of July, 1942.

CIVIL APPEAL No. 94/42.

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

Before:— Copland, J. Frumkin, J. and Abdul Hadi, J.

Sam'an Ya'coub Abu Jarour of Betlehem, but resident in America, represented by Jamileh Jiries Halabi Appellant

v.

1. Ibrahim Abdel Nour on behalf of the Estate of the late Hanneh Ibrahim Youssef Abu Jarour.
2. Salha Yusef Saleh Abu Jarour.
3. Khalil Odet Allah Ikhleif. Respondents.

Magistrate ordering dispossession on basis of certain documents and oral evidence — DC on appeal reversing judgment of MC on finding that evidence did not prove Pltf's claim — Consequence of failure on preliminary points in CA.

1. Appellate Court can upset definite findings of trial Court based on written and / or oral evidence, if such evidence does not refer to matter in dispute or does not prove what it purported to prove.

2. Where Respondent recklessly raises preliminary points which

fail, he may be disallowed costs inspite of full success on merits of appeal.

Elia for Appellant.

Nasr for Respondents No. 2 & 3.

Appeal from judgment of DC, Jerusalem, sitting as a Court of Appeal, dated 17.11.41, in Civil Appeal No. 23/41.

JUDGMENT.

We need not trouble you Mr. Nasr.

This is an appeal from an appellate judgment of the District Court of Jerusalem in a dispossession case. As the learned President said on the appeal before him the substantial grounds of appeal before him were that the documents produced were not sufficient to prove title and that the land claimed was not identified by the witnesses and possession shown and were not referred to in the documentary exhibits.

Well, I do not think we need say more than that we agree with the judgment of the learned President. The learned President never held that Hujjehs and similar irregular documents could not in appropriate cases be used as evidence of title but what he said was that they were useless in this case because there was no proof that they referred to the land in question.

The same applies to the evidence as to the possession. He said that he was at a loss to comprehend how the learned Magistrate arrived at his very definite findings of fact on the evidence. We are also equally at a loss to comprehend.

The result is that the appeal must be dismissed. With regard to the question of costs, the respondent though knowing the consequences of failure raised two preliminary points which utterly and ignominiously failed. For that temerity he must pay in as much as he will get no costs in this case. Each side will pay their own costs.

Delivered this 21st day of July, 1942.

CIVIL APPEAL No. 69/42.

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

Before : Copland J. and Rose J.

David Moyal

Appellant.

v.

Elhanan Karwassarsky as Curator of the properties of Sheikh Tewfiq Dajani interdicted.

Respondent.

Vendor in breach of contract for sale of land — Interlocutory order of trial Court to assess damages payable by vendor on basis

of difference between contract price & market value of land — Court reversing its previous order as to basis for assessment of damages — Distinction between defaulting purchaser & defaulting vendor as to basis of assessment of damages — "Profit" damages.

1. Difference between contract price and market value of land on date of breach of contract — correct basis for assessment of damages where purchaser defaulting party, but wrong where vendor defaulting party.

2. While reversal by trial Court of interlocutory order should not become a practice, Court may, where circumstances of particular case require it, re-consider and reverse previous order.

3. No "profit" damages unless specifically pleaded and shown that non-performance by defaulting party of agreement was due to fraud or bad faith.

4. Where purchaser calls no evidence as to any out-of-pocket expenses incurred by him in preparation of contract or in reliance upon it, his damages — limited to interest on monies he advanced on account of purchase price from date of payment until recovery.

Abcarius and Rubinstein for Appellant
Eliash for Respondent

Appeal from judgment of District Court, Jaffa dated 13.4.42, in Civil Case No. 59/35.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa. This is the second occasion upon which the matter has been before this Court. On the first occasion (in Civil Appeal No. 162/40,P.L.R 1940 Volume 7, page 483) the matter was remitted to the District Court to assess the amount of damages payable as a result of the respondent's breach of the contract.

By an interlocutory order dated 7th July, 1941, the District Court held that "The damages must be assessed on the basis of the difference of value between the purchase price fixed in the contract between the parties and the value of the land on the date of the breach of the contract by the defendant." This would, of course, have been a correct basis for the assessment of damages had the defaulting party been the purchaser. Authority for this view is provided in Yacoub Nakashian v. Salim Abdo Nassar, Civil Appeal No. 217/38 *) P.L.R. 1938, page 606. When the case came on for trial, however, the District Court came to the conclusion, in my opinion rightly, that this was a wrong basis of assessment in a case where the vendor was the defaulting party.

The appellant's first point of appeal is that the District Court should not have reversed their own interlocutory order. While I am fully alive to the disadvantages attendant upon the lack of finality which would

*) 4 CtLR p. 242.

result if the reversal of such interlocutory orders became a practice, I nevertheless, consider that in the circumstances of this particular case the District Court were right in assessing the damages on what subsequent consideration persuaded them was the proper basis, even although this involved a reversal of their previous order. As they say in their judgment.

> "We feel that it would be highly absurd if, having made an order limiting the scope of our enquiry.... we held ourselves bound by that mistaken view of the matter, thereby inviting a further appeal with the certainty that the case would be sent back to this Court once again."

The first point that arises, therefore, is whether the appellant was entitled to 'profit' damages. As was pointed out by the District Court, he would only be so entitled if he could show that the non-performance of the agreement was due to fraud or bad faith, as laid down in article 110 of the Ottoman Code of Civil Procedure. In this matter not only was fraud or bad faith not specifically pleaded, but on the issue itself the trial Court came to the conclusion that, apart from the fact that it had not been pleaded, no such allegation had been established. I see no reason to dissent from their conclusion. The District Court, therefore, held that the plaintiff was only entitled to such actual financial loss as he had incurred through the breach. No evidence was called by the appellant as to any out-of-pocket expenses incurred by him in the preparation of the contract or in reliance upon it. The Court, therefore, held that his damages were limited to the interest on the monies which he had paid as part of the purchase price from the date of payment until the filing of the action, interest subsequent to the filing of the action having already been awarded under the earlier judgment of the Court, dated 28th June, 1940.

In my opinion, the District Court properly applied their minds to the relevant considerations and I see no reason to disturb their judgment.

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

Delivered this 14th day of July, 1942.

CIVIL APPEAL No. 87/42.

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

Before:— Copland, J. and Rose, J.

Mazal Behor — Appellant.

v.

1. Moshe Dankner
2. Estate of Haya Rachel Dankner, a/b Moshe Dankner

Respondents.

Defendant denying that there was consideration for note sued upon — Allegation of lack of consideration not specifically denied by Plaintiff — Trial Court holding that onus of proof shifted to Plaintiff — Scope of Rule 122 *of Civil Proc. Rules — Onus of proof where consideration for note denied.*

a. Party not bound to repeat in pleadings what law already presumes in his favour; so while maker of note as Defendant when denying consideration must do so specifically in his defence, Plaintiff need not allege in reply specifically that consideration was given.

b. Onus of proof of allegation that no consideration for note — on maker as Defendant no matter whether owner specifically denies that allegation or not.

Eliash for Appellant. *Ph. Joseph* for Respondents.

Appeal from judgment of DC, Tel-Aviv dated 28.4.42, in Civil Case No. 321/40.

JUDGMENT

This is an appeal from a judgment of Judge Hubbard, sitting in the District Court of Tel Aviv, in which the present appellant was the plaintiff. The learned Judge heard the evidence and when the parties addressed him at the end of the proceedings, Dr. Philip Joseph for the defendant, now respondent, submitted that the onus of proof that there was consideration for the note was on the plaintiff. He based himself on Rule 122, on the ground that the plaintiff, having failed to deny specifically the allegation that there was no consideration, the onus was shifted to her to prove that there was consideration. We think that in that view the learned Judge was wrong. By the Bills of Exchange Ordinance, it is presumed in favour of the owner that consideration was given. If when the maker is sued the maker says that there is no consideration he, of course, has to allege that specifically in his statement of defence, but we do not think that rule 122 compels the plaintiff, when consideration has been denied by a defendant, to allege in a reply specifically that consideration was given. The presumption that there was consideration is already in his favour. It would be useless to demand

that he should repeat something which was already presumed to be in his favour. In fact, in this case, a distinct issue was raised as to whether or not there was any consideration and we do not think that the absence of a reply by the plaintiff can, in any way, be held to have shifted the onus of proof. Holding this view it is, of course, clear that the judgment of the learned Judge cannot be supported.

The only further question that arises is whether we should give judgment for the claim made by the appellant or whether the case should be remitted to the District Court. We are in favour of the second course. The learned Judge, having formed an opinion in favour of the respondent on this question of the onus of proof, himself says distinctly that the other evidence was quite irrelevant on the view that he took. It is clear, therefore, that that evidence, such as it was, was not taken into account by the learned Judge, and we think that he should be given an opportunity of expressing his opinion on the other evidence in the case. This is particularly necessary in view, of course, of section 6 of the Evidence Ordinance by which no judgment can be given in any Civil Case on the evidence of a single witness unless that evidence is uncontradicted or unless it is corroborated by some other material evidence. And that Rule applies equally to questions where the onus of proof is in issue.

For these reasons the judgment of the Court below must be set aside, and the case remitted for the learned Judge to give a fresh judgment taking into consideration the other evidence and the facts proved before him.

Costs will be costs in the cause. We certify the sum of LP. 15 advocate's attendance fee on this appeal for the successful party.

Delivered this 30th day of June, 1942.

CIVIL APPEAL No. 72/42

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

Before:— Edwards, J.

Aron Mas'ud & 10 others. — Appellants.

v.

1. Nimir Hamad Haj Bakr Hammad & 3 others.
5. Members of the Village Settlement Committee of Miska Village
6. 'Abd el Hafiz Zuhud & 2 others
9. The Attorney-General — Respondents.

Case remitted by CA to LSO to decide question of possession by mortgagors — LSO finding that mortgagors ceased for a very long period to be in possession of mortgaged land — Position

of mortgagee where mortgagor's title elapsed — Possession by some of villagers alleged to be on behalf of all.

1. a) A mortgagee's rights depend on validity of title of mortgagor.

b) Where registered title of mortgagor elapsed owing to adverse possession by others, mortgagee's rights elapse, too, whether on not he was a bona fide mortgagee without notice — immaterial.

2. Possession by some of villagers — not possession on behalf of all.

Kehaty and *Amon* for Appellants

Cattan and *Germanus* for Respondent No. 5.

Crown Counsel (*Rigby*) for Respondent No. 9

Appeal from decision of Settlement Officer, Tulkarm Settlement Area, dated 12.3.42, in case No. 5/ Ghabat Miska.

JUDGMENT

This is an appeal, by leave of His Honour the Chief Justice, from a judgment of the Land Settlement Officer, Tulkarm Settlement Area. The matter has already been before this Court (C.A. No. 188/40) *) when on the 3rd December, 1940, the case was remitted to the Settlement Officer for him to hear any evidence which the Appellants might choose to produce as to occupation and possession, and to give a new judgment, if necessary. Shortly stated the facts are that the Appellants, Nos. 2—11, granted a mortgage to the first Appellant. It seems implicit from the judgment of this Court of the 3rd December, 1940, that the only question left for the Land Settlement Officer was to decide the question of the possession of the mortgagors. If the Land Settlement Officer, after hearing evidence held, and was entitled so to hold, that the claims of the Appellants Nos. 2—11 at Land Settlement must fail, that would seem to conclude the matter, because whether or not the first Appellant 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. At the hearing before me Mr. Kehaty, advocate for the Appellants Nos. 1 & 11, sought to argue that a note on a particular Mazbata as regards the possession of the mortgagor could be construed as notice to the first Appellant that the registered title of the Appellants Nos. 2 — 11 had elapsed owing to adverse possession by others. In view, however, of the decision of this Court of the 3rd December, 1940, I, think that I am precluded from dealing with anything other than the question whether the Land Settlement Officer was entitled on the evidence before him to make the finding of fact

*) 9 CtLR p. 13.

which he did. Now, Mr. Cattan, advocate for the Respondent No. 5, exhaustively reviewed the evidence led before the Land Settlement Officer on the 24th December, 1941. It is clear from that evidence that the mortgagors had ceased to be in possession for a period commencing from about ten years before the last war, and it also seems clear that they had left the particular village a year before a certain crime was committed. This negatives the suggestion that they had had to leave the village because of a certain crime and because one or more of them had been charged with the commission of that crime. There was abundant evidence before the Settlement Officer on which he could reach the conclusion which he did, and I see no reason for disturbing his finding. It was argued on behalf of the Appellants that possession by some of the villagers was possession on behalf of all. So far as I know, however, this doctrine applies only to co-heirs, and even then, it is a rebuttable presumption. Even had the parties been co-heirs the presumption in this case would have been rebutted owing to the evidence that the Appellants Nos. 2—11 had been absent for so long a period. The words "if necessary" at the end of the penultimate paragraph of the judgment of this Court of the 3rd December, 1940, are very significant and again lead me to the conclusion that I am right in thinking that all that the Land Settlement Officer had to do was to hear evidence as to possession and make findings of fact thereon. As I have said, I am not prepared to interfere with the findings of fact of the Land Settlement Officer.

I accordingly dismiss this appeal with costs. I shall hear parties' advocates argue as to the proportions in which and by whom the costs to Respondent No. 5 should be paid.

Appellants to pay (jointly and severally) the fifth Respondent's costs, to be taxed on the lower scale, of this appeal only (as Respondent No. 5 did not have an advocate at the first appeal) to include LP. 15 advocate's attendance fee at this appeal.

Delivered this 30th day of July, 1942.

CRIMINAL APPEAL No. 37/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Gordon Smith, C.J., Copland, J. and Frumkin, J.

1. Nissim Reuven
2. Yehoshua Becker — Appellant.

v.

The Attorney-General — Respondent.

Charge of murder during commission of, or attempt to commit, robbery —Assize Court finding accused not guilty of murder &

convicting him of robbery — Competence of Assize Court — Invoking English Common Law while specific provisions in Palestine Law.

1. Conviction on a non-capital offence when trying a capital offence — not ultra vires Assize Court.

2. Where Palestine Law has specific provisions for a certain matter, position under English Common Law — irrelevant.

3. In a charge under sec. 214(d) of Cr. Code Ord. (causing death in order to secure escape etc.) absence of intention to kill specific person — immaterial.

4. Court of Appeal not under duty nor entitled to make recommendations in regard to carrying out of death sentences.

Seligman and *Kritzman* for Appellants.
Crown Counsel (*Hogan* and *Rigby*) for Respondent.

Appeal from judgment of Crim. Assize Court sitting at Jerusalem, dated 6.3.42, in Crim. Assize Case No. 2/42, whereby 1st Appellant was convicted of robbery, contrary to Sec. 288(1) of Crim. Code Ord., and 2nd Appellant was convicted of murder, contrary to Sec. 214(d) of Crim. Code Ord., 1936, and sentenced 1st Appellant to 14 years' imprisonment, and 2nd Appellant to death.

JUDGMENT

The two accused were tried together, being charged jointly with the murder, under Section 214(d) of the Criminal Code Ordinance, 1936, of one Federman. After a long trial, followed by a reasoned and analytical judgment, the accused Reuven was found not guilty of murder but guilty of robbery, such being the relevant offence referred to in the charge, and he was sentenced to fourteen years' imprisonment. The second accused, Becker, was found guilty of murder, and the consequential sentence was passed. Both accused appealed, and both appeals were dismissed without calling on Counsel for the Prosecution, and the Court intimated that as Counsel for the accused had raised several novel points of construction, which had not apparently been raised in previous similar cases, a short written and considered judgment was desirable.

On behalf of Reuven it was submitted that the Court had no jurisdiction to convict him of robbery, with which offence he had not been separately charged. In support of this contention it was argued that as Article 41 of the Order-in-Council conferred exclusive jurisdiction on the Court of Criminal Assize to try capital offences, and that as by Article 40, District Courts had jurisdiction to try other and lesser offences, therefore the conviction on a non-capital offence by the Court of Criminal Assize was ultra vires. It was also argued, in effect, that Section 11 of the Courts Ordinance confirmed this view and that as the Criminal Procedure (Trial Upon Information) Ordinance did not and

could not confer such jurisdiction, therefore Section 52 of such Ordinance was also ultra vires.

These are novel points, and it is not surprising that Counsel could not refer us to any earlier case giving a ruling on such points.

It is to be noted that Article 41 of the Order-in-Council, after providing for the constitution of a Court of Criminal Assize and its jurisdiction, goes on to read "and such other jurisdiction with regard to other offences as may be prescribed by Ordinance."

Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance reads as follows:—

> "The court may find an accused person guilty of an attempt to commit an offence charged, or of being an accessory after the fact, or may convict him of an offence not set out in the information and without amendment of the information notwithstanding that such offence is one within the jurisdiction of some other court to try upon information, or one which could be tried summarily:
>
> "Provided that such offence be covered by the evidence in the case and by findings of fact necessary to establish it and does not render the accused person to a greater punishment than does any charge in the information."

It is therefore abundantly clear that there is no substance in this submission nor in the alternative submission that having been charged with murder only he could not be convicted of robbery, as this latter offence was in a different category to that of murder. This alternative submission is ruled out by the second paragraph of Section 52 above, as the charge of murder specifically refers to the offence of robbery and it was a condition precedent to a possible conviction for murder that the Court must come to the conclusion that robbery was committed or attempted.

Further, it would be rather astonishing, at this date, to find that a Court of Criminal Assize could not, (as must have been done hundreds of times) on a charge of murder, convict an accused of the lesser offence of manslaughter and be compelled to order that such case should then go back for trial by a District Court on the lesser charge.

On the facts of this case as against Reuven it was urged that the Court had erred in drawing the inferences that this accused was one of those participating in the robbery and that there was nothing improbable in the possibility of the crowd having lost the scent and, so to speak, found another scent, — or have "changed foxes". The Court considered this possibility and rejected it and had no reasonable doubt about the matter. In view of the evidence, which showed a continuous chase of this accused, although not continuous all the time by the same individuals, and that he was in view of one or more of the witnesses from the moment of the robbery until he finally threw away his revolver and gave up, we are not surprised that the Court below had no reasonable doubt, and it is quite impossible for this Court to say that the

Court below erred in the slightest degree in drawing the inferences it did, and which were fully justified from the evidence and circumstances of the case.

As regards Becker, who was convicted of murder, it was submitted that on the same facts and circumstances under the English Common Law, he would only have been found guilty of manslaughter. Be that as it may, and we by no means assent to such proposition, the fact remains that he was neither charged nor tried under the Common Law of England but under a specific provision of the Criminal Code. Under this provision any person, who where an offence has been committed causes the death of any person in order to secure the escape or avoidance of punishment in connection with such offence, of himself or others, is guilty of murder. Robbery, with violence, had been committed in broad daylight, the two robbers — of whom Becker was one — chased by a crowd of people; they separated, and Becker was run to earth in a store, where shortly afterwards a minor gun battle took place with an armed policeman in plain clothes, and during the course of which a bullet from the revolver of Becker caused the death of one, Federman. Becker then escaped from this store and was again chased by several people in the course of which he fired other shots and was eventually secured after his ammunition was exhausted. These facts were all conclusively proved and come exactly within the scope and meaning of the words used in the section. It is quite immaterial that Becker had no intention to kill Federman, but he fired the shot which caused his death in order to secure his escape, and in fact he did secure his escape from this refuge, but fortunately, only temporarily.

As regards the sentences, that of fourteen years in respect of Reuven is not excessive, in view of the facts of the crime and in spite of his youth. As regards Becker, also a young man, it was suggested that this Court should recommend mercy on account of his youth and other factors.

It is not the duty of this Court to make recommendations in regard to the carrying out of death sentences, nor is this Court entitled to make any such recommendations.

Delivered this 26th day of March, 1942.

HIGH COURT No. 57/42.

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

Before:— Gordon Smith C.J., and Edwards, J.

El Haj Mahmoud Ibn Ahmad Ideh El Masri — Petitioner.

v.

1. Chief Execution Officer, Hebron.
2. Musbah Ibn Ahmad Othman Gheith.
3. Aid Ibn Abdel Rahim Othman Gheith — Respondents.

Sale through Execution Office of land planted on with few trees — Notice of sale failing to mention number of trees and saying instead "some trees" — Allegation of misdescription of property calling for revaluation and re-advertisement.

Where land under sale by Execution Office planted on with few trees, mentioning them in notice of sale as "some trees" does not amount to material misdescription of property, and no reason (particularly where proceedings going on for considerable time) for revaluation and re-advertisement.

Goitein for Petitioner. *Cattan* and *Ousta* for Respondent Nos. 2 & 3.

Return to a rule nisi issued on 28.5.42 directed to 1st Respondent calling upon him to show cause why he should not withdraw his order dated 11.5.42, and stay all execution proceedings in Ex. file No. 171/41 and carry out execution in accordance with law.

ORDER

This is a return to an Order Nisi issued on the 28th day of May, 1942. The Petitioner has complained that for various reasons the execution proceedings were not in order and the point has now turned mainly as to alleged misdescription of the property in the Notice of sale. The Petitioner asks for a revaluation and re-advertisement on the ground that the number of trees were not mentioned in the advertisement. The trees on the property, which are few in number, were mentioned in the notice as "some trees" and this, in our opinion, does not amount to a material misdescription of the property. The matter has been going on for more than 12 months and we find no reason to delay it anymore by returning it for revaluation and readvertisement thereby causing further delay and unnecessary expense.

The Order Nisi is, therefore, discharged with costs fixed at an inclusive sum of LP. 10.— to the 2nd and 3rd Respondents.

Delivered this 21st day of July, 1942.

CIVIL APPEAL No. 141/42.

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

Before:— Rose, J., Edwards, J. and Frumkin, J.

Otto Rabl — Applicant.

v.

Central Bakery Beit-Lehem Ltd. — Respondent

Application to set aside award — Court confirming part of award and remitting certain matters to arbitrators for clarification— Premature application to Court of Appeal for leave to appeal.

Leave to appeal cannot be granted from judgment confirming part of award and remitting other to arbitrator; award as a whole being in suspense, appeal — premature.

Edit Note: CA 16/31 1 C of J 191 followed.

Ben-Jaminy for Applicant. *Sandler* for Respondent.

Application for leave to appeal from judgment of DC,, Tel-Aviv dated 18.5.42, in Civil Case No. 340/41.

JUDGMENT

This is an application for leave to appeal from a judgment of the District Court of Tel-Aviv, dismissing an application to set aside an arbitration award. In the judgment appealed against the learned President substantially confirms part of the award but remits certain matters to the arbitrators for clarification. In these circumstances, counsel for the respondents, Mr. Sandler, says that the application for leave to appeal is premature and in support of his argument he relies upon Civil Appeal 16/1931, reported in the Collection of Judgments Vol. 1, at p. 191. In that case, the facts of which are very similar to the present one, and by which we regard ourselves as bound, the Court said:

> "By such remission the award as a whole is in suspense, and we are of opinion that no leave to appeal can be granted from a judgment of this nature".

We agree with that language, assuming that it means that no leave to appeal can be granted from a judgment of that nature because it is premature. As was stated by the Court in the case referred to, the position would seem to be as follows: when the matters remitted to the arbitrators have been decided by them, the District Court can then adjudicate on those matters and, if necessary, reiterate its previous judgment on that part of the award which was previously confirmed. From that final judgment an appeal would lie by leave.

The costs will follow the event and the costs of the ultimately successful party will include the sum of LP. 5 for advocate's attendance fee.

Delivered this 16th day of September, 1942.

CIVIL APPEAL No. 98/42.

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

Before:— Gordon Smith, C.J. and Edwards, J.

Abdul Rahim Abdul Ruhmen Al Kufurainy — Appellant.

v.

1. Muhammad Mustafa Salameh
2. Mahmoud Ismail Abu Hamdeh — Respondents.

Action re land brought before MC sitting as LC and then referred to single arbitrator — Award of arbitrator submitted to MC for confirmation — Objection that land situate outside jurisdiction of MC dealing with award — Arbitrator awarding, in excess of his powers, part of produce of land in dispute — Divisibility of award — Jurisdiction in matters re land.

1. Courts must be careful not to entertain suits affecting land situate outside their jurisdiction.

2. Where Defendant did not suggest that land in dispute outside jurisdiction of Court and then raises this objection at a later stage, onus upon him to ask Court to hear evidence to that effect; if he did not do so, he cannot raise this point of jurisdiction on appeal.

3. Arbitrator's award — divisible; if he exceeded his powers, part in question of award may be deleted, while remainder confirmed.

Edit Note: as to 3: CA 237/38 5 CtLR 33 followed.

Nakhleh & *Habayab* for Appellant.

Nazzal for Respondent No. 1.

Appeal from judgment of MC, Ramallah, sitting as a LC, dated 12.5.42, in Civil Case No. 70/42.

JUDGMENT

Edwards J.:

This is an appeal from a judgment of the Magistrate at Ramallah, who had confirmed the award of an arbitrator.

The facts are that the present Appellant was the first defendant in an action brought in the Magistrate's Court as Ramallah sitting as a Land Court. When the parties appeared before the Magistrate they agreed to refer all matters to a single arbitrator under Section 6 of the Land Courts Ordinance. In the statement of claim it was alleged that the land in question was situated in the village of Kafr Nimeh and that the value of the land in question did not exceed LP. 25. When the award of the arbitrator came on for authentication before the Magistrate at the instance of the Plaintiff (the Respondent to this appeal), the present Appellant's advocate filed an objection alleging, *inter alia*, that the Magistrate had no jurisdiction to authenticate the award, as the land law within the village of Kharbatha.

At the hearing before us the Appellant's advocate cited the Establishment of Courts Order, 1939, (Palestine Gazette Supplement No. 2 (1939) Vol. 3., p .1496, para 3) and the Administrative Divisions Proclamation, 1939, at page 1550 of the same volume. It is clear that the village of Kharbatha is within the jurisdiction of the Ramle Magistrate and not of the Ramallah Magistrate. We realise how careful Courts must be not to entertain suits affecting land situate outside their jurisdiction. The matter, however, in this case is different. There is nothing in the award of the arbitrator to show that the land in dispute was in the village of Kharbatha. The arbitrator merely said that he went to the village of Kharbatha and that he then went to the land and inspected the boundaries, but there is no definite finding that the land was in the village of Kharbatha. The present Appellant never suggested at the first hearing before the Magistrate that the land was not within the village of Kufr Nimeh, which village, we may say, is in the Ramallah sub-district. In our view, the onus was upon the present Appellant, when resisting the confirmation of the award, to ask the Magistrate to hear evidence (to be adduced by the Appellant) to show that the lands were definitely not in the Ramallah district. As he did not do so, we think that he cannot now come to this Court and complain that the Magistrate had no jurisdiction.

Another ground of appeal, which was only faintly argued by the Appellant's advocate, was that the arbitrator made a finding as to ownership of land in the absence of proper documentary evidence, and that the Magistrate relied on a contract of sale which had been made outside the Land Registry. We think that there was abundant evidence upon which the arbitrator could make the award which he did — an award which, we may say, seems exhaustive and fair. We do not think that the Appellant has proved either of the matters set out in Section 6(4) of the Land Courts Ordinance.

It is admitted by the Respondents' advocate that the arbitrator exceeded his powers when he ordered the Appellant to pay half the produce of the land for the present year; but we agree with the Respondents' advocate that the award is divisible (see C.A. 237/38 *), P.L.R., Vol. 6, p. 24).

The award will therefore be authenticated, with the exception of the words, "together with half the produce of the land for the said year", which words will be deleted. Subject to this deletion, the judgment of the Magistrate is authenticated, and the appeal is dismissed. The Respondents' advocate took two preliminary objections to the appeal; but, as we have dealt with the appeal on the merits, it is unnecessary to discuss those two points.

We accordingly dismiss the appeal. The Appellant must pay the

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*) 5 CtLR p. 33.

Respondents' costs of this appeal, to be taxed on the lower scale, and to include an advocate's attendance fee at the hearing of this appeal of LP. 10.

Delivered this 24th day of September, 1942.

HIGH COURT Nos. 85/42, 86/42 and 87/42.

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

Before:— Copland, J.

High Court No. 85/42.

Siegfried Zwillinger — Petitioner.

v

1. Superintendent of the Detention Camp, Mazra, near Acre.
2. Frederick George Parkhouse, Acting Deputy Superintendent of Police, Frontier Control, Jerusalem.
3. Inspector-General of Police and Prisons, Jerusalem

Respondents.

High Court No. 86/42.

Karl Scherer — Petitioner.

v

Superintendent etc. as in H.C. 85/42 — Respondents

High Court No. 87/42.

Joachim Suchier — Petitioner

v.

Superintendent etc. as in H.C. 85/42 — Respondents

Petitions by enemy aliens for orders "not to be removed from jurisdiction of HC" — Powers of High Commissioner under Reg. 17B of Defence Regulations 1939 to detain in or outside Palestine.

1. An enemy alien cannot apply for a writ in nature of Habeas Corpus, no matter how his petition headed.
2. Very wide words in Reg. 17B of Defence Regulations, 1939 give High Commissioner power to detain and to transfer to a place other than Palestine.

Edit Note: HC 82/41 12 CtLR 81 and HC 7/42 12 CtLR 86 referred to. See also Edit notes to above cases.

Weyl for Petitioners.

Attorney-General and *Solicitor General* for Respondents.

Return to a summons issued 26.7.42, directed to Respondents calling upon them to produce the body of Petitioner, on 31.7.42, at 9.30 a.m., and to show cause why he should not be released from custody.

ORDER

This is a return to orders nisi in the nature of Habeas Corpus with regard to three persons asking for them to be produced before this Court for the purpose of their release. The petitions, it is true, are headed "petition for an order directed to the Respondents not to remove the petitioner from the jurisdiction of this Court", but, whatever they may be called, they are petitions in the nature of Habeas Corpus.

Now the affidavits in reply state that each of these three persons is an enemy alien and is detained as such under Regulation 17.B. of the Defence Regulations, 1939. It is settled law, not only in this country but also in England, that an enemy alien cannot apply for a writ of Habeas Corpus. That statement of the law appears from Rex v. Vine Street Police Station Superintendent Ex Parte Liebmann (1916 1 K.B. 268) and also from Rex v. Commandant of Knockaloe Camp Ex parte Forman (117 L.T. 627). Those cases were referred to and applied in this country in several cases including what I will call the first Olles case, High Court No. 82/41 *) (8 P.L.R. 429). It is true that a second application by Mr. Olles **) obtained, at any rate, a technical success, but the main principle as laid down by this Court in the first case was not impugned. In the two cases which have already been decided this morning, in which the Chief Justice and myself sat, we decided that an enemy alien has no power to apply for a writ in the nature of Habeas Corpus. That ruling applies equally to these three cases.

With regard to the question of deportation, or, as the Attorney General prefers to put it, transfer, in today's previous cases we were of opinion that the very wide words in Regulation 17.B., which gives power to the High Commissioner to detain any enemy alien in such places and such conditions as the High Commissioner may from time to time determine, gives him power to detain and to transfer to a place of detention other than Palestine.

For these reasons the orders nisi must be discharged. The Attorney General does not ask for costs.

Given this 31st day of July, 1942.

CRIMINAL APPEAL No. 17/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Rose, J., Edwards J. and Frumkin, J.

1. Darwish Abdul Razzak el Dajani
2. Abdul Rahman Abdulla

Applicants.

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*) 12 CtLR 81.
**) 12 CtLR 86 (HC 7/42).

v.

Attorney-General Respondent.

Application for leave to appeal from conviction of conspiracy, attempt to obtain money by false pretence and forgery — CA treating application for leave to appeal as appeal itself — Claim that trial Court wrongly shifted onus of proof upon accused — Document containing untrue or fraudulent statements not amounting to forgery — Proof of negative — When production of document containing untrue or fraudulent statements constitutes attempt to obtain money by false pretences — Reduction of sentence.

1. Usual practice of Court of Appeal — to treat applications for leave to appeal in criminal cases as appeals themselves.

2. Where judgment states that at end of prosecution Court was satisfied there was a case to answer on all counts, passage in judgment, that onus must shift in the circumstances and duty upon accused to explain his acts and intentions" cannot be said to indicate that Court overlooked rule that onus in criminal cases on prosecution.

3. Mere circumstances that a document, which in other respects is what it purports to be, contains untrue or fraudulent statements of fact does not of itself make that document a forgery.

4. While always difficult to prove a negative, Court of Appeal will not interfere, if it cannot say that trial Court was not justified in drawing inference that onus of proof was satisfied.

5. Where document produced to officer appointed to assess and examine claim might have resulted in payment of claim being ordered without further enquiry at all, one cannot say act of accused indistinguishable from a litigant making untrue or fraudulent statements in his statement of claim.

B. Joseph & Caspi for Applicant No. 1. *Elia* for Applicant No. 2. *J.G.A.* (*Beham*) for Respondent.

Application for leave to appeal from judgment of DC, Jerusalem in Crim. Case No. 300/41 dated 6.2.42 whereby both applicants were convicted on charges of conspiracy contrary to sec. 34, attempt to obtain money by false pretences contrary to sec. 301 & 29 forgery of official documents contrary to sec. 338 and also convicting 2nd Applicant of charge of forgery of another official document contrary to sec. 338 of C.C.O. 1936, and sentencing each of Applicants to 1 year's imprisonment and ordering 1st Applicant to pay LP. 100 towards cost of prosecution.

JUDGMENT

These are applications for leave to appeal from a judgment of the District Court of Jerusalem convicting the two accused on four counts, one of conspiracy, one of attempting to obtain money by false pretences and two of forgery. In accordance with the usual practice, we are treating these applications as the appeals themselves. The facts are adequately

set out in the judgment of the trial Court and need not be referred to here in any detail.

The first point taken by the appellants was that there is a passage in the judgment of the trial Court which should of itself be regarded as being fatal to the conviction. That is the passage on page 7 of the judgment which reads as follows: —

> "Having regard to the obvious object and purpose of the documents we considered the onus must shift in the circumstances and there is a duty upon both accused to explain their said acts and intentions,"

It is urged by Dr. Joseph, on behalf of the first appellant, that that goes contrary to the rule that the onus in a criminal case always remains on the prosecution. If, however, one reads the next sentence in the judgment, the difficulty seems to be resolved because the learned President goes on to say:—

> "At the end of the case for the prosecution, therefore, we felt little difficulty as regards the facts which had emerged and were satisfied that there was a case to answer by the accused respectively on all counts as laid."

We think, therefore, that the passage objected to was, at the worst, mere surplusage and does not indicate that the Court wrongly applied its mind to the relevant considerations.

We must, then, consider whether there was sufficient evidence to justify the convictions on these four counts. We are of opinion that as regards the two counts for forgery there was clearly insufficient evidence to justify the convictions. The mere circumstance that a document, which in other respects is what it purports to be, contains untrue or fraudulent statements of fact does not of itself make that document a forgery. The convictions on counts 3 and 4 therefore cannot stand.

The evidence as regards conspiracy is also very slender, and we are of opinion that the conviction on the first count cannot be supported.

There remains the second count, that of attempting to obtain by false pretences the sum of LP. 1000 from the Government of Palestine. This depends mainly on three documents (Ex. 1, 2 and 3) and the evidence of two police officers, namely, Sgt. Cressy and Yahya Langer. In order to establish the false pretence, the prosecution, of course, has to show that the two motor cars in question were not burnt on the material dates. While the evidence of the two police officers may not perhaps read as clearly as it might do, we are satisfied that Sgt. Cressy's evidence and particularly that of Yahyia Langer, who was the officer in charge of the Measheārim Police Station at the material time, is sufficient to justify the Court in drawing the inference that the cars were not burnt on the 28th of April or on any date round about that time.

Proving a negative is, of course, always a difficult thing to do, but

this was eminently a question of fact for the trial Court and we cannot say that it was not justified in drawing the inference that the prosecution had satisfied the onus which was upon it. Still less can we say that the trial Court was not justified in rejecting the evidence called on behalf of the accused.

A further point was raised that, even assuming that the findings of the trial Court could be supported, nevertheless no criminal offence had been committed because these claims had to go before a tribunal. It is said that what was done in this case by the accused was indistinguishable from a litigant making untrue or fraudulent statements in his statement of claim. We cannot see any substance in this point for the reason amongst others, that the documents which were produced in this case might well have resulted in payment of the claim being ordered by the officer appointed to assess and examine such claims without any further enquiry at all.

We now come to the question of sentence and it is urged as regards the first appellant by Dr. Joseph that, as the forgery and conspiracy counts have gone, he should be granted a substantial reduction of sentence. As regards the first appellant we cannot see the force of that argument. It is clear, we think, from the circumstances of the case, as far as it affects him, that the main count was that of attempting to obtain money by false pretences. What we have to consider is what is a reasonable sentence to pass for that offence. We cannot say that a sentence of one year is excessive for a person who attempts to obtain the sum of LP. 1000 by false pretences. As regards the first appellant therefore, the convictions on the 1st, 3rd and 4th counts are set aside and the conviction on the second count and the sentence of one year's imprisonment are confirmed.

With regard to the second appellant, we think that the matter is somewhat different. If the forgery and conspiracy counts go out, the position is that he has been convicted only of aiding and abetting the 1st accused in attempting to obtain money by false pretences. Further, he has already lost his employment as a result of this matter. We think, therefore, that his sentence should be substantially reduced and that justice will be done if he goes to prison for three months. In this case also, therefore, the convictions on the 1st, 3rd and 4th counts are set aside and that on the 2nd count confirmed. The sentence will be varied as stated.

Delivered this 20th day of April, 1942.

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CIVIL APPEAL No. 122/42.

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

Before:— Gordon Smith, C.J., Frumkin, J. and Khayat, J.

Israel Feigin — Appellant.

v.

David Moshkovitz — Respondent.

Claim for eviction on ground of breach of conditions of lease in that tenant turned congregation into a Synagogue — Onus of proof — Insufficiency of evidence.

If landlord who knows that for years tenant used premises for a congregation claims that recently congregation expanded into a Synagogue, for him to prove it; evidence of a signboard being put up bearing word "Synagogue" — not sufficient to prove breach of contract.

Edit Note: See CA 110/42 12 CtLR 73 and CA 101/42 12 CtLR 130.

Goitein and *Ben Ari* for Appellant.

Olshan and *Etzioni* for Respondent.

Appeal from judgment of DC Tel-Aviv dated 29.5.42, in Civil Appeal No 82/42 on appeal from judgment of MC, Tel-Aviv dated 25.3.42, in Civil Case No. 9393/41.

JUDGMENT

This is an appeal from a decision of the District Court dated the 29th May, 1942, which reversed a decision of the Magistrate's Court dated the 25th March, 1942, in which latter judgment an eviction order was granted at the suit of the appellant in respect of some premises which had been occupied by the respondent since 1936. The ground for eviction, as set out in the Statement of Claim, was that the defendant had sublet part of the flat to another and in paragraph 4 it claimed that the plaintiff was entitled to eviction under the contract and the Rents Restriction Ordinance 1940. On the case coming before the Magistrate, the appellant gave evidence, and as regards the concrete facts he said that as regards the document which had been entered into originally in 1936. "There was no condition in it. I did not allow defendant to change the object of the lease. I did not allow him to start a Synagogue. I knew there was a congregation there, but not a Synagogue. Recently I saw a signboard 'Synagogue' with a certain name on it".

There was some discussion in cross-examination as to the difference between a 'congregation' and a 'Synagogue'. Apart from the question as to whether there was or was not an alteration in the original contract, we agree that the District Court was wrong in not admitting the photostatic copy as evidence in this case. In the respondent's evidence, he admitted that he put up a sign board but he said: "I have no Synagogue, only a congregation, and I have no licence". In cross-examination he stated, and I am quoting as reported: "On Sabbaths 20—30 persons

pray, on holidays 60—70 persons, and on weekly days none. Sometimes people stand in the street on the anniversary of one's death".

Counsel for the appellant rather stressed that evidence as to numbers and has argued that a Synagogue has been established there which is contrary to the terms of the contract between the parties. In the judgment of the District Court it is stated: "It was proved that the state of the flat was not changed from 1936 and until now, namely, there is no proof in the file that in 1936 there used to come to the defendant, who is a Rabbi, only a *congregation* of persons to perform prayers and that only recently had the congregation expanded into a Synagogue". It was on those grounds that the District Court reversed the decision of the Magistrate, namely absence of proof, absence of evidence as to congregation being held on these premises, and we agree that there is no evidence before the Court and there was no evidence that under the Rent Restrictions Ordinance there was a breach of the conditions of the tenancy. Under Section 8 of this Ordinance, which is applicable, you can only get an eviction order in certain circumstances. So long as the tenant continues to pay the rent and performs the other conditions of the tenancy, you cannot get an eviction order, except on certain specified grounds as set out in this section. None of these grounds are present in this case and the question is whether he has been performing the conditions of the tenancy. It was for the Defendant to prove to the contrary and there was no evidence, which possibly might have been brought, that the respondent has not performed the conditions of his tenancy. It was admitted by the appellant that he knew all about the congregation being held there practically since 1936. Apart from the fact that there was evidence that a notice has been put up on which is the word "Synagogue", there is no evidence on the record that a Synagogue assembles there or is held there, in possible breach of the terms of the contract.

We, therefore, dismiss the appeal with costs to include LP. 10 advocate's attendance fee.

Delivered this 18th day of September, 1942.

CIVIL APPEAL No. 47/42.

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

Before:— Gordon Smith, C.J. and Edwards, J.

Mrs. Sara Lea Ulman — Appellant.

v.

Samuel Ulman. — Respondent.

Claim for maintenance before Rabb. Court — Husband counter-claiming divorce — Rabb. Court ordering husband to pay wife specified sum as compensation against receipt by her of divorce — Rabb. C.A. confirming, with certain variations, judgment appealed

from — Claim for maintenance before DC — Effect of submission to competent Court having concurrent jurisdiction.

1. District Court cannot grant permanent maintenance if personal law applicable to parties precludes award of such maintenance.

2. District Court cannot vary an order made by a competent Court having concurrent jurisdiction, to which parties submitted.

Edit Note: as to 2 see: CA 112/36 1 CtLR rep. 12; CA 51/38 3 CtLR 173.

Hake for Appellant. *Silberg* for Respondent.

Appeal from judgment of DC, Tel-Aviv, dated 27.2.42, in Civil Case No. 56/41.

JUDGMENT

This was an appeal against the judgment of the District Court, Tel-Aviv, dated the 27th February, 1942, which dismissed the claim for maintenance by the Appellant on the grounds that, being dissatisfied with the judgment of the Rabbinical Court, she could not now come to a Court of concurrent jurisdiction with her claim for maintenance. The facts are sufficiently and lucidly set forth in the judgment of the District Court, and it is unnecessary to repeat them at length.

The main point in the appeal was whether the District Cort was correct in this respect in view of the fact that the Rabbinical Court had not, so it was submitted, dealt with the Appellant's claim for maintenance at all.

In reply to the claim for maintenance before the Rabbinical Court, the Respondent had claimed a divorce, and after hearing the parties the Rabbinical Court ordered "(a) No prospects for peace between the spouses and they must be divorced. (b) Defendant to pay to Plaintiff LP. 450 compensation", and then followed details as to how the compensation was to be paid. The Appellant appealed to the Rabbinical Court of Appeal, and as a result the amount of compensation was reduced and the Court of Appeal confirmed that the parties must be divorced. The judgment concluded, "Should she refuse to accept the divorce within four months from date of the deposit he shall be entitled to claim the repayment of the money and the return of the notes".

Evidence as to the Jewish law was taken and was summarized as follows in the District Court judgment: —

> "It is clear from his evidence that where a wife applies for maintenance to the Rabbinical Court that Court may make an order ordering the husband to pay compensation or "Ketuba", and pending the payment of same that he shall pay to the wife maintenance. It is forbidden moreover to give the wife a divorce without her consent or against her will but this divorce or "get" may be deposited until the wife chooses to accept it.
>
> "In this particular case the wife was not compelled to receive the "get" but that upon depositing the money the husband is released from paying maintenance to his wife if the wife refuses to accept the "get", the husband can obtain the return of the money after the time laid down in the judgment, but the wife is

> still entitled at any time to go to the Rabbinical Court and again claim her compensation if she is willing to receive the "get" and the Court may then deal with the matter and fix the compensation."

Counsel for the Appellant before us emphasized the fact that the Appellant did not claim a divorce, did not want a divorce and could not be divorced without her own consent, and that all she wanted was maintenance. That this is so is quite clear both from the proceedings and from all the facts of the case. Evidence, as to the Jewish law was given, but nowhere is there a clear answer to the question which was actually put to the Chief Rabbi in the following terms: "Under the Jewish law, in the case where the couple was married for 38 years, and the wife being now 66 years, and there are children and grand-children, is it possible to refuse maintenance and to leave her without means of support in old age?" To say the least, the reply given was no answer to this question. Most of the evidence given was as to divorce, the 'Ketuba' or compensation and the 'get', but as I have said the Appellant was not seeking a divorce.

In this respect, I would again quote the judgment of the District Court, as follows: —

> "It is necessary, therefore, in this case to come to a decision as to what appears to be the exact effect of the Rabbinical Court judgment. It seems to me that the judgment is in no sense a judgment for maintenance but purports to grant the Plaintiff compensation or "Ketuba" which the plaintiff cannot receive unless she accepts the "get", in other words unless she agrees to a divorce she gets nothing. This would appear to be the situation according to Jewish Law as a result of the judgment of the Rabbinical Courts. Can the plaintiff, therefore, now come to this Court, having failed to obtain maintenance before the Rabbinical Court? When it seems clear that the Rabbinical Court could not grant her permanent maintenance in any case and could have granted maintenance only pending some event such as possibly the return of the husband to live with her, or the lodgment of the sum ordered by the judgment."

It seems clear, therefore, that the District Court found as a fact that under Jewish law the Rabbinical Court was not entitled to award permanent maintenance. If this is so, then the District Court itself could not grant such relief, as under Article 47 of the Order-in-Council the personal law of the parties is applicable.

A further point arose as to whether the Appellant, having applied to the Rabbinical Court and having submitted to the jurisdiction of such Court, could subsequently come to a Court of concurrent jurisdiction for the same relief previously sought. In this connection two local cases were cited: Dienfield v. Dienfield, C.A. 112/36*), Rotemberg, Vol. 9, p. 750, was an action before the District Court by a wife against her husband for maintenance of their children. The husband pleaded

*) 1 CtLR Reg. 12.

that a Rabbinical Court had already made an order in favour of the wife and that therefore the District Court could not give a fresh order. In the Court of Appeal it was held that the District Court would have had jurisdiction in the first instance, yet since the parties had chosen another competent Court of concurrent jurisdiction any variation of the order made by the latter Court could only be obtained from that Court. With respect, I quite agree.

In Mintz v. Mintz, C.A. 51/38**), P.L.R. 1938, p. 263, the facts were somewhat different. The Rabbinical Court had "arranged" a divorce upon terms and the Respondent had paid LP. 300 compensation, the daughter to remain with the wife and the son could elect, and if he elected to remain with his mother the husband was discharged from liability to maintain him. Subsequently the wife applied to the District Court for maintenance of both the children and was awarded LP. 4 a month. The judgment on appeal was to the effect that the Respondent had elected to go to the Rabbinical Court and Appellant had consented to the jurisdiction of that Court and that the Rabbinical Court was the proper and competent Court to apply to and not the District Court. The judgment referred to the Dienfield case and stated that in that case "this Court had held that the practice of going from one Court to another should not be allowed".

In effect, this application to the District Court appears to me to be almost in the nature of an appeal from the Rabbinical Court of Appeal, for which there is no provision, and moreover, as I have stated, if the Jewish law, i. e. the personal law of the parties, precludes the award of permanent maintenance to a deserted and abandoned wife, as has been found as a fact in the judgment of the Court below, then the District Court would have no power to make such an award.

I fully endorse the remarks in the judgment as to the unsatisfactory position of a wife so deserted, and I have every sympathy with the Appellant, and it is with regret that I feel compelled to dismiss this appeal.

Whether it would be possible to amend the law so as to compel a husband to contribute to the maintenance of his deserted wife and children, irrespective of race, religion, creed or divorce, as a matter of a civil duty and obligation, is one for consideration by others, but in view of the increasing number of such claims it is time such matters were considered.

The appeal must be dismissed with costs, to include LP.10 advocate's fee.

Delivered this 18th day of May, 1942.

Edwards, J.:

I agree that the appeal should be dismissed.

**) 3 CtLR 173.

CIVIL APPEAL No. 101/42.

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

Before: Copland J.

1. The Agent of Carmel Convent, Haifa.
2. Zakaria Salim Nahlawi. Appellants

v.

Subhi Kassab. Respondent

Kousa. For Appellants No. 1. *W. Salah*L No. 2.
Solomon. For Respondent.

Tenant of shop dividing it & sub-letting whole of it to different sub-tenants to knowledge of landlord — Contract of lease prohibiting sub-letting without written consent of landlord — Waiver inferred from conduct — Failure of one of sub-tenants to pay part of rent — Position of tenant & sub tenant letting & occupying respectively whole of premises.

1. Lessor who for considerable time knew and condoned sub-lease cannot towards end of period of lease claim eviction on ground that sub-lease was breach of contract.

2. a) Sub-tenant occupying whole of premises let to tenant — in same position under Landlords & Tenants (Rent Restriction) Ord. as one occupying only part of them.

b) Nothing in law of Palestine similar to recent legislation in England excluding from protection tenants who take premises in order to sub-let them at a -profit.

note thereto.

Edit Note: as to 1 see: CA 122/42 12 CtLR 125 and Edit.

Appeal from judgment of DC, Haifa sitting as a Court of Appeal, dated 30.4.1942, in Civil Appeal No. 81/42.

JUDGMENT

This is an appeal from the learned Relieving President Haifa who reversed a judgment given by the Magistrate in two consolidated cases for eviction. The case is not an easy one and I frankly admit that up to this moment I do not think that I can fully understand the judgment of the Magistrate nor indeed some parts of that of the learned Relieving President. However, so far as I am able to gather what has happened, the facts are shortly as follows: The appellants let certain premises to one Subhi Kassab in November, 1939, the period of the lease being for the year 1940. There was a condition in the lease that the lessee was not entitled to sub-lease the premises without the consent in writing of the lessor. Needless to say, the lessee, without any consent in writing, did sublet not only part of the premises but the whole of the premises to three different sub-tenants. To do this it was necessary to divide this shop into three parts which the lessee proceeded to do unhindered by anybody on the part of the Convent, the lessors. All proceeding well, the lessee Subhi Kassab got his rent for some time punctually

monthly from his sub-tenants, duly paid his lessor, and it was not until the7th of December, 1940, that is to say, only twenty-four days before the year expired, that the first fly on the ointment appeared. On that date the agent of the Carmel Convent, a Father Tammab, who had succeeded the agent Father Salanti, who had made the original lease to Kassab and who, being an Italian, had been interned at the outbreak of war with Italy, Father Tammab wrote to Subhi Kassab saying that as they wished to use this vegetable shop for themselves, and did not want to let it to any other person, they would be glad, if he would vacate the store and deliver the keys on the 31st of December.

This letter was confirmed by another letter from the agent Father Tammab on the 10th of December not one word had been said about the lessee Kassab having broken the terms of the lease. On the 27th or 28th of December, 1940, the appellants, the Convent, entered an action for eviction in the Magistrate's Court, on the ground that the lessee had broken the terms of his contract by sub leasing without the written permission of the lessor. It is noteworthy that on the 28th December, 1940, in spite of their letters of the 7th and 10th December, 1940, the Convent let part of the premises to another person.

The learned Magistrate consolidated as I have said, two eviction cases, one by the Convent against Kassab, the other by Kassab against one of his sub-tenants. This happened about one year after the original eviction action had been started. It seems a somewhat peculiar state of affairs, as the Judge remarked, as eviction matters are generally considered rather urgent. The learned Magistrate, in an exremely long and complicated judgment held, so far as I am able to understand him that Father. Augustin Galanti, the agent, did agree to the sub-lease and did agree to the alterations, which were made in the shop, but in spite of that finding he granted an order of eviction against the lessee on the ground that the period of the lease was for 1940 only and was no longer in occupation of it since he had sub-let it to others. He granted what he called a formal order of eviction against him, whatever that may mean, and then proceeded with regard to the second case to find that the sub-tenant had not paid all the rent which was due by him but refused to grant an order of eviction, since Subhi Kassab was no longer the lessee of the shop. That problem was taken on appeal to the learned Relieving President, who reversed the learned Magistrate's judgment on every point. The learned Relieving President found that there were laches on the part of the Convent in not having taken steps sooner in suing for eviction for breach of contract and refused to grant eviction. With regard to the action by Kassab against his sub-tenant, he found that, as the rent had not been paid in, Kassab was entitled to an order of eviction against this sub tenant. Some argument ensued upon the problem whether the Landlord and Tenants (Rent Restriction) Ordinance, as extended, applied to a sub-tenant in the

same way as it applied to a tenant.

I think after giving careful attention to all the arguments raised both on behalf of the appellants, the Convent and Kassab's sub-tenant, and on behalf of the respondent, that the learned Relieving President came to a correct conclusion on the law and the facts, so far as I am able to understand them. There was evidence, which the learned Magistrate apparently believed, that in November, 1939, that is to say, over one month before the term of the lease began, Kassab had been allowed into these premises for the purpose of making the necessary alterations so that they might be sub-let. There was further evidence that whilst these alterations were being made, the agent of the Convent came down to inspect the premises and made no protest whatever. There is further evidence that during the whole of the year when the rent was being paid every month, there were frequent visits by the agent on the scene and no protest was made about the occupation of the sub-tenants. It is too late within a week of the termination of the year's period of lease to come forward and complain of a breach of the contract which the complainant knew of and condoned 13 months before. I think, therefore that with regard to the appeal against Kassab it fails.

Similarly it fails with regard to the second appellant's appeal, that of the sub-tenant Zakaria Selim Nahlawi. The question depends to a certain extent upon whether the Landlord and Tenants (Rent Restriction) Ordinance, as extended, applied to sub tenants as it applies to tenants. The appellants have argued that a sub-tenant is a person who occupies only part of the premises leased to the tenant. I do not think they are right in their view. I can see no reason why, say, if a building consisted of ten rooms, ten sets of apartments, and the tenant of the whole building leased out nine of these apartments, retaining one for his own use, he should be in a different position from a man who let out all ten and retained nothing for his own use. I think that the learned Relieving President was right and certainly no cases have been quoted to me to the contrary. It is true that in a recent amendment of the Rent and Mortgage Restrictions Act in England, the application of the Act has been tightened up with regard to its application to tenants who take premises in order to sub-let them at a profit. They no longer obtain protection in England but there is nothing in the law of this country of a similar nature and since it is not disputed, that the Ordinance applies to Haifa, I think therefore that the learned Relieving President came to a correct decision and that the second appellant, Zakaria Salim Nahlawi, who was the sub-tenant, having failed to pay the rent in due time, is liable to be evicted. For these reasons the appeal must be dismissed with costs against each of the appellants to include the sum of LP. 10 advocate's attendance fee.

Delivered this 25th day of September, 1942.

CIVIL APPEAL No. 118/42.

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

Before:— Edwards, J. and Abdul Hadi, J.

Halimeh Mahmoud Badram & 5 others. Appellants.

v.

Ahmad Mahmoud el Baik Respondent.

Party joined by leave of Court as co-plaintiff — Judgment in favour of plaintiffs including co-plaintiff — Appellant failing to cite co-plaintiff as Respondent.

Failure of Appellant to cite party joined by leave of trial Court as co-plaintiff and included among those for whom judgment issued — fatal to appeal.

Edit. Note: CA 89/39 6 CtLR 123, CA 23/40, CA 13/41 9 CtLR 180 and CA 113/41 10 CtLR 128 followed.

Abu Ghazaleh for Appellants.

Appeal from judgment of MC, Ramleh, sitting as a LC dated 30.5.42, in Land Case No. 210/42.

JUDGMENT

Abdul Hadi, J.:

This is an appeal from the judgment of the Magistrate's Court of Ramleh sitting as a Land Court, dated the 30th May, 1942, whereby judgment was given against Appellants, who were Defendants in the Court below. In the statement of appeal Counsel for Appellants submitted several grounds and asked that the judgment of the Magistrate be set aside. The Respondent-Plaintiff, Ahmad Mahmoud Al Beik, filed a statement of reply in this Court and on the grounds mentioned therein he asked that the appeal be dismissed.

We heard both parties, each of whom supported his grounds of appeal. Without entering into the merits of this appeal we think that it can be disposed of on the preliminary point taken by the Respondent in paragraph "A" of his reply, which he reiterated before us. He submitted that the appeal was defective in form in that the Appellants had failed to cite all the parties to the original action, other than the Appellants, as Respondents, and that Zahra Bint Ibrahim el Hafi, who was joined by leave of the lower Court as Plaintiff, and in whose favour judgment was given, had not been cited as Respondent in the appeal.

Upon scrutinizing the record of the trial Court, including the judgment, it appears that the said Zahra appeared in the Court below and asked that she be allowed to be joined as Plaintiff, which prayer was eventually granted and judgment was given jointly in her favour and in favour of her husband, Ahmad, the present Respondent.

We think that, as Zahra had been joined as co-plaintiff in the lower

Court, she became a party to the proceedings and as judgment was given in her favour, she must necessarily be considered as a party and should have been cited by the Appellants as a Respondent to the appeal and should have been summoned to this Court, as provided for in Rules 313 and 314 of the Civil Procedure Rules. Authority for this view is found in Civil Appeals Nos. 89/39 *), 23/40, 13/41 **), and 113/41 ***). That being so, we have no alternative but to dismiss the appeal with costs fixed at an inclusive sum of LP. 7.

Delivered this 8th day of October 1942.

Puisne Judge.

I concur *British Puisne Judge.*

MISCELLANEOUS APPLICATION No. 36/42.

IN THE APPELLATE TRIBUNAL APPOINTED UNDER SECTION 20(2) of the ADVOCATES ORDINANCE, 1938.

Before:— Gordon Smith, C.J., Copland, J. and Abdul Hadi, J.

Zaki Sa'ad Appellant.

v.

Chairman and Members of the Law Council, Jerusalem.

Respondents.

Decision of Law Council, while term of their appointment expired, re striking off of advocate from Roll — Notice in Gazette appointing Law Council retrospectively to date of expiration of period of appointment — Question of validity or otherwise of proceedings in intervening period.

Council appointed under certain law — non-existing after expiration of term of appointment; any act afterwards done by it — a nullity, order making appointment retrospective but without validating the actions in intervening period — unavailing.

Edit. Note: Misc. Appl. 34/42 11 CtLR 173 referred to.

Goitein for Appellant. *Crown Counsel* (*Hogan*) for Respondents.

Appeal under sec. 20 of Advocates Ord. 1938, from decision and recommendation of Law Council dated 28.4.42.

ORDER

On the facts of this case there is nothing to distinguish it from the facts in the previous application we had, Misc. No. 34/42 ****) in connection with Najeeb Jad, except this one point which has been raised as to the constitution of the Council. On those other facts, we do

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*) 6 CtLR p. 123. **) 9 CtLR p. 180.
***) 10 CtLR p. 128.

****) 11CtLR p. 173.

not propose to repeat what we have already said in the previous judgment. As regards the point that has now been taken in this case which was not taken in the previous case, this, as I have said, raises the question of the constitution of the Council. The Council was appointed in 1938, and in accordance with Section 3(4), the period of that appointment is for three years. But it provides that the members are eligible for reappointment on the expiration of the term of their appointment. Therefore the appointment, in effect, of the first Council under this Ordinance terminated in November, 1941, after which date there was in the absence of any further appointments no Council. A notice was published in the Gazette of 7th June, 1942, page 970, appointing the Council retrospectively to the date of the expiration of the period of three years, to November 1941. But as I have said, at the date of the decision there was no Council and there is nothing in that notice which validates any of the actions of the Council in the intervening period. It is, we think, most unfortunate as regards the decision of the Council and possibly a little hard, but the saying is that hard cases make bad law and we feel that if we support the action in this respect we should be making bad law. The result is, therefore, that the proceedings in connection with the striking off of this advocate from the Roll are a nullity. It will be for the Council to decide whether they take fresh action or not, and in this connection we must draw attention to the fact that this advocate was convicted, served a sentence of three months and then continued to practise for another 21 months before any action was taken to strike him off the Roll. We think that there was undue delay in taking the necessary steps.

No order as to costs.

Given this 12th day of June, 1942.

CRIMINAL APPEAL No. 62/42

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Copland, J., Rose, J. and Khayat, J.

1. Yunis Ismail
2. Ahmad Ali el Jundi — Applicants.

v.

The Attorney-General — Respondent.

Policemen accused of stealing under sec. 274 & 276(*c*) *of Crim. Code Ord. — Preliminary investigation by Mag. upon order by AG given under sec.* 16 *of MC Jurisd. Ord. — Question of validity or otherwise of Order of Committal.*

a) A preliminary enquiry — a proceeding in Magistrate's Court.
b) Wording of sec. 16 of Magistrate's Courts Jurisdiction

Ordinance sufficiently wide to cover a preliminary enquiry ordered by Attorney General.

c) Order of Committal for trial before District Court of a Government Official in respect of an act relative to his functions — not vitiated by fact that order for preliminary enquiry was made by Attorney General under sec. 16 of Magistrates' Courts Jurisdiction Ordinance and not under sec. 74 of Criminal Procedure (Trial Upon Information) Ordinance.

Edit. Note:— As to a) see: CrA 144/41 and CrA 145/41 11 CtLR 14.

G. Salah for Applicants.

Crown Counsel (*Hogan*) for Respondent.

Application for leave to appeal from judgment of DC, Jerusalem, dated 20.4.42, in Felony No. 50/42, whereby applicants were convicted of stealing by a person in public service of property which came into his possession by virtue of his employement contrary to sec. 274, of stealing by agent contrary to sec. 276(c) and 2nd appellant — of receiving stolen property contrary to sec. 309 of Crim. Code Ord. 1936, and sentenced to 1 year's imprisonment each.

JUDGMENT

This is an application for leave to appeal from a conviction by the District Court of Jerusalem, in which the two applicants were convicted under Sections 274 and 276(c) of the Criminal Code and the second applicant was also convicted under Section 309, and each of them was sentenced to one year's imprisonment.

The evidence may be stated shortly as follows: A police patrol in the Jordan valley under the command of British constable Watt, of which the two applicants were members, came into contact with a gang of smugglers attempting to cross the Jordan River from Transjordan into Palestine. A certain amount of firing seems to have taken place on both sides and, as a result, the smugglers, with the exception of one, managed to escape leaving the donkeys on which the smuggled goods were loaded behind them. The two applicants are charged with having stolen some of this smuggled property.

The case for the prosecution depends upon whether there were eight donkeys or nine donkeys in this smugglers' convoy. Only eight donkeys were turned in to the Jericho Police Station and the allegation is that the ninth donkey was taken away by these two applicants and unloaded and the goods stolen. The District Court found in their judgment that there were in fact nine donkeys seized by the police and not eight. In arriving at that conclusion they seemed to have relied, in part at any rate, upon the evidence of one Salem Mohammad el Ismail. This witness, who is one of the smugglers, stated that they had nine donkeys with them when they crossed the river from Trans-Jordan into Palestine. He also says that when they arrived at Jericho he was told to say that there were only eight donkeys and not nine. He

states that he was beaten in order to make him tell this lie. He says that this was done with the knowledge of the British Constable Watt in charge of the patrol. The District Court found as a fact that there were nine donkeys and not eight. From the evidence before them this Court is not inclined to interfere with that finding of fact. Apart from that, the first applicant Yunis Ismail, made a full statement in the nature of a confession to the Police of Jericho, in which he detailed the facts and said that the Police of the patrol divided up the property found on the ninth donkey. When a search was made, a considerable part of the stolen property was found hidden in the earth in the garden of the first applicant. The District Court believed that evidence and in fact it is difficult to see how they could have come to any other conclusion.

The only other point taken on appeal is that there was no proper Order of Committal by the Attorney General ordering the preliminary enquiry, which is necessary seeing that the two applicants were policemen. The order for investigation was made under Section 16 of the Magistrates Courts Jurisdiction Ordinance by the Attorney-General himself, and it is argued with considerable force by the applicant that the order should have been made under Section 74 of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36. Both these sections in the Magistrates Courts Jurisdiction Ordinance and the Trial Upon Information Ordinance are in practically identical terms and the Court is of opinion that the wording of Section 16 of the Magistrates Courts Jurisdiction Ordinance is sufficiently wide to cover a preliminary enquiry ordered by the Attorney General in this case. This Court has already held that a preliminary enquiry is a proceeding in a Magistrate's Court. The result is that the application by the first applicant Yunis Ismail beside being completely devoid of any merits is equally unsupportable on any technical ground. The application for leave to appeal in this case must therefore be dismissed.

With regard to the second applicant, Ahmad Ali el Jundi, the evidence against him was very slight and Mr. Hogan, appearing for the Attorney General on this appeal, says that he cannot support the conviction. The only evidence against him was that he was a member of this particular police patrol when the goods were seized and that some property resembling the stolen property was later on found in his house in Jerusalem. The application in his case for leave to appeal must be allowed. The appeal is allowed and the conviction is quashed.

Delivered this 11th day of May, 1942.

CIVIL APPEAL No. 48/42

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

Before:— Rose, J. and Khayat, J.

Israel Glickman — Appellant.

v.

Benjamin Goldansky — Respondent

Action brought in MC for taking of account, value of subject matter being stated by Pltf to be not in excess of LP. 150 — Interpretation of Rule 171 of MC Procedure Rules, 1940 — Scope of sec. 3 of MC Jurisd. Ord.

Action for taking of account, whatever value of subject matter may be, — outside jurisdiction of Magistrate's Court, it must be brought in District Court, which has residuary jurisdiction in Palestine.

Pelley for Appellant. *Toublin* for Respondent.

Appeal from judgment of District Court, Haifa ,sitting in its appellate capacity in Civil Appeal No. 123/41 dated 23.2.42.

JUDGMENT

This is an appeal by leave from a judgment of the District Court of Haifa dismissing an appeal from a judgment of the Magistrate. The point to be decided is whether a Magistrate's Court has jurisdiction to hear and determine an action for the taking of an account where the value of the subject matter is stated to be not in excess of LP. 150.

There does not appear to be any authority of this Court on the matter but the point was considered by the District Court of Tel-Aviv in Civil Appeal (District Court) No. 195/37 when it came to the conclusion that an action for an account is a special action which does not fall within the matters included in the jurisdiction laid down in the Magistrates Courts Ordinance, 1935.

It is true that the jurisdiction of a Magistrate's Court is now contained in section 3 of the Magistrates Courts Jurisdiction Ordinance, 1939, but the relevant part of the section is substantially unaltered and reads as follows:

"3. Subject to the provisions of this Ordinance, magistrates' courts shall exercise jurisdiction as follows:

.. ..

(e) Civil actions (other than actions concerning immovable property):—

(i) When tried by a magistrate, other than a British magistrate, in which the value of the subject matter or the amount of the damage claimed does not exceed one hundred and fifty pounds, and

(ii) when tried by a British magistrate, in which the value of

the subject matter or the amount of the damage claimed does not exceed two hundred and fifty pounds; and

(iii) counter-claims to the same value or amount as in original actions.

Provided that, where the counter-claim arises from the same subject matter or circumstances as the original action, the magistrate may try such counter-claim whatever may be the amount claimed in it."

The Magistrate based his judgment on the view that a claim for an account is a *sui generis* action and has no definite money value, and that the position cannot be affected by the plaintiff's stating that he limits any resulting claim to a sum not exceeding LP. 50. Counsel for the appellant contends that, assuming the judgment in the Tel-Aviv case to be correct, the position has since been altered by the introduction of the Magistrates Courts Procedure Rules, 1940, Rule 171 of which empowers a Magistrate at any stage of the proceedings in a cause or matter to direct any necessary enquiries or accounts to be made or taken. He argues that as this rule is similar in its terms to Rule 221 of the Civil Procedure Rules, 1938, the inference should be drawn that the jurisdiction of the Magistrate's Court has been correspondingly widened.

The matter is not free from difficulty but I have come to the conclusion that this argument is fallacious and that the jurisdiction of the Magistrate's Court remains as it stood before the introduction of the rule, the Magistrate merely being empowered in the course of the hearing of any cause which falls within his jurisdiction, to direct the taking of any necessary accounts. In order to determine whether an action falls within his jurisdiction reference must still be made to section 3 of the Magistrates Courts Jurisdiction Ordinance. Having regard to the limited language of that section, I consider that the decisions of the Magistrate and the District Court were correct and that an action for an account must be brought in the Court which has the residuary jurisdiction in Palestine, namely, the appropriate District Court.

It is true that in England the County Court is empowered to hear actions for an account, but there the matter is covered by special statutory provisions which, of course, have no applicability to Magistrates' Courts in this country.

For these reasons I am of opinion that the appeal must be dismissed with costs on the lower scale to include the sum of LP. 15 for advocate's attendance fee.

Delivered this 29th day of May, 1942.

CIVIL APPEAL No. 134/42.

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

Before:— Copland, J. and Frumkin, J.

Israel Zerwinsky — Appellant.

v.

1. Beit Zeiroth Mizrahi
2. Shulamith Levanon. — Respondents.

Question of proper tender of rent — Appeal from judgment of DC sending case back to trial Court to determine whether or not there was a breach of contract — Better course for appellate Court to follow where mixed question of law & of fact in issue.

Where question of proper tender of rent a mixed question of law and of fact, appellate Court correct in remitting matter to trial Court instead of determining it itself.

Goitein for Appellant. *Gorali* for Respondents.

Appeal from judgment of DC, Jerusalem, sitting as a Court of Appeal, dated 26.6.42, in Civil Appeal No. 20/42.

JUDGMENT

This is an appeal by leave from a judgment of the learned Relieving President of the Jerusalem District Court allowing an appeal from a judgment of the Chief Magistrate and remitting the case to the Chief Magistrate on one point, to determine whether or not there was a breach of the contract as alleged by the appellant. The alleged breach in this case was non payment of rent. The appellant argues that there was no proper tender of the rent. It is admitted that no money was actually paid. We have heard a considerable amount of argument and we think that the learned Relieving President was correct in sending the case back to the Chief Magistrate to determine this point which is, in fact, a mixed question of law and of fact. It is undesirable in a way that on a second appeal, at any rate, an appellate Court should determine such a question. In these circumstances it would be undesirable and we do not propose to say anything about the merits of the case as there is a possibility that it may come back to us on its merits. We therefore confine ourselves to saying that we think that the order made by the learned Relieving President was a correct one and that the case should go back to the learned Chief Magistrate.

Costs to be in the cause and we certify a sum of LP. 10 as advocate's attendance fee on the hearing of this appeal.

Delivered this 5th day of October, 1942.

CIVIL APPEAL No. 82/42.

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

Before:— Copland, J.

His Grace Bishop Yousef Ma'alouf for the time being the head of the Greek Catholic Melkite Community in Acre, Haifa, Nazareth & all Galilee — Appellant.

v

Elias Mikhail Hajjar — Respondent.

Distinction between issue of Certificate of Succession and determination of property which may or may not pass under certificate — Certificate of Succession with rider that it should not be acted upon pending settlement by competent Court re ownership of property.

a) District Court in its probate capacity has no power to determine what property does or does not pass under Certificate of Succession.

b) If District Court satisfied that deceased left heirs but there is a dispute whether he left any property to be distributed or whether he was capable of inheriting they should issue Certificate of Succession with rider that it should not be acted upon pending settlement by competent Court re ownership of property.

Edit Note:—see CA 83/39 6 CtLR 136.

Bustany for Respondent.

Appeal from Order of DC, Haifa dated 24.4.42, in P.R. Case No. 66/41.

JUDGMENT

In this case Abcarius Bey on behalf of the appellants has withdrawn his appeal on the ground that in view of the judgment of this Court in Kaliopi N. Patlacos v. Greek Orthodox Patriarchate, Civil Appeal No. 83/39 *) (6 P.L.R. p. 462,) it would be quite useless to argue it and he therefore asks that the appeal be withdrawn. The Court orders that the appeal be withdrawn and the judgment of the District Court be confirmed.

Whatever difficulty may have arisen in this present appeal is due I think 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. The District Court sitting in its probate capacity has power only to issue probate or letters of administration as the case may be, or to issue certificates of succession. In its probate capacity a District Court has no power to determine what property does or does not pass under the certificate. It may well be, as this Court remarked in the case quoted

*) 6 CtLR p. 136.

that a man may leave heirs and at the same time his estate may be insolvent. The fact that an estate is insolvent does not mean that a man has no heirs. That I think, is the easiest exmple to exlain what I mean. In future, therefore, if a District Court is satisfied that there are heirs to a deceased but that there exists a dispute as to whether the deceased in fact inherited any property or left any property to be distributed, or for some reason or other he was incapable of inheriting property, the certificate should still be issued, but with a rider, as the learned President issued in this case, that no action should be taken on the certificate pending settlement by a competent Court regarding ownership of the property. That I think is the right view to take and I hope that District Courts in future will observe these recommendations.

The appeal is therefore withdrawn and the respondent is entitled to total costs of LP. 10.

Delivered this 8th day of October, 1942.

HIGH COURT No. 94/42.

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

Before:— Copland, J. and Khayat, J.

Samuel David Fried — Petitioner

v.

Execution Officer of the Magistrate's Court of Petah Tiqvah and 3 others. — Respondents

Court confirming agreement between parties to action for eviction & "cancelling" claim — CXO ordering eviction on strength of agreement confirmed by Court.

Order "cancelling" or dismissing claim and confirming agreement that Defendant should remain in premises up to specified date and then vacate them — not a judgment for eviction which can be executed.

Edit Note:—Compare HC 106/42 12 CtLR 149.

Levison for Petitioner.

Levin and *Shaony* for Respondents 2, 3 and 4.

Return to an order nisi issued on the 15th of September, 1942, directed to the first respondent calling upon him to show cause why his order of 28.7.42, made in Petah Tiqvah Magistrate's Court, Execution File 223/42, for the execution of an alleged judgment of eviction against Petitioner, dated 27.5.41, of the Magistrate of Petah Tiqvah Magistrate's Court, should not be set aside.

ORDER

We have already announced our decision and the following are our reasons therefor.

The petitioner was in occupation of certain business premises in Ramat Gan leased to him by the 2nd, and 4th respondents, hereinafter called the lessors. The lessors entered an action for eviction against the petitioner, the ground being non payment of rent due. During the course of the trial the parties came to an agreement and asked the Magistrate to confirm that agreement. Two of the conditions of the agreement were that the term of the lease should be extended from 1.7.41 to 31.5.42, and that at the end of that term the tenant would vacate the premises. The Magistrate thereupon cancelled the claim and confirmed the agreement. The petitioner did not vacate the premises on the date specified in the agreement, and the lessors put the order of the Magistrate into execution. The petitioner objects to execution on the ground that the action having been dismissed there was no judgment to execute, and that the agreement by itself cannot be executed unless a judgment is founded on it.

We think that the petitioner is right. The confirmation of the agreement after the Magistrate had cancelled the claim, and "cancelled the claim" can only mean to dismiss it, is of no legal force whatevne. There is no judgment for eviction which can be executed and the order nisi must, therefore, be made absolute, with costs against the lessors to include LP. 10 advocate's attendance fee.

Given this 7th day of October, 1942.

CIVIL APPEAL No. 54/42.

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

Before:— Rose, J., Edwards, J. and Frumkin, J.

Partnership M. Goledetz, of 29 Mincing Lane, London. Appellant

v.

Partnership Azriel Schrier & Son and o. Respondents

Defence asking that action should be struck out — Court concluding its ruling with words "the claim must be dismissed with costs" — Question whether appeal lies as of right or by leave — Order and decree.

1. Ruling to strike out statement of claim (even if concluding with "the claim must be dismissed") — not a decree conclusively determining right of parties, so appeal from it only by leave.

2. Appeal against ruling of District Court in a matter of

arbitration — only by leave either of District Court or Court of Appeal.

Edit Note:— CA 219/40 10 CtLR 10 followed; see CA 234/41 11 CtLR 59 and Edit Note thereto.

Reuss for Appellant. *Bar-Shirah & Elhanani* for Respondents.

Appeal from judgment of DC, Tel-Aviv, dated 23.3.42, in Civil Case No. 182/41.

JUDGMENT

In this case a preliminary point has been taken by the Respondent that the Appellant is at fault in that he should have obtained leave to appeal. It is true that at the conclusion of the ruling of the learned President, he used the words "the claim must be dismissed with costs", but in order to see what was really meant by those words, I think that it is relevant both to look at the remainder of the ruling itself and also to see what in fact was asked for in the statement of defence. Paragraph 1 of the defence asks that the action be struck out, meaning presumably that the statement of claim should be struck out, and in the final paragraph of the defence, it also prays that the action be struck out on certain technical grounds. Alternative defences were raised on the merits. These merits were not considered by the learned President, as he appears to have dealt with the matter purely on a technical footing and in his ruling itself it is, I think, abundantly plain that what he intended to do, and what he in fact thought he was doing, was to strike out the statement of claim.

Now, according to the Law of Palestine the only power to strike out is contained in Rule 21 of the Civil Procedure Rules. Rule 317 of the Civil Procedure Rules says that an order of a District Court other than a decree, may be appealed against to the Supreme Court with leave. The point then arises as to whether an order or ruling striking out a statement of claim under Rule 21 is a decree within the meaning of Rule 2 of the Civil Procedure Rules. On that point I am clearly of opinion that it is not, because it does not conclusively determine the rights of the parties, in that Rule 23 of the Civil Procedure Rules provides that the striking out of a statement of claim shall not preclude the plaintiff from presenting a fresh statement of claim in respect of the same cause of action.

Authority for this view is contained in Civil Appeal No. 219/40*) (7 P.L.R. 600) in which the late Chief Justice said;

> "We think that the order of the lower Court was made under Rule 21 of the Civil Procedure Rules, and that being so leave to appeal should have been brought under Rule 317 before the appeal could be heard."

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*) 10 CtLR p. 10.

I am also of opinion that, having regard to paragraph 6 of the statement of claim, this was an action to enforce an award. That being so, I think that under Section 15 (3) of the Arbitration Ordinance an appeal only lies from the ruling of the District Court by leave either of that Court or of the Court of Appeal.

On these two grounds I am of opinion that the appeal must be dismissed for the technical reason that no leave was obtained. In order to meet any difficulties that may arise in the future, I would add that Mr. Bar-Shira has stated to this Court, very properly, that he does not intend, in reliance upon the last few words of the learned President's ruling, to raise the plea of *res judicata* if the action is brought in another form.

The appeal is therefore dismissed with costs on the lower scale. Having regard to the circumstances and to the fact that the appeal was decided on a purely formal point, we propose to certify the sum of LP. 5 only for advocate's attendance fee.

Delivered this 12th day of May, 1942.

CRIMINAL APPEAL No. 82/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Copland, J., Edwards, J. and Khayat, J.

The Attorney-General — Appellant.

v.

Saleh Mohammad Salim Shama — Respondent

Accused acquitted under Rule 265, MC Proc. Rules — New charge filed by AG in DC — DC acquitting accused on ground that acquittal in MC a bar to new charge — Non-applicability of MC Proc. Rules to summary trials in DC — Effect of stay of execution.

1. Magistrates' Courts Procedure Rules do not apply to summary trials in District Courts; Rule 265 (withdrawal of complaint), not incorporated in District Court (Summary Trials) Rules, cannot be imported from Magistrates' Courts Procedure Rules.

2. Stay of Proceedings — no bar to filing of further proceedings against person concerned.

Crown Counsel (*Hogan*) for Appellant. *Cattan* for Respondent.

Appeal from judgment of DC Haifa in Misd. Case No. 98/42, dated 13.5.42, whereby respondent was acquitted on ground of stay of proceedings in respect of 2 charges under sec. 105 & 109 of Crim. Code Ord. 1936.

JUDGMENT

This is an appeal by the Attorney-General against a judgment of the District Court acquitting the accused on the ground that the accused was acquitted by virtue of Rule 265 of the Magistrates Courts Procedure Rules, 1940, and that that acquittal was a bar to the new charge filed against him.

Now, we may say straight away that the reason given by the District Court for the acquittal was a wrong one. It is quite clear that the Magistrates Courts Procedure Rules do not apply to summary trials held in the District Court because for that purpose there are special District Court (Summary Trials) Rules and just because the equivalent of Rule 265 of the Magistrates Courts Procedure Rules is not incorporated in the District Court (Summary Trials) Rules that is no reason for importing it in the way that the District Court did. There are, however, further points which have been argued in this appeal with which this Court must deal.

The first point taken by Mr. Cattan is that no appeal lies under Section 67 of the Criminal Procedure (Trial Upon Information) Ordinance, on the ground that here the District Court committed an irregularity of procedure and that that is not a ground of appeal. It is quite true that irregularity of procedure is not a ground of appeal but where the District Court went wrong in this case was in applying the law wrongly to the facts In this case they applied the wrong law to the facts; we are, therefore of opinion that an appeal lies.

It is further argued by Mr. Cattan that the powers of the Attorney-General with regard to ordering a stay of proceedings are statutory, being given by Section 18 of the Magistrates Courts Jurisdiction Ordinance, 1939, and that nowhere is there to be found a power to cancel a stay. In these proceedings, however, the stay has not been cancelled. The stay of the original proceedings remains in effect for all time and the present proceedings are founded on a new charge. Whether the Attorney-General has a power to file a new charge after staying proceedings upon an old charge is we think covered by Criminal Assize Appeal No. 3/29 Attorney General v. Hilweh Hazboun (P.L.R. p. 362). This was an application for leave to appeal to the Chief Justice from a final judgment given by the Court of Criminal Assize. Sir Michael MacDonnell, the late Chief Justice, at page 364 said as follows:—

> "The Attorney-General could have stayed proceedings upon that Information and filed a new Information, or new Informations, charging Hilweh as well as Jerius with murder, either jointly with Jerius in one Information, or separately in distinct Informations."

The application for leave to appeal in this particular case by the Attorney-General was dismissed on the ground that the Attorney General did not

make use of the one means which lay to his hand under the law as it then existed. It seems to us that the grounds of the decision in that case apply equally to this case. There is no bar to an Attorney-General when once he stays proceedings upon an information or charge, filing a new information or charge, and that seems to be supported also by remarks made in Archbold's Criminal Pleading Evidence and Practice 1931 p. 128 where it is stated that a nolle prosequi puts an end to the prosecution but does not operate as a bar or a discharge or acquittal on the merits. It is true that in Roscoe's Criminal Evidence it is said, reporting a case on the subject, that up to the year 1705 there had been no instances apparently reported where a fresh information had been filed after a stay. It seems perhaps a little peculiar because in those days criminal trials were considerably more technical in their procedure than they are to day. The Court is of opinion that a stay of proceedings or a nolle prosequi, if one likes to use Latin phrase, is no bar to the filing of further proceedings against the person concerned.

To deal with one of Mr. Hogan's arguments we do not think that Section 7 of the Interpretation Ordinance actually applies to the case but refers to regulations and orders which have to be published in the Gazette but so far as I know, and I am quite sure, that no informations or orders of such a nature have ever been published in the Gazette.

For these reasons the Court holds that the appeal must be allowed and the charge remitted to the District Court to be heard on its merits.

Delivered this 15th day of June, 1942.

HIGH COURT CASE No. 36/42.

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

Before:— Copland, J. and Khayat, J.

The Registrar of Trade Marks — Petitioner.

v.

1. Trupha Limited
2. M. Cholodny — Respondents.

Application by Registrar of Trade Marks for determination which of two marks should be registered — High Court ordering both marks to be registered — Priority of user of trade mark.

1. Where on a reference by Registrar of Trade Marks to determine which of two marks, in his opinion very closely resembling one another should be registered High Court sees no likelihood of confusion between the marks, it will order registration of both of them.

2. (*Obiter*) Question of priority of user of trade mark does not arise where difference in dates of user too small to be taken into account.

Rand & Seligsohn for Respondents.

Application for determination of rights of Respondents in respect of disputed trade marks.

ORDER

This is a reference by the Registrar of Trade Marks to the High Court to determine which of two marks put forward for registration shoud be registered, the Registrar being of opinion that the marks very closely resemble one another. The marks are in connection with a preparation containing iodine, one is 'Iodoral' and the other is 'Iodosal Trupha'.

The first point for decision is whtether the marks do so resemble one another as to be likely to cause confusion, and the second is if they would so cause confusion, then which of the two has the prior right to registration. It is stated that both these preparations are only supplied on the prescription of a doctor. One of the arguments of the second Respondent is that, owing to the bad handwriting of doctors, confusion is likely to arise in the mind of a chemist who is called upon to supply one of these particular preparations. All we can say is, if such confusion would occur in these two names, Iodoral and Iodosal Trupha, with a pharmacist, then pharmacists must be more stupid and unintelligent than one has hitherto supposed them to be. Speaking for ourselves, and that is the test the Court has to apply, we cannot see there is any likelihood of confusion. If a pharmacist is presented with a prescription which he cannot read, then, of course, it is his duty to telephone to the physician who gave the prescription and find out exactly what he intended to prescribe. It is not his duty to guess which of the two is to be supplied. As we have said, in our opinion, in the circumstances in which these preparations are supplied, there is not such a resemblance between the two that any confusion should arise in the mind of any reasonable person. That being so, the second question of priority of user does not in fact arise, though if it had arisen the difference in dates of user is really too small to be taken into account.

In the result we order that both marks should be registered by the Registrar of Trade Marks, and that answers the Registrar's question.

The first Respondent is entitled to costs, together with a sum of LP. 10 advocate's attendance fee at the hearing of this reference.

Delivered this 15th day of May, 1942.

HIGH COURT No. 106/42

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

Before:— Copland, J. and Khayat, J.

Prances Mayani — Petitioner.

v.

Chief Execution Officer, Magistrate's Court, Jerusalem.
Abraham I. Shapira — Respondents.

Court confirming agreement between parties to action for eviction & making it order of Court — Execution of consent judgment.

Consent judgment based upon, and embodying, agreement between parties that Defendant should vacate premises on specified date — a judgment for eviction which can be executed.

Edit Note: Compare HC 94/42 12 CtLR 142.

Levitsky for Petitioner. *Goitein* for Respondent No. 2.

Return to an order nisi issued on the 7th of September, 1942 directed to lst Respondent calling upon him to show cause why his order dated 19.8.42 in Jerusalem Execution file (Magistrate's Court) No. 777/42 should not be set aside and to cancel and/or stay all execution proceedings in the said file.

ORDER

This case is very similar to High Court 94/42 heard on the same day. The difference is that in this case there is a judgment which can be executed. The 2nd respondent sued the petitioner for eviction, the ground being non payment of rent. When the action came up for hearing the 2nd respondent agreed not to ask for immediate eviction and after negotiations with the petitioner it was agreed that the premises should be vacated on 1.7.42. The learned Magistrate gave judgment in accordance with the agreement which was recited in full in the judgment. This was, therefore, a consent judgment and there was no question of staying proceedings nor, as was the case in High Court 94/42, was the action dismissed. We think that this judgment, based as it is upon, and embodying, the agreement between the parties, can be executed and the petition must, therefore, fail.

For these reasons the order nisi must be discharged. The petitioner will pay the 2nd respondent his costs to include LP. 10 advocate's attendance fees.

Given this 7th day of October, 1942.

CIVIL APPEAL No. 186/42.

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

Before:— Rose, J., Frumkin, J. and Khayat J.

Shalom Haim Maswari — Appellant.

v.

1. David Benjamini

2. Levana Benjamini Respondents.

Irrelevance of absence of any notification from landlord to tenant and vice versa — Tenant failing to make payment of rent on date fixed in contract of lease and offering payment some 11 days later — Question as to whether or not tenant failed to continue to pay rent — CA making finding of fact — Construction of sec. 8(1) of Rent Restriction (Dwelling Houses) Ord. 1940.

1. Tenant's position under Rent Restriction (Dwelling Houses) Ordinance, 1940 — not affected by absence of any notification from landlord to vacate the premises, nor by absence of any notification on his part to landlord expressing his intention of holding on under the Ordinnce.

2. a) Question whether tenant continues to pay rent — one of fact and of degree.

b) A trifilng unpunctuality in payment of rent — not to be regarded as discontinuance of payment.

3. Where Court of Appeal of opinion that, having regard to judgment of trial Court and circumstances of case, trial Court would come to same conclusion as Court of Appeal, were matter remitted for making a finding, it may dispense with remittal.

4. "Other conditions of the tenancy" in sec. 8(1) of Rent Restriction (Dwelling Houses) Ord. 1940 should not be held to include condition as to mode of payment of rent, phrase refers to matters altogether unconnected with such payment.

Edit Note: CA 55/41; 9 CtLR 142 and CA 80/40 7 CtLR 198 distinguished. See CA 121/42 12 CtLR 81.

Eliash for Appellant. *Smoira* for Respondents.

Appeal from judgment of DC, Jerusalem, dated 20.7.1942, in Civil Appeal No. 13/42.

JUDGMENT

This is an appeal by leave from a judgment of the District Court of Jerusalem allowing an appeal from a judgment of the Magistrate of Jerusalem.

The respondent in this case is a tenant who ,the period of his tenancy having expired, is entitled, in our opinion, to the protection afforded by Section 8 of the Rent Restriction (Dwelling Houses) Ordinance, (No. 44) of 1940. His position, in our opinion, is not affected by the absence of any notification from the landlord to vacate the premises; nor by the absence of any communication on his part to the landlord expressing his intention of holding on under the Ordinance.

The first point taken by the appellant is that the respondent discontinued payment of rent at the agreed rate. The facts would seem to be that the respondent, who was bound under the terms of his agreement to pay his rent quarterly, failed to make a punctual payment on the 29th November, 1941. He gave reasons for this failure which seem both to the Courts below and to us to be not unreasonable and, in fact, offered the rent in full some 11 days later.

The question as to whether a tenant continues to pay rent must,

in our opinion, be a question of fact and of degree. A trifling degree of unpunctuality should not, in our opinion, be regarded as a discontinuance of payment. While clearly no hard and fast line can be drawn we agree with the President of the District Court that in the circumstances of this case the delay of 11 days was not sufficiently serious to amount to a discontinuance. The only point which has caused us some little doubt is whether we should remit the matter to the Magistrate to make a finding on this matter. We consider, however, that it is not necessary to do so because it is quite clear from his judgment that his sympathies on the merits were with the respondent and that he only decided in favour of the appellant because he considered himself compelled to do so on technical grounds. Were the matter remitted to him we have no doubt that he would come to the same conclusion as the learned President and ourselves. To remit the case to him, therefore, would only be to increase the costs.

Mr. Eliash argues in the alternative that the respondent failed to perform one of the "other conditions of the tenancy" in that by his unpunctual payment he broke a term of the agreement under which the respondent was bound to pay rent by a series of promissory notes, which notes, of course, he had to meet punctually. Mr. Eliash asks us to put a narrow construction on the Section and to hold that a provision as to the mode of payment of rent should be regarded as one of the "other" conditions of the tenancy. He relied upon 2 cases, C.A. 55/41*, P.L.R. Vol. 8 p.179 and C.A. 80/40**,P.L.R. Vol, 7 p.302. Both these judgments, however, were decided upon the Landlord and Tenants (Ejection and Rent Restriction) Ordinance (No. 44) of 1934, the wording of the appropriate Section of which (Section 4) is not the same as that of the present Section 8. We prefer the broader interpretation which Dr. Smoira invited us to adopt and are of opinion that the phrase "other conditions of the tenancy" refer to matters altogether unconnected with the payment of rent.

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

Delivered this 10th day of November, 1942. *Puisne Judge.*

CIVIL APPEAL No. 148/42

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

Before:—Edwards, J. and Abdulhadi J.

William A.R. von Blaese — Appellant.

v.

Irene von Blaese — Respondent.

PDC granting alimony pendente lite to Jewish wife of Protestant subsequently converted to Islam, both of Pal. nationality — Be-

*) 9 CtLR 142. **) 7CtLR 198.

lated submission that CJ should under art. 55of Pal. O. in C. first determine Court to have jurisdiction.

Court of Appeal will not interfere with order of alimony pendente lite in suit between parties of different Religious Communities on ground that trial Court should have applied its mind to art. 55, Palestine Order in Council (Chief Justice determining Court to have jurisdiction), if point only taken after order made.

Edit Note: HC 80/42 12 CtLR 90 followed.

Ben-Jaminy for Appellant. *King* and *Gaguin* for Respondent.

Appeal from order of DC Jerusalem, dated 30.6.1942, in motion 185/42, (Civil Case No. 42/42).

JUDGMENT

This is an appeal from an order of the learned President District Court Jerusalem, (Judge Shaw), dated 30th June, 1942, whereby he ordered the respondent to the action to pay to the petitioner, who is the respondent to this appeal, the sum of LP. 8 monthly *pendente lite* as from the date of the filing of the statement of claim, namely, 13th April, 1942.

The parties met in Berlin in 1934 and about August, 1935, were married in England where a certificate of marriage was issued to them. In February, 1936, they came to Palestine as immigrants and settled in Jerusalem. At the time of the marriage the present respondent was a German Jewess and the present appellant was a Latvin Protestant. Since then the parties have acquired Palestinian nationality. Differences apparently arose between them and the present appellant is said to have deserted the respondent who, in consequence, brought the action in the District Court for maintenance or alimony, at the same time making an application for alimony pendente lite. It seems that, in his reply, the present appellant took the earliest opportunity of alleging that he had ceased to be a Latvian Protestant and had become a Moslem and he submitted that the District Court had no jurisdiction. On the 30th June, the learned President made the order against which the present appeal has been taken. On the 22nd July, 1942, the present appellant applied, by motion, for leave to appeal to this Court under Rule 317 of the Civil Procedure Rules, 1938. It would seem that then for the first time the submission was made to the learned President that under Article 55 of the Palestine Order-in-Council 1922 the Chief Justice alone was empowered to decide which Court had jurisdiction. The learned President, after hearing argument, gave leave to appeal, at the same time saying that he thought that the appellant had a right to apply to the Chief Justice but refused to suspend the Order of interim alimony. It is against that order that the present appellant now, by leave, appeals.

The main argument for the appellant is that the learned President should himself have realised that only the Chief Justice (who in fact subsequently did on the 5th October, 1942, decide that the District

Court of Jerusalem should have jurisdiction) had power to decide which Court should have jurisdiction and it was further argued that the learned President should have stayed all proceeding and that he had no power to make any order whatsoever in the case. Now, we are dealing with the order of the 30th June. It may well be that had this argument been advanced to Judge Shaw before that Judge made his order of 30th June, he might have abstained from making any order, even an order of alimony *pendente lite*, pending the submission to him of a decision by the learned Chief Justice under Article 55. As the advocate who then appeared for the present appellant on the 30th June did not bring the matter of article 55 definitely to the notice of the learned President, we are not prepared to interfere with his order. We refrain from discussing the legal question whether alimony *pendente lite* can be granted unless it is established that the national law to be applied in the case itself recognises the grant of such an interim remedy.

We have been referred to High Court 80/42 *) which would appear to be binding on us. We might add that Mr. Ben-Jamini who appeared before this Court did not appear in the District Court on the 30th June but only appeared in that Court on the 22nd July.

For the foregoing reasons we dismiss this appeal. Costs of this appeal will abide the event. We certify an advocate's attendance fee of LP. 10 at the hearing of this appeal.

Delivered this 22nd day of October, 1942.

CRIMINAL APPEAL No. 65/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Gordon Smith C.J., Edwards J. and Frumkin J.

Daoud Butros Jallad — Appellant.

v.

The Attorney-General — Respondent.

DC on appeal by AG substituting in adsence of accused sentence of imprisonment for one of fine — Rule of practice as to increasing sentence on appeal.

District Court in appellate capacity not to increase sentence or vary it to accused's prejudice without his being present and having opportunity of being heard.

E. Nasser for Appellant. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from judgment of DC. Jaffa, sitting as a Court of Appeal, in Crim Appeal No. 26/42, dated 30.4.1942, whereby it confirmed conviction of MC Jaffa, against Appellant, and varied sentence to 4 months' imprisonment.

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*) 12 CtLR p. 90.

JUDGMENT

In this case the sentence on the accused was varied on the appeal before the District Court, such appeal being by the Attorney-General. He had been fined LP. 10 before the Magistrate, and the sentence was varied to four months' imprisonment before the District Court. Apparently this increase of sentence took place before the District Court in the absence of the accused, and it was of course very much to his prejudice, and he had no opportunity of urging any reasons why he should not go to prison and be allowed the alternative of a fine. He had pleaded guilty to the offence but the price which he charged per kanter was very nearly four times the maximum controlled price.

We propose to vary the sentence in this case, and we propose to lay down as a rule of practice that a District Court should not increase a sentence on an accused person on appeal before it, or vary the sentence to the prejudice of the accused, without the accused being present and having the opportunity of being heard.

The sentence will be varied to the extent of a fine of LP. 50, or in default three months' imprisonment.

Delivered this 18th day of May, 1942.

HIGH COURT 64/42.

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

Before:—Copland J. Frumkin J. and Abdulhadi, J.

Binjan Haaretz Co. Ltd. Petitioner.

v.

Chief Execution Officer, Jerusalem & o. Respondents.

Sale of mortgaged property through XO — Application for fresh valuation and advertisement and extension of time.

Valuation made about a year prior to order of final sale — not such an old one as to necessitate a fresh valuation, but, in any case question of whether a fresh valuation should be made or not depends on discretion of Chief Execution Officer.

Goitein and *Asal* for Petitioner. *Buxbaum* for Respondent No. 2.

Return to an order nisi issued on 1.7.1942, diected to lst Respondent calling upon him to show cause why he should not set aside his order dated 12.6.1942, in Ex. file No. 80/41 and order a fresh valuation and/or a further advertisement with true price of land to be therein stated and to grant a further extension of time before final order of sale takes place.

ORDER

In this case the petitioners ask for an order of final sale issued by the Chief Execution Officer Jerusalem to be set aside on various grounds, the principal one being, that the valuation which was made in July 1941, was out of date when the final order of sale was made in June 1942,

and that the mortgagees are not in need of the money and it would only cause great hardship to the mortgagors if the mortgage debt is to be paid. They also ask for a further advertisement with the true price of the land to be stated therein and a further extension of time before the final order of sale takes place. It must be noted that the principal debt matured on the 6th September, 1928, that is to say, fourteeen years ago. It is also to be noted that no interest has been paid since the 1st December, 1936, that is, for nearly six years, and the interest due comes to about LP. 450. In these circumstances, the application for the discretion of the Chief Execution Officer to be exercised in favour of the mortgagees does not stand much chance of success.

The question of valuation or whether a new valuation was to be made, in our opinion, depends primarily upon the discretion of the Chief Execution Officer. Primarily so also the question whether a further extension of time should be granted for payment of the debt and interest depends on the discretion of the Chief Execution Officer. It is impossible to say, when we consider the facts in this case, that the Chief Execution Officer has exercised the discretion vested in him improperly. The valuation is not such a very old one as to necessitate a fresh valuation being made and, as I said in any case, the question of whether a new valuation should be made or not is a question really for the Chief Execution Officer.

In these circumstances we think the order nisi must be discharged with costs and LP. 10 advocate's attendance fee for the second respondent.

Delivered this 15th day of October, 1942.

CRIMINAL APPEAL No. 147/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:—Rose, J. Frumkin, J. and Khayat, J.

Abdul Hamid Salem El Diruwi — Appellant.

v.

The Attorney General — Respondent.

Question of leave to appeal from a judgment of a Munic. Tribunal — Nature of Munic. Trib. and finality of its judgts.

Municipal Tribunals, though exercising under Reg. 5 of Defence (Municipal Tribunal) Regulations certain of powers of Magistrates, — not Magistrates Courts, and no appeal lies from their judgments.

Goitein for Appellant.

Crown Counsel (*Rigby*) for Respondent.

Appeal from judgment of DC, Jaffa, sitting as a Court of Appeal from judgment of Munic. Tribunal of Gaza, dated 17.7.1942, in Crim. Appeal No. 27/42.

JUDGMENT

This is an appeal from a judgment of the District Court of Jaffa refusing leave to appeal from a judgment of a Municipal Tribunal sitting at Gaza.

Mr. Goitein frankly conceded that the matter may be reduced to a single point, and has been obliged to rely on what we must, with all respect, call the somewhat desperate argument that under article 39 of the Palestine Order-in-Council the words "Magistrates' Courts" include a Municipal Tribunal appointed under the Defence (Municipal Tribunal) Regulations, 1941. He contends that if that premise is accepted, he is entitled to call in aid article 40 which provides that a District Court is in all cases an appellate Court from a Magistrate's Court, subject to any Ordinance or Rules. He then argued that the regulations to which we have just referred are not Rules within the meaning of Article 40.

The whole argument depends, of course, upon the preliminary contention that a Municipal Tribunal is a Magistrate's Court. We have no hesitation in saying that, in our opinion, it is nothing of the kind. A Magistrate's Court, as its name implies, must consist of a person or persons holding a warrant, temporary or permanent, as a Magistrate. A Municipal Tribunal consists of three persons, one of whom, in the case of a Municipal area, has to be the Mayor , and the other two are persons appointed by the High Commissioner, who has a complete discretion as to the two persons he appoints. They may be persons without special qualifications and there is nothing in the Regulations to say that they have to hold a warrant as a Magistrate. It was no doubt for this reason that, in order to enable these Tribunals to function at all, the legislature found it necessary to enact Regulation 5 of the Defence (Municipal Tribunal) Regulations which provide that a Municipal Tribunal shall have certain of the powers of a Magistrate.

If a Municipal Tribunal is not a Magistrat's Court, and we hold that it is not, we have then to consider Regulation 6 which says:

> "The judgment of a municipal tribunal shall be final and conclusive, and no judgment, order or proceeding of a municipal tribunal shall be called in question, whether by writ or otherwise, or challenged in any manner whatever by of before any court".

No language, in our opinion, could be less ambiguous than that. Whether the result obtained by this regulation is desirable in the public interest is a matter that one must presume to have been considered by the legislature, but it is certainly not a matter which we can take into account. We are of opinion, therefore, that no appeal lies from a judgment of a Municipal Tribunal.

This appeal is therefore dismissed.

Delivered this 22nd day of October, 1942.

CIVIL APPEAL No. 28/42

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

Before:—Gordon Smith, C.J., Khayat, J. and Abdulhadi, J.

Ibrahim Adham el Farouki, Jaffa, Abul Huda Street, in his capacity as Mutawalli of Wakf "Abul Huda" and his 2 sons etc. Appellant.

v.

Sheikh Mohammad Ragheb Abul Huda El Farouki, Jaffa. Respondent.

Claim by beneficiaries of Waqf — Prescription.

Action by one beneficiary against Mutawalli (or Administrator) does not postpone prescription as regards claims of other beneficiaries.

Edit. Note: LA 49/36 9 C of J 904; CA 151/33 8 C of J 550.

Hussayni for Appellant.
Elia for Respondent.

Appeal from jdgt of DC, Jaffa sitting as a Court of Appeal, in Civil Appeal No. 82/41 dated 8.1.1942.

JUDGMENT

This is an action brought by the appellant in his capacity as Mutawalli of a waqf in respect of moneys due by a late Mutawalli. The moneys are due in respect of the years 1924 and 1925 when the respondent was Mutawalli.

The matter was investigated in the Magistrate's Court and on the ground that prescription was not postponed by reason of the appellant's own action in 1927, the claim was dismissed. On appeal to the District Court, on the same grounds, the appeal was dismissed and they held that the Magistrate's finding as regards prescription was correct. That is the main point in the appeal in this case, that is, whether by reason of the individual and personal action brought by the appellant in 1927, claiming his own personal share as a beneficiary of a wakf, prescription as regards others, commences from the date of the account which was ascertained by the Waqf Commission, or alternatively from the date appellant obtained his judgment. Finally, judgment was given in favour of appellant for one out of 18 and half shares on the 7th May, 1927. 'It is clear from Article 1667 of the Mejelle that time commences to run from the date when the right accrues to the plaintiff to claim the subject matter of the action and, in this case, the beneficiaries were entitled to claim their shares, as I said, since the moneys came into the hands of the Mutawalli, 1924—1925. Immediately after 1925 they could have taken action instead of which they have sat and done nothing ever since then. The action brought in 1927 by the Mutawalli himself does not, in my opinion, nor in the opinion of my brothers, extend the period of

prescription, which, as I have said, commences from the time the moneys came into the hands of the late Mutawalli. Similarly article 1672 does not help the appellant, in fact, that also is against him, and I cannot see that the case of the Privy Council quoted, is of any real relevance to the particular point raised in this appeal.

For these reasons we are unanimously of opinion that the appeal must fail. The Mutawalli should pay the costs of this appeal personally and the costs of the lower Court should be paid out of Waqf funds to include a sum of LP. 10 in this Court.

Delivered this 27th day of April, 1942.

CIVIL APPEAL No. 52/42.

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

Before: — Copland, J., Khayat, J. and Abdulhadi, J.

Taher Ahmad Abu Sultaneh and 3 others — Appellants.

v.

Salim Ali Ahmad el Dihmis and 4 others — Respondents.

Co-owner in Masha land seeking to restrain other co-owners from having part of land registered in their names.

1. Every owner and co-owner in Masha land — entitled to ask for injunction prohibiting other co-owners from registering in their names any part of the land and from interfering with his own possession.

2. (Per Abdulhadi J. dissenting) Unlike in an action for dispossession a co-owner cannot ask that other co-owners should be prohibited from registering in their names certain shares in Masha' land and from interfering with the land.

Appeal from jdgt. of MC, Tulkarem sitting as a LC in Civil Case File No. 6/42, dated 28.3.1942.

JUDGMENT

This is an appeal from the judgment given by the learned Magistrate of Tulkarem sitting as a Land Court. In that judgment the Magistrate held that the powers of attorney held by the present appellant, Taher Ahmad Abu Sultaneh, were invalid and that he had no power to bring the action before the Magistrate's Court. The prior history of the case before the Settlement Officer and the Land Court of Nablus is not material to the present appeal.

The principal ground of appeal is that the Magistrate was wrong in holding that Taher could not bring this action in his personal capacity. The point as to the powers of attorney being invalid has been dropped in this appeal.

I said just now that the prior history of the case was not important.

That is not quite accurate because the judgment of the Land Court stated definitely that the first three respondents to this appeal were merely mortgagees and had no rights therefore of ownership. The mortgage was for the amount of 2926 Turkish piastres and the Land Court ordered that a note should be inserted in the Register that the land was so subject to this mortgage and that the heirs, that is to say, the first three respondents in this present appeal, should take the produce until the mortgage is paid. The appellant has produced receipt No. 522899 from the Land Registry Office of Nathanya proving that the mortgage debt has been repaid, the sum of LP.24.381 mils being described as the mortgage debt due on this paticular parcel. That judgment was not taken any further and therefore has become final and stands. Therefore the first three respondents are only mortgagees and have no rights of ownership.

The question in this appeal is whether Taher can take steps by himself to restrain these mortgagees from having a part of the land registered in their own names and to restrain them from interfering with his own possession. The majority of the Court are of opinion that he can; since this land being Mashaa land, every owner and co-owner in the Mashaa has an interest in every particle of the land.

For these reasons we think that the present appellant was entitled to take action in the sense that he did and to ask that an injunction should be issued prohibiting the first three respondents from having any part of this land registered in their names and from interfering with his own possession.

The appeal will therefore be allowed and the order of the Court will be as prayed by the appellant. The appellant is entitled to his costs on the lower scale in this Court and his costs below together with the sum of LP.10.— advocate's fee for attending the hearing of this appeal, against the first three respondents.

Delivered this 18th day of May, 1942.

British Puisine Judge

Abdulhadi, J. (dissenting).

I am of opinion that the first Appellant, Taher Ahmad Abu Sultaneh, whose appeal counsel for Appellant has only argued on the ground that his submissions are identical with those of the other Appellants, is not entitled to ask that the Respondents should be prohibited from registering in their names certain shares in a land and should be restrained from interfering in the land. He is not entitled to do so because he does not deny that the said shares do not belong to him, and admits that his share was registered in the Land Registry in his name, and no one of the Respondents interferes with his possession. I think that such a claim must be made by the persons who own these shares independently, even if their shares and appellant's share pertain to the same land. When defining what an action is, Article 1613 of the Mejelle says that it is a claim by one who is claiming his right from another, and Appellant here does

not claim any right to himself. So also Article 1075 of the Mejelle considers joint owners of property held in absolute ownership strangers to one another as regards their shares. It appears, therefore, that the first Appellant, Taher, cannot be a proper party as against the Respondents in respect of what he is claiming in this appeal.

As regards Land Appeal No. 29/29, 1 PLR 422, cited by counsel for Appellant in support of his claim, I think that this case does not apply, because it was an action for dispossession while the present case is not so.

For the above mentioned reasons I think that the appeal should be dismissed.

CIVIL APPEAL No. 139/42.

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

Before: Copland, J., Frumkin, J., and Khayat, J.

Salam Mahmoud Hannoum, in his capacity as one of the heirs of his late father Mahmoud Hannoum and on behalf of the estate of his said father. Appellant.

v.

Hanna Abu Ata Respondent.

Notarial deed put into execution — Debtor paying off whole debt under notarial deed by yearly instalments — Belated claim that loan included usurious interest — Disagreement between Judges.

1. A notarial deed in execution has force of a judgment.
2. After paying during a period of several years all instalments on notarial deed in execution — too late to claim that loan included usurious interest.

Atalla for Appellant. *Moghannem* for Respondent.

Appeal from judgment of DC, Nablus, dated 15.7.1942, in Civil Case No. 4/42.

JUDGMENT

The first point in this case is whether the District Court, where two Judges had disagreed, was right in applying the Defence (Judicial) Regulations (No. 2) 1942, which came into force on the 14th day of July last and in dismissing the case because of disagreement. The two learned Judges delivered dissenting judgments on the 27th of June, 1942. On that particular date the Defence (Judicial) Regulations, 1942, were in force, dated the 24th June, 1942. The two Judges and the learned President were both unaware on the 27th June of the existence of those regulations and the learned President on application sent the case back to the Judges on the 13th of July to deal with it in accordance with the first Judicial Regulations. At the time it came back to the Judges the second Judicial Regulations were in force and they then

proceeded to dismiss the case owing to the disagreement. In this case it does not matter because, whatever set of regulations were in force, the result is the same, since under the first regulations it was the opinion of the presiding Judge which prevailed, and the presiding Judge's opinion was to dismiss the case. In our opinion there is no necessity to call in a third Judge as suggested, as the regulations came into force on the dates on which they are respectively stated to have come into force.

The facts of the case are that the appellant had given a notarial deed to the respondent admitting that he owed him a large sum of money. The deed was put into execution and the first instalment was paid in the year 1933, and instalments continued to be paid right up to the final instalment in the year 1942. For nine years the appellant never made any objection to the execution of this document. For nine years he paid the instalments. It was not until February 1942 after the last instalment had been paid, that the appellant entered an action in the District Court claiming that usurious interest was included in the loan. Now, the appellant says that the last instalment of LP.200 was paid by him as a deposit and that in a separate petition addressed to the Chief Execution Officer he asked for a delay to institute an action, which he finally did institute. The fact remains that according to the Execution officer's record the LP.200 was paid and there is no mention in the record of it having been paid as a deposit. The appellant attached the LP. 200 which would have been an entirely unnecessary proceeding if, in fact, it had been paid as a deposit, but from an application heard before the Registrar who released the attachment, the Registrar finds as facts that several payments were made by the appellant, that a dispute arose as to the exact sum paid, and then follow these important words "a settlement followed which provided the payment of LP.200 by the appellant to the respondent in the execution office of Tulkarm and the release of the appellant's properties. That was done". Now, it is quite clear from that that these LP.200 were paid as a result of a settlement effected between the parties and that settlement, having been made for perfectly good consideration, cannot now be upset at the instance of the person paying the money. As we have said, for nine years this document was in execution and a notarial deed in execution has the force of a judgment. For nine years no objection was taken that usurious interest was included. Payment was made on the last instalment and it is much too late now to come forward and try to upset this payment by the type of argument that has been advanced to us by the appellant here .It is unnecessary to go into any other points, because the matter is covered by the reasons which we have given.

For these reasons we think that the appeal fails and it 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 12th day of October, 1942.

CIVIL APPEAL No. 194/42.

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

Before:— Edwards, J. Frumkin, J. and Khayat, J.

Dr. Max Ludwig Kramer & 2 others Appellants

v.

Jacob Leibovitz Respondent.

Lessee making slight variations in performance of agreement of lease.

Slight or trifling variation in mode of performance of contract of lease — not a breach justifying ejectment.

Edit. Note : See CA 78/36 1 CtLR 31 ; CA 225/42 12 CtLR 164 ; CA 122/42 ibid. 125; CA 121/42 ibid 81; CA 97/35 7 C of J 175; CA 60/42 12 CtLR 18 referred to.

Caspi for Appellants 1 & 2.

Eliash and *Miller* for Appellant No. 3. *Adlerstein* for Respondent.

Appeal from judgment of District Court, Tel-Aviv, in its appellate capacity dated 30.7.42 in Civil Appeal No. 120/42.

JUDGMENT

This is an appeal, by leave, from a judgment of the District Court of Tel-Aviv, setting aside a judgment of one of the Magistrates of Tel-Aviv, who had dismissed an action brought by the present respondent for the eviction of the third appellant from a Diamond Cutting Factory, which premises had been the subject of an agreement of lease dated 30th June, 1941, such lease expiring on 31st July, 1942. It was admitted at the Bar by the respondent's advocate that the District Court was wrong in assuming that the Rent Restrictions (Dwelling Houses) Ordinance, 1940, apply or that any Rent Restriction Ordinance applied.

It is common ground now between the parties that the relationship between them was guided solely by the agreement of lease to which we have referred. The ordinary law, therefore, with regard to the effect of slight or trifling variations in the mode of performance of contracts in constituting a breach would seem to apply.

Mr. Eliash, for the appellants, referred to Hailsham Vol. 1, page 23, para 26 and Chitty on Contracts, 18th Edition page 837, Addison on Contracts 11th Edition, pages 494 and 495 Hailsham Vol. 7 page 332 para 462 and page 224 para 306 and Civil Appeal 60/42 Levanon's Current Law Reports, 1942 page 18*).

We have perused the record of the Magistrate in which, in the judgment, is a clear finding of fact as follows:

> "The lessor, from the outset, agreed in connection with the setting-up of a factory in the flat, which formerly was ordinarily used, to demolish and change walls: and he, in fact, signed a plan (Exh. T/4) radically changing the flat. Not exactly the

*) Volume 12.

same walls — which were agreed to by the landlord in plan T/4— were demolished, but changes were made varying slightly from this plan to fit with the technical necessity of the development. I wish to point out that from the difference between the intended plan (T/4) and the present state (T/7) I cannot perceive any damage which could affect the Plaintiff; but, on the contrary, the area of demolition as in fact carried out, is one third less than the area of the walls which were intended to be demolished according to the sketch and which were agreed to by the Plaintiff (See evidence of architect Chelouche)".

In our opinion there was evidence before the Magistrate's Court to support that finding of act. The Magistrate was therefore justified in refusing to order eviction. Several other points were raised at the hearing of the appeal before us; it is now unnecessary to deal with them. We would, however, add that we do not agree with the reasoning of the Magistrate with regard to the retention or return of the bills or promissory notes. As we consider that there has been no breach of the contract of lease we set aside the judgment of the District Court and restore the judgment of the Magistrate.

Delivered this 25th day of November, 1942.

CIVIL APPEAL No.140/42.

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

Before: — Copland, J. and Frumkin, J.

Solel Boneh Ltd.
Central Contracting Office of the Jewish Labour Federation — Appellant

v

S. Slonim — Respondent.

Appeal from appellate decision of D.C. that document duly stamped — English principle as to appeals based on stamp objection.

Old English principle that no appeal from decision that document sufficiently stamped applies in Palestine.

Edit. Note: CA 11/40 8CtLR 156 and CA 225/40 ibid. 229 followed.

Smoira for Appellant — *Sussman* for Respondent.

Appeal from jdgt of DC, Tel Aviv, in its appellate capacity dated 26.5.1942, in Civil Appeal No. 174/41.

JUDGMENT

In this appeal from an appellate decision of Judge Plunkett, the preliminary objection has been taken that no appeal lies since the appeal is based on a stamp objection. In other words, the English principle that no appeal lies from a decision that the stamp upon a document is sufficient, applies in this country, and in support of that argument two cases have been cited to us, Civil Appeal 11/40*), (7 PLR p. 91) and Civil Appeal 225/40**) (7 PLR p. 601). The grounds of appeal are

*) 8 CtLR 156 **) 8 CtLR 229

that the District Court was wrong in holding that the action was entertainable by reason of Section 29 of the Stamp Duty Ordinance having been deleted. The basis of the learned Judge's decision on appeal is to be found in the penultimate paragraph of his judgment where he says this:

> "Section 29 of the Stamp Duty Ordinance has been deleted and I must hold since these documents were duly stamped by the Stamp Commissioner before the Magistrate proceeded to hear the case that the case should not have been dismissed under Section 30(1) of the Stamp Duty Ordinance but should have been heard and determined".

The meaning of that sentence is this, that the learned Judge held that the documents were duly stamped, (objection had been taken before him that they were not duly stamped) and if they were duly stamped that the document should therefore have been admitted in evidence and the case should go back to be heard and determined on that basis.

Now, it is argued by the appellant that this provision of English law, that no appeal lies against the rejection of a stamp objection is statutory and that this is based on Order 39 Rule 8 of the Rules of the S.C. It is true that the authority at the moment is Order 39 Rule 8, but the origin of the rule would appear to go back very, very much further. In a case referred to in Civil Appeal 11/40, a case of the year 1753 was cited. From the footnotes on page 721, Halsbury, 2nd Edition, vol. 13, cases are cited, where the rule applies and where the rule does not apply, of 1853 and 1852, long, of course, before the rules of the Supreme Court came into existence. The rules of the Supreme Court are based on the Judicature Act of 1875. We are of opinion, therefore, that the objection is a good one and there is no appeal proper before this Court. We do not in any way decide the merits of this case nor in fact the merits of the decision of the learned President of the District Court. We have no power to say, in the view that we take of this case, whether that decision is a right decision or a wrong decision. The point can be argued in a proper form where there is no stamp objection coming up.

In these circumstances there is no appeal before this Court and the application must, therefore, be dismissed with costs.

Delivered this 19th day of October, 1942.

CIVIL APPEAL No. 225/42.

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

Before: — Rose, J.

Daniel Peretz & Co. — Appellants.

v.

Dr. Julius Wurzel — Respondent.

Action for eviction on ground of tenant failing to give notice of renewal of lease as provided in contract of lease.

a) Tenants holding over of premises — by operation of law (Rent Restrictions Ord.) not by virtue of provision of tenancy agreement.

b) Tenant's failure to give notice of renewal of lease — not failure to comply with term of tenancy agreement within meaning of sec. 4(1) (b) of Rent Restriction (Business Premises) Ord.

Edit. Note: CA 186/42 12CtLR 149 followed; see also CA 195/41 10 CtLR 141 and CA 80/40 7 CtLR 198.

Appeal from judgment of District Court, Haifa, dated 6.10.1942 C.A. 65/42, on appeal from judgment of Magistrate's Court, Haifa, dated 27.3.1942, in Civil Case No.47/42.

JUDGMENT

This is an appeal from a judgment of the District Court of Haifa setting aside a judgment of the Magistrate's Court. The appellant was a yearly tenant of certain business premises, one of the terms of the agreement of tenancy being that, in the event of his wishing to renew, due notice must be given. The appellant wishing to hold over under the Rent Restrictions (Business Premises) Ordinance, 1941, the first question to be determined is whether failure to give such notice of renewal, if such has been established, is a failure to comply with a term of the agreement of tenancy within the meaning of section 4(1)(b) of the Ordinance. No other breaches were established, and apart from this clause in the agreement it is not suggested, in view of the decision in Civil Appeal 186/42*, which has not so far been reported, that the position is in any way affected by the absence of notice.

The appellant argues that at the close of his tenancy which in the absence of any renewal would have terminated at mid night on the 31st December, he had committed no breach, as apart from the provisions of the Ordinance he would then have vacated the premises in the normal course. The effect of the Ordinance is merely to extend the tenancy on the old terms and, in my opinion, the appellant's contention is correct that he is holding over by operation of law and not by virtue of any provision in the tenancy agreement.

The only matter which has caused me difficulty is that the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1938, contained an express proviso that failure to give notice concerning the renewal of any agreement of tenancy in respect of any dwelling house within the time prescribed in such agreement shall not be deemed to be a failure to comply with the term of such agreement within the meaning of the subsection, which proviso has not been repeated in the present Ordinance. Mr. Goitein argues that the reasonable inference is that the legislature now intends that failure to give such notice should be regarded as a failure to comply with the term of the agreement of tenancy. That is, of course, a strong legal argument but to my mind it is by no means conclusive where, as in this instance the wording of the Ordinance is

*) Reported on p. 149 & seq., supra.

clear and unambiguous. In my opinion the proviso in question was mere surplusage, and it was no doubt for that reason that it was omitted from the present Ordinance.

That is sufficient to dispose of the appeal. It is therefore, unnecessary to consider the further point whether the circumstances surrounding the appellant's communication of his intention to renew amounted to a failure to comply with the relevant term of the agreement. I would add, however, that I am satisfied that on the facts as proved before the Magistrate the respondent's case has no merits.

For these reasons the appeal must be allowed, the judgment of the District Court set aside and that of the Magistrate restored. The appellant will have his 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 December, 1942.

CIVIL APPEAL No. 221/42.

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

Before:— Rose, J. Frumkin, J. and Abdulhadi, J.

Israel Greenberg — Appellant

v.

Chaim Balbatnik — Respondent.

Protection of subtenants by the R. R. (Business Premises) Ord. 1941 — Meaning of 'Landlord', 'Tenant' and 'Sub-tenant'.

1. Sub-tenant of business premises — entitled, as against his lessor, to protection offered by Rent Restriction (Business Premises) Ordinance.

2. "Landlord" in sec. 4(1)(e) of Rent Restriction (Business Premises) Ord. does not include a tenant who sub-lets to a sub-tenant.

Edit. Note: see HC 18/42 11 CtLR 190.

Haas for Appellant — *Lustig* for Respondent.

Appeal from judgment of District Court, Tel-Aviv, in its appellate capacity, dated 30.9.1942, in Civil Appeal No. 146/42.

JUDGMENT

This is an appeal from a judgment of the District Court of Tel-Aviv, in its appellate capacity, setting aside a judgment of the Magistrate's Court. The facts are sufficiently set out in the Magistrate's judgment. As is stated in the judgment of the District Court, the first point to be decided is whether a sub-tenant of business premises is protected by the Rent Restrictions (Business Premises) Ordinance, 1941. We agree with the view of the District Court that the only reasonable inference to be drawn from the fact that Section 6(2) of the Ordinance provides for the protection of a sub-tenant as regards the amount of rent payable

by him is that he is entitled, as against his immediate landlord (the tenant of the original premises), to the protection afforded by the Ordinance.

The second point to be decided is whether the term "landlord" in Section 4(1)(e) of the Ordinance includes a "tenant" who has sub-let. It is to be noted that in the Ordinance which we are considering there is no definition of "landlord" whereas in the Rent Restrictions (Dwelling Houses) Ordinance, 1940, it is expressly stated that "landlord" includes any person from time to time deriving title under him, and 'tenant' includes a 'sub-tenant'. Moreover, the 'Business Premises' Ordinance contains separate definitions for 'sub-tenant' and 'tenant'. There is no question of any ambiguity here, and therefore I am of opinion that the District Court was right in saing that the term "landlord" in the "Business Premises" Ordinance does not include a tenant who sub-lets to a sub-tenant.

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

Delivered this 4th day of December, 1942.

CIVIL APPEAL No. 243/41.

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

Before: — Rose, J., Frumkin, J. and Khayat, J.

Zeev (Wilhelm) Faust — Appellant

v.

Amos son of Reizla Reiber Breitbart through his guardians ad litem Reizla Reiber-Breitbart & Dr. Shimon Lustig. and another — Respondents.

Evidence in proof of paternity — Previous statement & affidavit of claimant that she married A. prior to relations with B. alleged father of child — Court accepting explanation that previous statement and affidavit false.

Court believing subsequent evidence adduced by Plaintiff in explanation of his original statement of claim and affidavit, entitled to accept explanation and amend pleading accordingly.

Wiesel for Appellant. *Iszajewitcz* & *Scharf* for Respondents.

Appeal from jdgt. of DC, Tel-Aviv, dated 7.11. 1941, in Civil Case Nos. 159/38 and 22/40.

JUDGMENT

This is an appeal from a judgment of the District Court of Tel Aviv. The matter covers the paternity of an infant born in March, 1935, and as regards the paternity issue, evidence was called before the judge which, if admissible and if believed, was, in our opinion, clearly sufficient to justify him in coming to the conclusion that the appellant was the father of the child. There was the evidence of the wife Shoshana; there was the evidence of the woman who shared a room with her at the relevant

time — Sara Sorkin; and there was the very significant fact that after the girl had announced her pregnancy to the appellant he gave her a cheque for LP.20. In view of those facts it is, in my opinion, idle to ask a Court of Appeal to say that there was no sufficient evidence upon which the Trial Court could, if it wished, come to the conclusion that the appellant was the father.

But the matter is complicated by the fact that the appellant contends that the woman was, in fact, married already to the second respondent. The matter that has caused me difficulty is the fact that the woman herself made a sworn declaration on the 8th March, 1938, in which she states that she married the second respondent in the year 1933 and that she came to Palestine with him as his wife. She says that there was no consummation of the marriage. She also says that after the birth of the child she registered the fact that the father of the child was what she described as her "legal husband", the second respondent. Also in her original pleading, which was drafted on her behalf by an advocate, she sets out substantially the same allegations, namely, that she was married to this man, that the marriage was only formal and there was no consummation of it ; and it was not until 1941 that her pleadings were amended and she alleged, which is her present case, that she was never, in fact, married to the second respondent, although an endorsement to that effect was made on his passport and she came to this country as his wife in 1933.

The question is whether subsequent evidence of the parties can dispose of that difficulty. We think that the Judge below was right in coming to the conclusion that it could. This woman Shoshana went into the witness-box and explained why she swore this false affidavit and made false statements of fact in her original statement of claim and the learned President says on page 3 —

> "According to the evidence the reason for the wording of the original statement of claim appears to me to have arisen from the fact that Mordechai Breitbard and Reizla Reiber came to Palestine on a passport as husband and wife and Reizla Reiber feared lest the authorities should discover that they were not in fact husband and wife, and the consequences which might follow."

He then says:

> "I am satisfied that I cannot hold Reizla Reiber bound by the original statement of claim".

That seems to me to be sufficient reasoning. It must be a matter of evidence and credibility for the Court below and the Court came to the conclusion that this woman and the second respondent were telling substantially the truth on this issue.

Now, the appellant says, and we have a certain sympathy with him on this point, that by this late amendment of the pleading in 1941, he was deprived of an opportunity of obtaining evidence from Poland to prove that a form of marriage had, in fact, been gone through, Poland having been invaded at the end of 1939. That is true, but it seems to

me that, although the appellant may have a slight grievance, the matter is not of such importance as to justify allowing the appeal on that point.

Leaving aside this question of the affidavit and the statement of claim which the Court below found was adequately explained, there was in fact, apart from passport (which clearly would not be sufficient of itself to establish that a marriage had taken place), no evidence at all that this marriage ever took place in Poland.

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

Delivered this 19th day of February, 1942.

CIVIL APPEAL No. 78/42.

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

Before : Copland J .Frumkin J. and Abdulhadi J.

Rahmo Nehmad — Appellant

v.

1. Raphael (Abdu) Lalo
2. Eliyahu Lalo — Respondents.

Granting or refusing leave to defend in an action lodged under Summary Procedure Rules.

1. a) Leave to defend should be given if Defendant shows that he has a fair case for, or fair probability or plausible suggestion of defence or shows facts raising a plausible dispute.

b) In actions on bills of exchange and promissory notes absence of consideration—a defence as between immediate parties, and in such case leave to defend should be given.

2. (Per Frumkin, J.) Granting or refusing leave to defend-matter for discretion of Judge trying case.

Gluckmann for Appellant *Ben Ami* for Respondents.

Appeal from order of DC, Tel-Aviv dated 31.3.42, in Civil Case No. 61/42.

JUDGMENT

Copland , J.

This is an appeal from an interlocutory order of Judge Korngruen granting to the respondent to the appeal leave to defend in an action lodged under the Summary Procedure Rules. The defence so far as I understand it, which it is sought to put forward, is that the two promissory notes, which are the subject matter of the action of the claim by the appellants, were given as security for what might be found owing on an account, that the respondents query certain items in the account which has been furnished to them and deny that they owe that money in those items and that it is, herefore, for them to bring forward their defence in order to show to the Court that

they do not owe a certain part of the money that is claimed from them. Their defence is that, deducting the items in the account which they say they do not owe, there is no money owing to the appellants, and, therefore, the promissory notes cannot be sued upon.

Rules as to Summary Procedure are found in the comments on Order 14 in the Red Book, in the Rules of the Supreme Court. In the 1938 Edition at page 162, it is stated that leave to defend should be given if a defendant shows that he has a fair case for defence, or a fair probability of a defence or a plausible suggestion of a defence or if he shows facts which might constitute a defence or which raise a plausible dispute. The grounds, therefore, on which leave to defend are given are obviously very wide ones. It is further stated at the bottom of page 162 that — "When the affidavits are entirely contradictory and in order to decide the case between the parties, the evidence on both sides must be gone into... that would be in effect trying the case upon affidavits... which was not the object or intention of Order 14". In such a case, therefore, leave to defend should be given.

In actions on bills of exchange and promissory notes absence of consideration is a defence as between the immediate parties to the appeal and in such a case, again, leave to defend should be given.

In these circumstances, I think that the learned Judge came to a correct decision in granting leave. The appeal is therefore dismissed with total costs of LP. 10 to be paid by the appellant, in any event.

Delivered this 18th day of June, 1942.

Abdulhadi, I concur

Frumkin

I should have thought that this is a case where leave to defend should have been refused if the rules as regards Summary Procedure are to be applied at all and if promissory notes and solemnly made bonds should not be disregarded. All what was put up against these documents, so far, was a denial of the debt and an allegation that there are certain accounts between the parties and the defendant did not even suggest that if leave to defend is granted he will lodge a counterclaim. It seems, however, that the matter of granting leave or refusing it is a matter for the discretion of the judge trying the case and he, having granted leave, I am not prepared to interfere.

Delivered this 18th day of June, 1942.

CIVIL APPEAL No. 143/42.

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

Before: Rose: J.

1. Fares Nasser Rashwan
2. Nayef Salim Wadi

Appellants

v.

Director or Customs,
Excise and Trade — Respondent

Compounding customs offence & subsequently seeking recovery of the goods — Claimant explaining why he admitted that goods were smuggled while in fact they were not.

Person compounding offence under Customs Ordinance and signing document, in usual form, admitting that goods smuggled cannot subsequently claim goods back on ground that in fact he committed no offence.

Mogannan for Appellants

Junior Government Advocate (*Wa'ary*) for Respondent

Appeal from judgt of DC., Jaffa, dated 11.7.42, in Civil Case No. 40/42.

JUDGMENT

This is an appeal from a judgment of the District Court of Jaffa. It is, in many ways, an unfortunate case as it appears that the appellant was able to adduce evidence, official and unofficial, that the duties on the goods in question were actually paid, However, for reasons good or bad, he appears to have elected to compound offences which, he now declares, he did not commit. In a letter dated 16th March, 1942, addressed to the Director of Customs, the appellant's advocate, Mr. Sahyoun, says "My client realises that apart from the merits it will be in his interest as a merchant to compound these two cases with you instead of going into legal disputes that may take a long time".

That may or may not have been a wise decision on the part of the client, the appellant ; but he made it and signed documents, in the usual form, admitting that the goods were smuggled. It is true that he says in his evidence that the reason why he did this was because he wished for the release of the truck, which was of far greater value than the goods which were alleged to be smuggled. But it is really not for a Court of Appeal to go into that and it would seem that one of the objects of the Ordinance will be defeated if a member of the public, whose goods are seized, is enabled to compound an offence and subsequently to institute an action in a Civil Court for the recovery of the goods in question, on the ground that, on the true facts, no offence had been committed.

As I say, it may well be that this particular appellant has been hardly treated on the merits, but he elected, apparently on the advice of his advocate, to take a certain course when there were alternative courses open to him and I think that he cannot, at least in law, complain now.

For these reasons the appeal must be dismissed. In the circumstances of the case and having regard to the fact that the respondent's representative failed to be present at the opening of the hearing, I think that the fair order is that there should be no costs of this appeal.

Given this 21st day of October, 1942.

CRIMINAL APPEAL No. 80/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before: Copland J., Edwards J. and Khayat J.

Mohammad el Abed Mousa Asfour v. A.G.

Conviction of concealing a deserter from British Army — DC on appeal by convicted person increasing sentence from 4 months to one year imprisonment.

1. Supreme Court bound by previous judgments.
2. District Court should not on appeal before it increase sentence of accused or vary it to his prejudice without his being present and having opportunity of being heard.

Ghussein for Appellant *Crown Counsel* (*Rigby*) for Respondent

Appeal from jdgt. of DC, Nablus dated 28.3.42.

JUDGMENT

The appellant was convicted before the Magistrate of Nablus of harbouring and concealing a deserter from the British Army. The Magistrate, on quite sufficient evidence, found him guilty and sentenced him to four months imprisonment. The appellant then appealed to the District Court. The appeal was heard by the acting President Judge Bodilly. The learned Judge found that there was sufficient evidence to support the conviction and dismissed the appeal but went on to say that in time of war the offence of concealing a deserter is a very serious one and that the sentence of four months imprisonment was wholly inadequate, and he increased it to twelwe months, All this was done in the absence of the appellant. Now, a similar case came before this Court on the 18th May last also on appeal from the same learned Judge, (Jallad v. A.G.) Criminal Appeal No. 65/42 *). In their judgment this Court laid down the rule as a rule of practice that a District Court should not increase a sentence on an accused person on an appeal before it or vary a sentence to the prejudice of the accused with out the accused being present and having the opportunity of being heard. That, if I may say so, with respect, seems a highly common sense view of what should be done. It is needless to remark that we are bound by that judgment and the facts of the case are exactly the same as the facts of this case which we have just referred to.

The only question that arises before us is whether we should vary the sentence of four months by increasing it or not. The learned Judge said while four months might be adequate in peace time it is wholly inadequate now. In peace time I think the sentence of four months would be much too much. We are of opinion, that a sentence of four months imprisonment was an adequate punishment for the offence of which the appellant was convicted. We, therefore, allow the appeal and restore the sentence of four months imprisonment by the Magistrate to run from the date of the judgment from the District Court. 30.6.42.

*) 12 CtLR 153.

CIVIL APPEAL No. 109/42.

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

Before: Copland J., Frumkin J. and Abdulhadi J.

Abraham Frank — Appellant

v.

Suleiman Abu Ghazaleh & another — Respondents

Co-owner of land hearing of sale of certain shares therein but not of particulars such as price & name of purchaser — Co-owner making his formal claim of shuf'a (pre-emption) a week later, i.e. after obtaining full particulars of sale.

a) Provisions of Mejelle re shuf'a — very formalistic and must be applied with utmost strictness.

b) Claimant of shuf'a must make formal claim at moment he hears of sale, even though not knowing the price or name of purchaser.

Edit. Note:— see CA 267/40 9 CtLR 53 and Edit. Note thereto.

Pratt for Appellant. *Germanus* for Respondent.

Appeal from jdgt of MC, of Jaffa, dated 27.5.1942, in Civil Case No. 593/42.

JUDGMENT

This is an appeal from a judgment of the learned Magistrate Jaffa, in a case of shuf'a. The learned Magistrate found in favour of the claim for shuf'a on the ground that the present first respondent, who was then plaintiff before him, had not been guilty of any delay in complying with the provisions of the Mejelle on the subject, and that mere knowledge of a sale was not sufficient to impose on a claimant of shuf'a the duty to claim, until he knew the actual particulars such as the price and name of the purchaser. The learned Magistrate held that there was no evidence that the plaintiff, that is to say, the present respondent, knew the name of the purchaser before the 19th of February, 1942, when he made his formal claim of pre-emption. The appeal turns really on this one point, was there or was there not delay in the making of this claim. As this Court has frequently said the provisions of the Mejelle on this subject are very formalistic and completely out of date in a modern world, and our practice, therefore, has been always to apply those provisions with the utmost strictness. They are not really very difficult provisions to follow, but the main essential is that the moment the sale is heard of the claim for shuf'a must immediately be made.

Now, it is clear from the record in this case that the first respondent knew that there had been a sale of some of the shares on the 11th February, 1942, when this information came out in the course of a hearing of a partition action to which he was a party. It is not suggested that he knew the names of those purchasers or that he knew what shares had been sold or the prices, but he then proceeded to obtain from the Land Registry particulars of the sales, and it was not until the 19th Feb-

ruary, as we have stated, that he made this formal claim.

Now, in our opinion, there was nothing to prevent him on the 11th February, when he knew that there were sales and he did not know who the purchasers were, as a matter of precaution from claiming his right of pre-emption. It he had done so, that does not mean that he would be compelled to follow it up. After enquiry, he might have found that the price was too large, or that he had no objection to the new purchaser as a co owner or other matters. As a precaution in order to preserve the right of shuf'a the claim should have been formally made on the 11th February, at the moment when the fact of a sale taking place was known.

As I have said, that is the main ground of this appeal, and is the ground on which we decide it. The appeal must therefore be allowed and the judgment of the learned Magistrate set aside and judgment entered for the present appellant, who was then defendant.

The first respondent will pay the appellant's costs.

Delivered this 21st day of July, 1942.

CIVIL APPEAL No. 150/42.

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

Before: Edwards J. and Frumkin J.

Emil Schleien — Appellant

v.

Moses (Moshe) Witztum — Respondent

Claim for return of goods or their value — Judgment not in alternative but only for value — Damages in connection with purchase of controlled articles.

1. Where statement of claim asks for return of goods or their value judgment should be in alternative, according to claim, not for value only.

2. If price of certain article is under legislative control, evidence that higher price was offered in Palestine — of no avail in a claim for damages or loss of profit.

Eliash for Appellant

Goitein for Respondent

Appeal from jdgt of DC, Haifa dated 12.7.42 in Civil Case No. 2/41.

JUDGMENT

This is an appeal from a judgment of the District Court of Haifa, ordering the appellant to pay the respondent a sum of LP. 260 being the price of 2½ tons of olive oil and the sum of LP. 150 damages alleged to have been suffered owing to the wrongful detention of the said oil by the appellant, who was the defendant in the Court below.

The first ground of appeal is that, as the statement of claim asked

for the return of the oil or its value and as in the early passages of the judgment reference was in fact made to the claim for the return of the oil, the District Court should have given judgment in the alternative. We think that this ground of appeal is good and must be sustained.

The judgment of the Court below must therefore be amended to read as follows, namely, Judgment for the return of 2½ tons of 'Itzhar' olive oil within fifteen days from 12th November, 1942 and in the alternative the appellant, that is the defendant in the Court below, to pay to the Respondent, that is the plaintiff in the Court below, the sum of LP. 260 with costs etc., as in the original judgment except for the variation in the order as to costs which we hereafter make.

The other ground of appeal is that there was no evidence before the Trial Court to justify any award of damages.

It is clear that the Court below based its judgment in this regard on the evidence of the plaintiff in cross-examintion to the effect that a certain broker had "approached him three weeks ago for the purchase of oil and was prepared to pay LP. 190 for ton of oil". The Court below erred in thinking that legislative control of the price of olive oil was in force only from 15th January, 1942. The price of oil was, in fact, controlled at the sum of LP. 85 per ton as from the 5th October, 1939, and it was from that date onwards an offence to sell at higher prices or to pay higher prices.

We do not think that the finding of the Court in paragraph 5 of its judgment, based as it was on the evidence as to the offer of LP. 190 per ton, justified a finding that the respondent had proved his claim for damages, seeing that the Court was in error in that it did not realise that the price of this olive oil was, at all material times, controlled at LP. 85 per ton and consequently this offer of LP. 190 could not have been accepted or acted upon.

It is clear from the judgment of the District Court that that Court did not rely on Exhibit P. 10, which seems to have contained merely a calculation of the profit which might have been made had the oil been exported and sold in the United States.

We do not think that Exh. P. 10, even if its contents are correct, could be said to be evidence which of itself is sufficient to prove damages. We, therefore, think it unnecessary to remit the case as we are of the opinion that the respondent failed to prove damages. The award of the sum LP. 150 must be set aside. The judgment of the District Court is therefore amended in the direction stated above. We also consider that the instruction and advocate's attendance fee of LP. 30 awarded in the Court below should be altered to LP. 15. The respondent will pay the appellant's costs etc.

Delivered this 12th day of November, 1942.

CIVIL APPEAL No. 79/42.

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

Before: Copland J. and Abdulhadi J.

Shafeeka Bint Muhammad el-Baik & 2 others Appellants

v.

Muhammed Rushdi Hafiz Gharbieh Respondent

Unregistered sale of land in Beersheba District — Old practice contrary to provisions of law — Sale & contract to sell.

1. a) Although it has been common practice in Beersheba District for 20 years not to register sales of land, yet law re compulsory registration applicable also there.

b) Purchaser buying land, wherever situate in Palestine by unregistered sale acquires no title which he can validly transfer to another.

2. Payment of purchase price of land and transfer of possession — indicate complete sale, not contract to sell.

Edit. Note:— see CA 221/38 4 CtLR 253 and Edit. Note thereto.

Bsiso for Appellant

Appeal from jdgt of MC, Beersheba sitting as a LC in Land Case No. 245/41 dated 29.4.42.

JUDGMENT

This is an appeal from the learned Magistrate, sitting as a Land Court in Beersheba, in regard to certain property in Beersheba town. It is common ground between the parties that the land in question is not registered and never has been registered. It is also well within the knowledge of the members of this Court that this is a common practice in regard to the Beersheba lands and the law as to the compulsory registration of sales has not been strictly enforced in the Beersheba District. Twenty years have now passed, and it is more than time that this particular law as to the registration of sales should be applied even in Beersheba.

Now, two sales are involved in this particular case — one from Haj Hafez to his son, the present respondent and the second from the present respondent to a man of the name of Abdallah Ashur. Both these sales were completed sales. They were not contracts to sell, for in each case the purchase price was paid, as is indeed admitted, and possession transferred.

As we have already said, the law applies equally to the Beersheba District. Both those sales were, therefore, illegal and invalid not having been registered. As the first sale from Haj Hafez to the present respondent was an invalid one, the present respondent acquired no title which he could transfer. And as the respondent had no title to transfer, he obviously could not transfer anything to Abdullah Ashur. In our opinion the fact that Haj Hafez, the father, gave a guarantee

for the second sale does not affect the situation. The result might have been different if this second transaction had been a contract to sell, but, as I have said, it was not a contract to sell but an out and out sale.

The appeal must therefore be allowed and the Magistrate's judgment set aside and judgment entered for the present appellants in the terms of their statement of claim. The Appellants are entitled to their costs etc.

Delivered this 29th day of June, 1942.

CIVIL APPEAL No. 165/42.

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

Before: Gordon Smith C.J., Frumkin J. and Khayat J.

Baruch Mintz — Appellant

v.

1. Nathan Benjamin (Nissan Baruch) Kramer
2. Rachel Kramer — Respondents

Certificate of succession acted upon in Land Registry — Application by mortgagees for appointment of Administrator of estate.

No appointment of Administrator for estate after Certificate of Succession granted and estate distributed accordingly.

Appeal from judgment of DC, Tel-Aviv, dated 31.7.42. in Probate 57/42.

B. Joseph and *Caspi* for Appellant.

P. Goldberg for Respondent

JUDGMENT

Having granted the application for a Certificate of Succession to the heirs, against which there was no appeal by the opposers and which was subsequently registered in the Land Registry, the learned trial Judge, in considering the subsequent application by the opposers for Letters of Administration to an estate of which they were entire strangers although being mortgagees and possibly might be considered as creditors, appears to have lost sight of the main consideration, through delving into the maze and intricacies of the Ottoman law on the subject. He was not satisfied that any breach of duty by the heirs was to be apprehended justly, and as there was no estate left to be administered after the Certificate of Succession had been registered it is difficult to conceive how it could be "just and convenient" to appoint an Administrator to administer something that did not exist.

For these reasons, and because the Respondents can still sue the heirs, if they think fit, we allowed the appeal and ordered that the order of administration be cancelled, with costs here and below on the lower scale, with advocate's attendance fee of LP. 10 before us.

Delivered this 11th day of November, 1942.

CIVIL APPEAL No. 149/42.

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

Before: Rose J.

Butrus Said Shalim — Appellant

v.

Sa'deh Samara Kurt in her personal capacity and on behalf of the estate of Samarah Kurt. — Respondent

Appointment by Relig. Court of Administrator of property of absent person — Consent to jurisdiction of Relig. Court.

1. Absentee — not a party at all to proceedings for appointment of administrator of his property hence jurisdiction of Religious Court in such proceedings not ousted by absence of his consent.

2. Where order of Relig. Community appointing administrator of absentee's property states they have been asked by council of absentee's family to assume jurisdiction and co-heirs themselves supported administrator's case in subsequent civil proceedings, one cannot say co-heirs did not consent to jurisdiction of Religious Court.

Edit. Note:— as to 1: CA 40/40 8 CtLR 173 distinguished, HC 86/35 2PLR 411 followed see also HC 10/41 9CtLR 78. As to 2 see: HC 24/41 9 CtLR 178, CA 22/40 7CtLR 92 and Edit. Note thereto.

Saadeh for Appellant — *Abdelhadi* for Respondent

Appeal from jdgt of MC Ramallah, dated 18.7.42, in Case No. 75/42.

JUDGMENT

This is an appeal from a judgment of the Magistrate of Ramallah sitting as a Land Court.

The only substantial point in the appeal raises a question as to the interpretation of article 54(2) of the Palestine Order-in-Council, 1922. It is clear that the case for the respondent depends mainly upon the validity of a certificate entitling her to administer the property of an "absent person", within the meaning of Article 51 of the Palestine Order in-Council.

It is urged by the appellant that not all the parties to the action gave their consent to the jurisdiction of the Ecclesiastical Court. It is contended that first the absentee himself and secondly the co-heirs of the respondent did not give their consent.

As to the absentee himself, the appellant relies upon Civil Appeal 40/40 *) P.L.R. Vol. 7 at page 411, which related to the obtaining of a certificate of guardianship from the Ecclesiastical Court, and in which it was held that, the minor children concerned being clearly parties to the proceedings and because they were minors being unable to give their consent, the jurisdiction of the Ecclesiastical Court was ousted. It is to be noted that the *ratio decidendi* of the case was that the minors were parties within the meaning of article 54(2) and therefore the absence of their

*) 8 CtLR 173.

consent, whatever might be the reason for that absence, was fatal to the jurisdiction of the Ecclesiastical Court.

Counsel for the respondent contends that the case of an absent person within the meaning of article 51 is different in that an absent person is not a party to the proceedings at all. He relies for this submission on High Court No. 86/35 P.L.R. Vol. 2 at page 411, where Corrie J. said:

> An application to a Court for the appointment of an administrator of the property of an absent person is a proceeding to which the absentee himself is not, and cannot be, a party. In consequence it is no objection to the jurisdiction of a religious Court to hear and determine an application for the appointment of an administrator of the property of an absent person that such absentee did not consent to the exercise of such jurisdiction."

That language is clear and unambiguous and I see no reason to differ from its conclusion.

That disposes of the point as to the consent of the absentee.

With regard to the question of the consent of the co-heirs there is, to my mind, little doubt that these persons did, in fact, consent, to the jurisdiction of the Ecclesiastical Court. It may be that the words used in the order of the Ecclesiastical Court granting the certificate could with advantage have been more specific on this point, but the order does set out that the council of the family of the absent person asked the Court to assume jurisdiction. There is, too, the further fact that the co-heirs themselves supported the respondent's case in the subsequent civil proceedings. I am therefore not prepared to say that the consent of the co-heirs was not obtained.

The remainder of the appeal raises issues of fact on which I see no reason to differ from the findings of the Magistrate.

The appeal is therefore dismissed with costs etc.

Delivered this 21st day of October, 1942.

GRIMINAL APPEAL No. 152/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL

Before: Copland J., Rose J. and Abdulhadi J.

Rafiq Ibn el Haj Saleh Salem, alias Abul Kalbat Appellant

v.

The Attorney-General Respondent.

Death sentence against adult for murder committed when under age of 18.

> Critical time to be considered with regard to accused's young age — time of trial, not of commission of offence.

Eliash for Appellant

Crown Counsel (*Rigby*) for Respondent

Appeal from jdgt of Court of Crim. Assize sitting at Nablus dated 7.10.42, Crim. Assize case No. 33/42, whereby appellant was convicted

of murder contrary to Sec. 214(b) of Crim. Code Ord. 1936, & sentenced to death.

JUDGMENT

The appellant was charged before the Assize Court sitting at Nablus with murder committed on the 6th September, 1938, and was convicted and duly sentenced to death.

Three grounds have been raised on the appeal, the first one of which is that the appellant was under the age of 18 years when the offence was committed and therefore sentence of death could not be passed against him. Section 13 of the Young Offenders Ordinance 1937, says that "sentence of death shall not be pronounced or recorded against a child young person or juvenile adult", that is to say, against a person who is under the age of 18 years. From Archbold, 28th Edition, page 260, we find this — "a person who at the time of trial is more than 16 years old is not a 'young person' within the meaning of Section 131 (of the Children Act 1908, 8 Edw. 7, c. 67) though he was under 16 at the time of the commission of the offence". The authority is R. v. Fitt, (1919) 2 Ir. R. 35. Further on in the same page, we find that "sentence of death may be pronounced on a person who is more than 16 years of age at the time of trial." (R. v. Fitt). The law in England now and in this country is that a person under the age of 18 cannot be sentenced to death. It is quite clear, therefore, that the critical time to be considered with regard to the question of age is the age at the time of trial.

It is further argued that there is no premeditation in this case. There was evidence before the learned Judge, which he believed, that the appellant was sitting down and when the deceased passed him he got up, followed him some paces, and fired two shots killing him. There was no evidence and indeed no suggestion of any kind of a quarrel at the time. It is difficult perhaps to imagine a clearer case of premeditation.

The last point is that there was no proper identification of the appellant as the person who committed the murder. He was identified as the person who shot by three eye witnesses, any one of whom, if believed, would have been amply sufficient to support the conviction. The Trial Judge believed those three witnesses and taking the evidence as a whole, there was ample material to indicate to the Court of Trial what the verdict should be. The appellant was convicted of a cold calculated and deliberate murder and the Court sees no reason to interfere with the conviction.

The appeal is therefore dismissed.

Delivered this 3rd day of November, 1942.

CIVIL APPEAL No. 156/42.

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

Before: Copland J.

Osman Ibrahim Suleiman & 6 others

v.

The Latin Patriarchate of Jerusalem — Respondent

LC dismissing claim to ownership to certain land and granting servitude to use threshing floors therein.

Threshing floors for common village use — only of matruke land category and cannot be object of servitude under Ottoman Law.

Anabtawi for Appellants

Levitsky and Amon for Respondent

Appeal from jdgt of LC, Jaffa dated 20.7.1942, in Land Case No. 3/40.

JUDGMENT

This is an appeal from the judgment of the learned President of the Jaffa Land Court, dismissing the claim of the appellants to ownership of certain land, but granting them a servitude over a portion of the land to enable them to use threshing floors therein and make straw huts during the threshing season. There is a cross-appeal against that part of the judgment which allows the servitude, on the ground that no such servitude is known in the Ottoman Law.

With regard to the appeal, I am of opinion that it fails. There was evidence before the lower Court sufficient to support that Court's conclusion that the property in dispute was comprised in the respondent's kushan. There was further evidence which satisfied the learned Judge that the ownership was proved. There is no ground, therefore, for upsetting that finding.

With regard to the argument that the houses are worth more than the land that, of course, like every other allegation of fact, is one which must be proved by the person alleging it, and no such proof is to be found anywhere in the sixty-six pages which were devoted to the evidence and it is, to put it mildly, extremely unlikely that villagers would erect houses worth LP. 10,000 merely to use during the threshing season, as stated by the appellants. That point fails.

With regard to the question of irrelevant evidence, the main ground for saying that it was irrelevant seems to be because it was against the appellants. There was ample and relevant evidence to support the Court's conclusion with regard to the question of ownership.

With regard to the cross-appeal, there is no such thing in the Ottoman law as a servitude over land exsercisable by villagers for the purpose of threshing floors. Servitudes, to use the English phrase, are defined

in the Mejelleh and are defined in the Land Code, but I have not been referred to any paragraph in either of these two works, and I am certainly not aware of any myself, which says that a threshing floor can be the object of a servitude. Nowhere, as far as I am aware, is there to be found any such servitude of a threshing floor. It seems unlikely that there would be such a servitude when one considers that threshing floors are areas set apart ab antiquo for use as such and that their category is that of matruke land. Matruke land cannot be obtained by kushan but we have evidence that in the year 1285 a kushan was issued in respect of this land, another one in 1293, and again in 1312 and 1925. A threshing floor can only be martuke land, this land is not matruke and, in my opinion, there can be no such thing as a servitude created on threshing floors for common village use.

In the result, therefore, the main appeal must be dismissed and the cross-appeal allowed. In view of these findings, there is no need to refer the case back for ascertainment of any area. The effect of this judgment will be that paragraph (b) of the learned Judge's judgment must be eliminated. The rest of the judgment stands. The respondents are entitled to their costs both for the appeal and cross-appeal.

Delivered this 2nd day of November, 1942.

CIVIL APPEAL No. 91/42.

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

Before: Rose J.

Salim Barakat — Appellant

v.

Municipal Corporation of Jaffa, in its capacity as Local Building and Town Planning Commission of Jaffa — Respondent

Expropriation by Town Plan. Commission of 25% of plot without compensation — Interpretation of sec. 27 of Town Pln. Ord. — Meaning of word "owner" in Town Plan. Ord.

1. As no special definition of "owner" in Town Planning Ordinance, Court should apply ordinary meaning, viz. person in whom, for time being, property vests beneficially.
2. When expropriating under sec. 27 of Town Planning Ordinance quarter of plot without compensation fact that previously a similar expropriation took place affecting same piece of land when belonging to another owner — irrelevant.

Cattan for Appellant — *Goitein* for Respondent

Appeal from jdgt DC, Jaffa, sitting as a Court of Appeal, dated 9.5 42, in Civil Appeal No. 15/42.

JUDGMENT

This is an appeal by leave from a judgment of the District Court of

Jaffa, allowing an appeal from the Magistrate's Court of Jaffa. It appears that the appellant, Mr. Barakat, is the owner of a certain parcel of land which falls within the area covered by a Town Planning Scheme in the Municipality of Jaffa.

The facts are admitted by the parties and, for the purposes of this appeal, it may be taken that in the year 1928 a portion of this parcel was expropriated without compensation from the then owner, in accordance with the relevant provisions of the Town Planning Ordinance, 1921—22. Subsequent to the year 1928 Mr. Barakat became the owner of this plot and in 1938 the Municipal Corporation of Jaffa in its capacity as the Local Building and Town Planning Commission of Jaffa again expropriated a portion of this land by virtue of section 27 of the Town Planning Ordinance, 1936.

The question for the decision of this Court is whether Mr. Barakat is entitled to compensation for the land in question. The matter depends upon the interpretation of section 27; and in the first instance Mr. Cattan for the appellant contends that, as a general principle, where there is an Ordinance imposing a liability to expropriation of land without compensation, then, if there is any ambiguity that ambiguity must be resolved in favour of the owner, that is to say, of the person who is liable to the expropriation. That is no doubt a correct statement of the law, but the principle only applies if there is an ambiguity. It becomes necessary therefore to look at the wording of the section itself. Section 27 reads:

> "Notwithstanding anything in any other Ordinance contained, it shall be competent for a Local Commission to expropriate without compensation any land which is included in a town planning scheme, and is required for the purpose of constructing, diverting or widening any road, street, playground or recreation ground included in the scheme, provided that not more than one quarter part of the area of the plot of any owner is so expropriated and it shall be lawful, for the Local Commission, after giving one month's notice in writing to such owner, to enter into immediate possession of such land not exceeding one quarter part as aforesaid, for the purposes aforesaid. Provided that, if it is established that hardship would be caused if no compensation were paid, the High Commissioner may in his discretion direct such compensation to be paid by the Local Commission as, having regard to all the circumstances of the case, he shall think fit. If more than one quarter part of such area is taken, compensation shall be paid to the owner for the land taken in excess of such one quarter part..."

In the present case it is agreed that only one quarter part of the land has been taken.

It seems to me that what the legislature intended to do and what, in fact, it has succeeded in doing was to provide that an owner of a plot of land which happens to fall within a Town Planning Scheme is liable to the expropriation without compensation of one quarter of the

plot. Liability to such expropriation is one of the incidents of ownership of land within a Town Planning Scheme.

Having regard to the wording of the section itself, it seems to me to be impossible to come to any other conclusion but that the word 'owner' must mean the person owning the land at the time of its expropriation. I consider that any other interpretation would not make sense in view of the remaining provisions of the Ordinance. In the absence of any special definition of the word 'owner', it seems to me that the ordinary meaning of the word should be applied. In my opinion the word 'owner' normally connotes the person in whom, for the time being, property is vested beneficially. It is true that there are numbers of statutes and ordinances in which particular definitions of 'owner' are contained but such definitions can be of no assistance in the present matter owing to the absence of any special definition in the Town Planning Ordinance.

That being so, what is Mr. Barakat's position? In 1938 he was the owner of this parcel. The Town Planning Commission say in effect: "You are the owner of a plot of land within a Town Planning Scheme and therefore liable to the expropriation without compensation of a portion of that land. We wish to expropriate without compensation, for the purposes designated in section 27 of the Ordinance, 25% of that plot, as we are entitled to do." The fact that at an earlier date the same piece of land belonged to another owner and a portion of it was then expropriated without compensation does not seem to me to be relevant.

That is sufficient to dispose of the appeal, but I would add that in any case in which the High Commissioner is satisfied that hardship has been caused, he may direct the award of compensation. I do not wish to be understood as suggesting that the present case is one in which the High Commissioner should exercise that discretion. It would not be proper for me to express any view upon that matter, nor have I heard argument as to the merits of the case. I merely point out that there is such a power in the High Commissioner which he can exercise in appropriate cases.

For these reasons the appeal must be dismissed with costs on the lower scale to include the sum of LP. 15 for advocte's attendance fee.

Delivered this 9th day of July, 1942.

CIVIL APPEAL No. 61/42.

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

Before: Rose J. and Edwards J.

Emile Litwinsky — Appellant

v.

1. Maurice Litwinsky 2. Raymond Litwinsky — Respondents

Application by a member of a partnership for an originating summons — Discretion of Court regarding originating summonses.

1. While always difficult for an appellate Court to decide when to interfere with exercise of discretion by trial Court, it can, and in a proper case should, review exercise of a discretion as to mode of trial of any cause or matter.

2. a) Inference to be drawn from Rule 260 of Civil Procedure Rules — that rule making authority intended that application for dissolution of partnership and consequential action thereupon should normally be made by originating summons.

b) Discretion under Rule 266 though given to Court in respect of all matters covered by Part XXIII of Civil Procedure Rules, should not normally be exercised as regards originating summons taken out under Rule 260 (by member of partnership).

Edit. Note:— As to 1 see: CA 45/42 11 CtLR 201; CA 270/40 9 CtLR 204; CA 118/39 7 CtLR 24; CA 21/40 ibid 91.

Eliash for Appellant

Richardson for Respondent No. 1. *Ph. Joseph* for Respondent No. 2.

Appeal from order of DC, Tel Aviv, dated 31.3.42, in OS. 318/41.

JUDGMENT

This is an appeal from an order of the District Court of Tel Aviv, refusing to make any order on an originating summons taken out by the appellant and referring the parties to an action in the ordinary course.

The appellant contends that the Court improperly exercised the discretion awarded to it by Rule 266 of the Civil Procedure Rules, 1938. It appears that differences have arisen between the three Liwinsky brothers, who are the parties to the present proceedings, and as a result of these differences the partnership formerly existing between them has terminated. The appellant took out an originating summons in accordance with Rule 260 of the Civil Procedure Rules, asking that the business of the partnership should be wound up and a receiver appointed. The first respondent supported the application. The second respondent vigorously contested it and a considerable amount of evidence was heard by the Court.

It is always a difficult matter for a Court of Appeal to decide when it should interfere with the exercise of a discretion by a Court or Judge. There is, however, authority for the view that an appellate Court can, and in a proper case should, review the exercise of a discretion as to the mode of the trial of any cause or matter. Rule 260, so far as I am

aware, breaks new ground and is not based upon any equivalent English Rule of Court. In my opinion the inference to be drawn from it is that the rule making authority intended that application for the dissolution of a partnership and consequential action thereupon should normally be made by an originating summons, which intention is in harmony with the wording of the rule. It should further be borne in mind that Rule 266 gives a discretion to the Court in respect of all the matters covered by Part XXIII of the Civil Procedure Rules, and it seems to me that, as regards an originating summons taken out under Rule 260, the discretion under Rule 266 should not normally be exercised.

In the present case, I consider that the matters asked for by the appellant by way of relief are in no way exceptional and may conveniently be considered by the Court, in the course of the hearing of an originating summons, and I further consider that it was the intention of the rule making authority that a case such as the present one should be so heard.

Counsel for the appellant has asked this Court itself to make an order on the strength of the material which is before it. I do not think, however, that that would be a proper course. The matter must therefore be remitted to the District Court to complete the hearing of the originating summons and to make any order upon it which seems to the Court to be appropriate.

Costs will be in the cause and on the lower scale. In order to facilitate the final arrangements, I certify the sum of LP. 15 for advocate's attendance fee.

Delivered this 15th day of July, 1942.

HIGH COURT No. 110/42.

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

Before: Copland J. (sitting alone).

Central Agudath Israel of Palestine, Petitioner.

v.

1. The Chief Secretary Government of Palestine
2. The District Commissioner, Jerusalem District Respondents

Enjoyment during 20 years of administrative privilege of registering marriages & divorces — Who may & who may not act as registering authority for marriages & divorces among Jews

1. An administrative privilege does not become a legal right merely because granted for many years.
2. Rabbi entitled to be recognised as registering authority — Rabbi designated by competent religious authority of Jewish Comunity; non-members of Jewish Community, whether organised as a congregation or not, have no statutory right to have their own Rabbis officiating as registering authorities.

Edit. Note: HC 5/42 11CtLR 65 followed.

Petition for an Order to issue to 1st & 2nd Respondents to show cause why they should not issue Forms of Divorce Registration Certif. for sanctioning of Jewish Divorces to Rabbis appointed by Petitioner's Jerusalem Congregation Va'ad Hair Leqehilath Haashkenazim (The Council of the Ashkenazic Jewish Community at Jerusalem), and to any other Rabbi recognized by Petitioner.

Frank for Petitioner *Ex parte*

ORDER

This is a petition for an order to issue to the Chief Secretary and the District Commissioner Jerusalem, to show cause why they should not issue Forms of Divorces to Rabbis appointed by the Central Agudath Israel or recognised by them. The Central Agudath Israel, according to the terms of the petition, is an organization which aims at embracing all orthodox Jews who, for religious considerations, do not recognise the Jewish Community as constituted under the Religious Communities (Organization) Ordinance, 1926.

Now, for some time, and until the present time, apparently the Rabbis nominated by this organization have been granted administratively the power of celebrating marriages and have been issued with books of marriage certificates. What they desire now is that they should be granted Forms of Divorce Registration Certificates since under the law both marriages and divorces must be registered. The argument of the petitioner is that since in 1918 they were allowed to do these acts of celebrating marriages and that practice continued until 1938, they should be allowed still to continue doing these acts and also to register divorces, since the same Rabbis perform both these functions. As I said in the course of the argument, the argument really boils down to this, that, because for some twenty years they had been granted this privilege, that privilege is now claimed to be a legal right, and that it should be further extended. There is, so far as I know, no law of prescription with regard to these matters and I do not think that this is an argument that can have any force in a Court of law. The privilege is and remains solely an administrative privilege.

The question then arises as to whether they have the legal right to the issue of these certificates. Now, in High Court No. 5/42 *) Israel Rokach petitioner and the District Commissioner Lydda District and two others respondents, the leading judgment was given by Frumkin J. In that closely reasoned and exhaustive judgment, which was the judgment of the Court or at any rate of the majority of the Court, it is stated that the vast majority of the Jews who are not registered as members of the Jewish community are organised in an organization or congregation known as the "Central Agudath Israel" who, it is common knowledge, have for the last 20 years or more tried hard to obtain recognition as an independent Jewish Community with rights

*) 11 CtLR 65.

similar to those accorded to the recognised Jewish Community, and it is also common knowledge that all these efforts have thus far been unsuccessful. And then the judgment goes on to quote from a letter of the Chief Secretary to the petitioners of the 4th February, 1932, refusing to accord this recognition. As I have said, with regard to the registration of marriages the Rabbis of the Agudath Israel have the administrative privilege of having their Rabbis supplied with books of marriage certificates and such Rabbis as Frumkin J. pointed out are thus recognised as registering authorities. In a further passage of the judgment from which I am quoting the following occurs:

> "In scrutinizing all this legislation one can come to only one conclusion, namely, that as regards Jews the Rabbi entitled to be recognised by the District Commissioner as registering authority is the Rabbi designated by the competent religious authority of the Jewish Community; and that persons who are not members of the Jewish Community, whether organised as a congregation or not, have no statutory right to have their own Rabbis officiating as registering authorities so long as Government has not availed itself of the power vested in it by the Palestine (Amendment) Order-in-Council, 1939, 65A(a)".

The learned Judge goes on to say that this statement of the law may appear to be hard for those persons who had opted out of the Jewish Community, but that the answer to that objection was that, good or bad, that was the law. With all respect I entirely agree with the statement of Frumkin J. and with the conclusions reached by him and I also agree with his remarks at the conclusion of the judgment that it would be a great danger if the numbers of authorities registering divorces were unduly enlarged. As Frumkin J. said, the main object of the Ordinance, that is the Religious Communities Ordinance, would be defeated and the purpose of keeping marriages and divorces within the framework of law and good order undermined. That judgment I not only agree with as I have said, but I am bound by it. In any event it would be unbecoming for me as a single Judge sitting alone to disagree, or in any way to suggest that I disagree, with a judgment delivered by a Court of three Judges. So far from disagreeing with it, in my opinion, with due respect it is a correct statement of the law as it exists up to the present time. The law may be good or it may be bad but when the law is thought to be bad the remedy is to alter the law, not to come to the Court and ask the Court to strain the law because they think it is bad. In view of this High Court judgment it would be quite useless to grant an order nisi and the application must, therefore, be refused.

Given this 24th day of September, 1942.

CRIMINAL APPEAL No. 155/42.

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before: Rose J. Frumkin J. and Khayat J.

Samuel Berkovitz and 3 others — Appellants

v.

The Attorney-General — Respondent.

Confession, when admissible & when not—Tests to determine question as to whether confession free & voluntary — Proper and improper caution.

1. Weight to be attached to a confession — a matter of pure fact for trial Court, but its admissibility — a matter with which a Court of Appeal not only may but should interfere, if, in their opinion, wrong tests have been applied.

2. a) In deciding whether a confession is free and voluntary — many years' practice in Palestine to apply English tests.

b) Tests to determine question whether confession to Police Officer by person in custody free and voluntary — contained in Judges Rules made for guidance of Police and Courts in England.

3. An essential element in a proper caution — to make clear to prisoner that he is not obliged to say anything unless he wishes to do so, hence confession by prisoner in response to an observation by person in authority that it would be better for him to tell the truth — inadmissible.

4. Where person in authority says words with intention of their being communicated to prisoner and calculated to lead him to believe that it would be better for him to say something, statement made thereupon by prisoner — inadmissible.

5. Question whether or not a confession is true — utterly immaterial when considering its admissibility.

6. a) Caution must convey to person concerned that he has a completely free choice to say anything or not but that if he does say, anything he says may be given in evidence.

b) "I warn you that you are entitled to give evidence before me or in Court" or "you are not bound to make a statement to me or to volunteer a statement at once" — improper cautions, because completely omitting element of freedom of choice as to whether to make a statement at all, to any body, at any time.

Edit. Note:— As to all the points in case see CrA 87/42 12CtLR 37 and Edit. Note thereto.

As to 2a) CrA 19/38 3CtLR 140 followed.

As to 2b) CrA 91/42 12CtLR 61 followed.

Eliash and Ben Israel for Appellants

Junior Government Advocate (*Salant*) for Respondent

Appeal from jdgt of DC, Haifa, dated 30.9.42, in Crime No. 142/42, whereby Appellants were convicted of offences contrary to Sec. 274 & 24 of Crim. Code Ord. 1936, and sentenced to 5 years' imprisonment each.

JUDGMENT

This is an appeal from a judgment of the District Court of Haifa convicting the four accused of offences against Section 274 of the Criminal Code Ordinance. The only question raised on appeal is as to the admissibility of certain statements made by all four accused which were in the nature of confessions. It is not suggested by Mr. Salant that if these statements are inadmissible the convictions can stand, and it is quite apparent on reading the judgment that not only was the Court influenced by these statements but, in fact, it regarded them as the main element in the prosecution case.

The question of when a statement in the nature of a confession is admissible still seems to be a matter of considerable difficulty not only to persons in charge of prosecutions but also to many of the Courts of this country, and we think that it may perhaps be helpful to set out as simply as possible what we think to be the law which should be applied and the principles which should be followed in this very important branch of criminal law.

The law is contained in Section 9 of the Evidence Ordinance, Cap. 54 of the Revised Edition, and reads as follows:

> "Evidence of confession by the accused that he has committed an offence is admissible only when the prosecution has given evidence of the circumstances in which it was made and the Court is satisfied that it was free and voluntary."

In deciding whether a confession is free and voluntary it has been the practice for many years in this country to apply the English tests. There is ample authority for this statement and it is sufficient to refer to Criminal Appeal 19/38 *), P. L. R. Vol. 5, page 212, where Trusted C.J. says:

> "The provisions of Section 9 of the Evidence Ordinance dealing with confessions are clear and in practice the Courts have applied the English tests in order to ascertain if a confession was free and voluntary."

In order to see what tests have been applied in England it is necessary, of course, to advert to English authority. In our opinion the whole of the principle involved can be derived from a single authority, the case of Regina v. Thompson, (1893) 2 Q. B. D., page 12, in which Cave J. gave his famous judgment. There have, of course, been innumerable cases in which discussion has taken place as to whether the particular facts fall on one side of the line or the other, but the principle which has been applied in these cases is to be found in the judgment of Cave J. In support of our view we would refer to a very recent case of the Court of Criminal Appeal in England, the case of Rex v. Cowell, All England Law Reports, 1940, Vol. 2, page 599, where the Court quoted with approval a passage from a ruling of the trial Judge, Humphreys J., who was sitting with a jury. This is what Humphreys J. says:

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*) 3 CtLR p. 140.

> "All I am ruling is that upon the evidence which is before me, and which must necessarily be incomplete at this stage, there is no ground for saying that the statement is inadmissible in law owing to any of the well-known grounds referred to by Cave J. in Regina v. Thompson, which still remains the leading authority upon this matter."

Those are the words of an eminently practical criminal Judge who, for many years before his elevation to the Bench, was Senior Treasury Counsel and therefore had first-hand experience of conducting important prosecutions on behalf of the Crown. On the matter which we are considering, therefore, his opinion would seem to be of special weight.

Before turning to Cave J.'s judgment, however, we think that it will be useful to refer to a certain passage in a judgment of Lord Summer which was cited to us by Mr. Salant in the course of argument as authority for the proposition that a Court of Appeal should not interfere if the trial Court comes to a decision that a confession is free and voluntary. The case is that of Rex v. Ibrahim, 1914 A.C. page 599, and the passage in question at page 610 reads as follows:

> "With Regina v. Thompson before him, the learned Judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests with the trial judge. Their Lordships are clearly of opinion that the admission of this evidence was no breach of the aforesaid rule."

It must be remembered that this was a case tried by a Judge and jury, and so far from laying down that the question of the admissibility of a confession is one for the trial *Court* (as opposed to the trial *Judge*) alone, it is clear upon a careful reading of the passage that Lord Sumner in fact was laying down precisely the opposite proposition. What he says in effect is that while the question as to whether a confession is free and voluntary is, prima facie, a question of fact, nevertheless this is a matter which should be withdrawn from the jury and determined by the Judge. In other words Lord Sumner is merely repeating what has been laid down in countless earlier authorities that the admissibility of a confession is a question of fact, or of mixed fact and law, for the Judge; and the weight to be attached to that confession, once it has been admitted, is a matter for the jury. This is entirely in accordance with the view expressed in Rex v. Cowell (supra), Humphreys J. being quoted by the Court of Criminal Appeal as having said: "I think, upon this evidence, that this statement is admissible, but it may not be true. That is not for me to decide." Where, as in this country, there is no jury, it follows that the weight to be attached to a confession is a matter of pure fact for the trial Court, with whose decision an appellate Court would be most unlikely to interfere; but its admissibility is eminently a matter with which a Court of Appeal not only may but should interfere if, in their opinion the wrong test have been applied. Incidentally it

is apparent from Lord Summer's judgment that he, too, regarded Regina v. Thompson as being the leading authority upon the matter.

Now, we come to Cave J.'s judgment. It is so admirably expressed and so concise that one is tempted to quote the whole of it, but it will probably be sufficient to refer only to certain passages. At the beginning of his judgment the learned Judge says:

> "The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him. This is a question which must necessarily arise for decision in a number of cases both at petty and quarter sessions; and to my mind it is very unsatisfactory that the principle which must guide the decision of magistrates in these cases should be loosely or confusedly interpreted.
>
> Many reasons may be urged in favour of the admissibility of all confessions, subject of course to their being tested by the cross-examination of those who heard and testify of them; and Bentham seems to have been of this opinion (Rationale of Judicial Evidence, Bk. v., ch. vi., s. 3). But this is not the law of England. By that law, to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible. On this point the authorities are unanimous."

The learned Judge then goes on to quote a very well known passage in Mr. Taylor's book on the Law of Evidence. Part of this quotation is as follows:

> "The material question consequently is whether the confession has been obtained by the influence of hope or fear and the evidence to this point being in its nature preliminary, is addressed to the judge who will require the prosecutor to shew *affirmatively*, to his satisfaction, that the statement was *not* made under the influence of an improper inducement, and who, *in the event of any doubt subsisting on this head*, will reject the confession."

This, it will be noted, refers to confessions in general made not necessarily to a Police Officer but to any person in authority.

We must now consider the special case of a satement made by a person in custody to a Police Officer. On that matter we would refer to a recent judgment of this Court, Criminal Appeal 91/42, C.L.R. Vol. 12, page 61, where the Court said:

> "In considering whether a statement made to the Police by a person in custody is free and voluntary, it is useful to have regard to the Judges Rules, which were formulated many years ago by His Majesty's Judges in England for the guidance of the Police themselves and the Courts, and which it is the practice of the Courts of Palestine to follow."

These rules, of course, have not the force of law but they provide a convenient set of tests to determine the question whether a confession to a Police Officer by a person in custody is free and voluntary. They are expressed in simple language; they break no new ground, amounting, in effect, to what may be described as an informal codification of the

decided cases on the matter up to 1912, the year of their issue. They are to be found in Archbold's book "Criminal Pleading, Evidence and Practice", (28th Edition) at page 406.

That is the position, then, as regards what should be the practice of the Courts in this matter.

Let us now turn to the facts of the present case. First of all we will deal with the first accused, Berkovitz. It must be noted that we propose to refer not to the evidence of the accused himself but to that of Police Inspector Shibboleth, who was actually the Police Officer in charge of the investigations. There is no question here of unsupported allegations by the defence. This is Shibboleth's own evidence which appears on page 26 of the record. He says:

> "I got no communication from Berkovitz in lock-up that he wanted to see me. I sent for him to take his statement. His statement took at least 1½ hours. While he was relating the story of his private life I told him I was not concerned with his private affairs and told him he had better tell me all about the theft and it would be better for him. I cannot remember my exact words."

It appears from the Judge's note that in his final speech to the Court Mr. Salant admitted that Inspector Shibboleth told Berkovitz that it would be better for him to tell the truth. There is, of course, a host of authorities that a confession made in response to such an observation by a person in authority is inadmissible, and it is somewhat disquieting to find a Police Officer in charge of the investigations in an important case making so elementary a blunder. As Cave J. points out, when approving certain observations of Pollock C.B. in an earlier case, the objection to telling a prisoner that it would be better to speak the truth is that the words import that it would be better for him to say *something*, whereas an essential element of a proper caution is to make it clear that he is not obliged to say anything unless he wishes to do so.

That observation by Shibboleth would, of itself, be enough to render the subsequent confession inadmissible, but unhappily there are other grounds of objection. There is the evidence of Mrs. Berkovitz, the wife of the first accused, who says that the accused having been arrested on the 4th of August, which we know to be the case, Shibboleth saw her on the next day and told her that he was anxious to help Berkovitz if he could, but Berkovitz "had to assist him and if not it may be that he would go to prison for as long as 8 or 10 years." Mrs. Berkovitz, with Shibboleth's knowledge, saw the accused on the next day and she says that she communicated the message to him. His statement was taken on the following day.

How does the learned Judge deal with these matters? It is to be noted that he does not say that he disbelieves Mrs. Berkovitz's evidence but says:

> "Assuming Mrs. Berkovitz's evidence to be true I have to con-

> sider two matters, the first of which is, did this inducement continue to operate on the mind of the accused at the moment of the alleged confession? There is no evidence as to this; and P/I Shibboleth testified that he never held out to the accused himself any threat, inducement or promise either before, during or after its recording."

With respect to the learned Judge, we think that this passage is open to objection for two reasons: first, if Mrs. Berkovitz's statement is true the case would seem to fall within the very facts of Regina v. Thompson, where a Mr. Crewdson, a "person in authority" said to the brother of the accused, with the intention of his words being communicated to the accused: "It will be the right thing for accused to make a clean breast of it", and the learned Judge held that the accused's statement was inadmissible on the ground that the communication of those words to him was calculated to lead him to believe that it would be better for him to say *something;* secondly, the statement that Shibboleth testified that he never held out to the accused himself any threat, inducement or promise is a finding which clearly cannot be supported in view of the passage in the record to which we have already referred.

The learned Judge goes on to say.

> "The second matter I have to consider is was this inducement calculated to make the confession an untrue one. Here I am definitely of the opinion that it did not, for the confession was substantiated by the action of the accused at the scene of the theft on the 8th August, 1941."

That, of course, is an entirely irrelevant test. The question as to whether or not a confession is true is utterly immaterial when considering its admissibility. Here we would refer again to Cave J.'s judgment in Regina v. Thompson where he says:

> "It is said by Pollock C.B. that the true ground of the exclusion is not that there is any presumption of law that a confession not free and voluntary is false, but that it would not be safe to receive a statement made under any influence or fear."

To turn to the other three accused. It is contended by Mr. Eliash that their statements as well as that of Berkovitz were given in response to an improper caution by Shibboleth. What are the elements of a proper caution? The form of words suggested in the Judges Rules is, in the case of a formal charge, as follows: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." In other circumstances it is suggested that the caution should take the form; "You are not obliged to say anything, but anything you say may be given in evidence." There is no special virtue in these particular words and it is not important what precise words are used so long as the caution conveys to the person concerned that he has a completely free choice as to whether he should say anything or not, but that if he does say anything what he says may be given in evidence.

Bearing this in mind, let us turn to the form of caution used by Shibboleth, it being common ground that the caution to all four accused was in identical terms, Shibboleth himself says in examination-in-chief, "When I cautioned accused Berkovitz I said to him in Hebrew, 'Ani mazhir otcha sheata rashai latet eduth lefanay o bevet hamishpat." Counsel on both sides agree that the correct translation of those words is. "I warn you that you are entitled to give evidence before me or in Court." As it stands that is clearly an improper caution. The element of freedom of choice as to whether to make a statement at all is completely omitted. The accused is, in effect, limited to the alternatives of speaking at once to the Police Officer or speaking later in Court. The principle is well stated in a summary of a South African case to which Mr. Eliash referred us and which appears at page 411 of the 14th Edition of the English and Empire Digest, Vol. 14:

> "Before any statement made by an accused person can be admitted in evidence against him it must be clear that the accused made the statement of his own free will and not under any feeling that he was legally bound to make a statement."

Mr. Salant appears to have done his best to remedy the situation and in answer to further questions Shibboleth said:

> "I did not give accused to understand he must either make a statement before me or before the Court. Gave him to understand he was not compelled to give a statement before me. I believe I explained to him that he need not volunteer a statement at once."

On this matter the learned Judge says:

> "Finally I come to the matter of the caution administered to all accused. I agree with accuseds' advocates that its wording is not exactly as that prescribed by the Judges Rules in that it omitted the approved words 'do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so', and instead the phrase 'you are free to give a statement before me or at Court, etc.' Now were the matter left there I might have had some hesitation in saying that the accused had been properly charged, but P/I Shibboleth clearly stated in his evidence when producing these statements that he gave the accused to understand that they were not *bound* to make a statement to him."

Unfortunately the further explanations of Shibboleth and the learned Judge's acceptance of them do not improve the position. The ground of objection is that the accused was not told that he was under no obligation to make a statement at all, to anybody, at any time. This omission cannot be remedied merely by pointing out to the accused that he was not bound to make a statement *before Shibboleth* or to volunteer a statement *at once.*

For these reasons we are of opinion that the statements of all four accused were improperly received in evidence. To adopt the language of Cave J. we decide this case on the broad, plain ground that it was not proved satisfactorily that the confessions were free and voluntary

and that therefore they ought not to have been received.

Other grounds were urged before us why these statements should not have been received in evidence and it may well be that the judgment of the trial Court is vulnerable in further respects. In view, however, of our decision on the matters to which we have already referred we do not think it necessary to deal with any further point.

It follows that the appeals of all four accused must be allowed and the convictions quashed. We would add that it is most unfortunate in the public interest that owing to the mishandling of the investigations by the officer in charge this result should be necessary.

Delivered this 6th day of November, 1942.

Frumkin J.

I fully agree and have nothing to add as indeed there is hardly anything which could usefully be added to the learned and thorough and yet so explicit judgment just delivered by my brother. In concurring I would only say this, that no words could be strong enough to express my regret that persons in charge of a duty so vital to the war effort, charged with so serious an offence, should escape the hands of justice because of the all too eager attitude of the Police.

HIGH COURT 62/42

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

Before: Gordon Smith C.J. and Copland J.

Muhammad Adib el Mutawalli, in his capacity as the Mutawalli of Waqf Sinan Pasha. Petitioner

v.

The Honourable the Chief Secretary on behalf of the Government of Palestine. Respondent

and between:

Muhammad Adib el Mutawalli, in his capacity as the Mutwalli of Waqf Sinan Pasha. Petitioner.

v.

1. The Honourable the Chief Secretary on behalf of the Government of Palestine.
2. Ibrahim Hussein el Husseini Respondents

(By order of Court dated 7.7.42)

Petition to HC while other remedy available — Failure to disclose full facts in petition or affidavit.

1. High Court will not interfere where petitioner has other remedy.
2. Failure to disclose full facts in petition to High Court or affidavit supporting it may be sufficient ground for discharging rule nisi, if granted.

Edit. Note:— As to 1 see HC 88/41 11CtLR 189 and Edit. Note thereto. As to 2 see Misc. Appl. 9/42 11CtLR 99.

Nakhleh for Petitioner. *Solicitor General* for Respondent No. 1.

Abcarius for Respondent No. 2

Return to an order nisi issued on 15.6.42, directed to respondent calling upon him to show cause why:

1. He should not conclude on behalf of Government of Palestine an agreement with petitioner in his capacity as Mutawalli of Sinan Pasha Waqf for payment of compensation in lieu of tithes by computing same on basis of agreements with Mutawallis of other private Waqf, and

2. To refrain from paying amount of compensation in lieu of tithes or any part thereof due or to become due to Sinan Pasha Waqf to lessees or any one of them.

ORDER

Gordon Smith, C.J.

We have heard very cogent reasons as to why this order should be discharged. There is an alternative remedy. That is one of the reasons why this order should not be made absolute. There have, on the facts before us, been laches on the part of the mutawalli and the full facts were not disclosed in the petition or the affidavit supporting the petition. Any one of these reasons would be sufficient grounds for discharging this rule. Actually the main ground on which we discharge the rule is that there is an alternative remedy. It will be for the petitioner and the second respondent, if they can't agree, to come to the Court and have their rights under this waqf settled by the Court once and for all. As soon as that has been done, the Government is quite prepared to pay compensation either to the second respondent or to the waqf in accordance with whatever the judgment of the Court may direct.

The order must, therefore, be discharged, with costs to include LP. 10 advocate's attendance fee to each one of the respondents.

Given this 17th day of July, 1942.

Copland J.

I agree entirely. I would only add that I hope more care will be taken in future by petitioners, when they file petitions, to file truthful petitions. Too many petitions are filed in these applications which do not contain the full facts and which, unfortunately, it would appear purposely do not disclose these facts, because if these facts were disclosed, as they ought to be, the rule nisi would never be granted.

CIVIL APPEAL No. 124/42.

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

Before: Copland J. and Frumkin J.

Yusuf Salih Husein Abu Hassan & 21 others. Appellants.

v.

1. Keren Kayemeth Leisrael Ltd.
2. The Palestine Jewish Colonization Association.
3. Tsur Development & Building Company, Tel-Aviv.

4. Faiza, daughter of Fausi Bey Sadek, Haifa.
5. Freihat, daughter of Fauzi Bey Sadek, Haifa. Respondents.

Question before LSO whether Pltfs owners or tenants — Onus of proof — LSO interjecting remarks into record in course of trial tending to show that he made his mind up when starting hearing of case.

1. Defendant's admission that Plaintiff, who claims ownership, is a tenant does not exonerate Plaintiff from proving ownership.
2. Recorded remarks of trying Judge showing, if standing alone, that he made up his mind before hearing both sides of case — good ground for setting aside his judgment, but not so where preconception negatived by subsequent remark and record as a whole.
3. (*Obiter*) Judicial Officer not to express his thoughts in course of trial but keep them until case finished or he delivers judgment or unless he has to give a preliminary ruling on a point to be decided there and then.

Salah for Appellants. *Ben-Shemesh* and *Rubenstein* for Respondents.

Appeal from decision of LSO, Haifa Settlement Area, dated 18.4. 1942, and delivered on 4.5.42, in Case No. 1/Daliyat er-Rauha.

JUDGMENT

This is an appeal from a judgment of the learned Land Settlement Officer Haifa Area, in which he dismissed the claim of the villagers of Deliyat to the ownership of some 1,500 dunams of land. The grounds of appeal are, first, do the respondents' kushans apply to this land, and secondly, were the appellants owners or tenants.

To take the second point first. It is argued that as the respondents admitted that the appellants were tenants, it was therefore upon the respondents to prove that the appellants were not owners. That, of course, is entirely wrong because if the appellants allege ownership the onus is upon them to prove it.

A subsidiary point was that the Settlement Officer made a mistake in chosing the particular road he did as one of the boundaries of the land in dispute instead of another road. That, however, is eminently a question of fact for the Settlement Officer to decide and we see no reason to interfere with his choice of the road.

The first ground of appeal, though, needs some little consideration. It is said for the appellants, that early in the trial of the case, as a matter of fact when the first witness was being heard, the Settlement Officer interjected three remarks which are recorded on the typed record and which we are told were actually read in Court. The first one is "witness applies Kushan on map as outlined by me in red. Area corresponds roughly". The second remark was to the effect that the reason why the original registration was split into two was explained and on the face of it they could not fit into the area West of the Kafrin Road as claimed by the Defendants. Later on he says this "I agree there is little doubt as all this applies to Fiscal BI. IV as claimed." And

then later on the Settlement Officer, in reply to a submission by Dr. Eliash that there was prima facie evidence that the registration covers the land, said: "I agree that there is every reason to believe that this area is covered by the Kushans". Here he then makes some other remark about the Deeds and the areas being approximately the same and goes on to finish "To save any doubt I will hear Taufic Bey Sadiq".

The appellants have referred to Civil Appeal 135/41 *) and Civil Appeal 59/42 **) in which this Court commented adversely on remarks made by a Settlement Officer in the course of the trial which tended to show that he had made his mind up before hearing both sides of the case, and it is argued that the same principle applies here. I agree that if those remarks which I have cited from pages 3 and 7 of the typed record stood alone, then I think that the appellants would have made out a good case for setting aside the judgment, but on page 35 of the typed record, after submissions by plaintiff and defendant, the Settlement Officer said "Mr. Salah" (that is the advocate for the defendant) "is right, at settlement each party must substantiate his claim fully. This is a case involving very considerable interest to a number of people and I want to feel there is no doubt whatsoever in making my decision".

Now this paragraph alters completely the view that the Court would undoubtedly, I think, have felt compelled to take. With regard to the first remarks it shows, as so frequently happens, that the opinion of the Judge trying the case varies from time to time as to what the position will be and it shows that, in this particular case before he heard his series of witnesses, he had not made up his mind on the essential points at issue. I would, however, make this remark. It is most undesirable for Settlement Officers, and indeed any Judicial Officer, to interpolate remarks into the record which really are not properly a part of the record. If the Settlement Officer thinks these various matters he should keep his thoughts to himself until the end of the case and not put them down on paper where they are liable to cause misconceptions or express them in Court. He should keep his ideas to himself until the case is finished or he delivers judgment, or unless he has to give a preliminary ruling on a point which is to be decided there and then.

For these reasons, though we feel that the remarks as I have said should not have been made, we are satisfied, taking the record as a whole, and in particular having regard to this paragraph on page 35, that the Settlement Officer had not made up his mind when he started hearing the case.

For these reasons the appeal will be dismissed with costs on the lower scale, LP. 10 advocate's attendance fee to each advocate appearing for the respondents.

Delivered this 30th day of July, 1942.

*) 10 CtLR 183. **) 11 CtLR 235.

CIVIL APPEAL No. 253/41.

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

Before: Rose J. and Edwards J.

Elias Wasif Mansur — Appellant

v.

Yusif Isa Mansur — Respondent

Adducing evidence to prove that indebtedness on bill sued upon included in other bill made later.

Defendant claiming that later promissory note included satisfaction of earlier one, subject matter of action, should be allowed to adduce evidence to prove it.

Nakhara for Appellant

Levin and *Lifshitz* for Respondent.

Appeal from jdgt of DC, Haifa, sitting as a Court of Appeal, dated 29.10.1941, in Civil Appeal No. 85/41.

JUDGMENT.

This is an appeal from a judgment of the District Court of Haifa remitting the case to the learned Magistrate for the hearing of certain evidence.

Only one matter of substance is raised. The present action relates to a promissory note for LP. 100 made by the respondent in favour of the appellant. The bill matured on the 3rd July 1936 and action was not filed until the 12th December 1939. In the meantime another promissory note for LP. 700 was made by the respondent in favour of the appellant, for the amount of which note the appellant has obtained judgment.

The respondent desired to call evidence to show that the said note for LP. 700 included his indebtedness on the bill for LP. 100, which is the subject matter of the present action. The appellant admitted in evidence that this note for LP. 700 related to certain business transactions between the parties and it seems to me to be eminently a matter in which evidence should be permitted to be adduced by the parties to show whether or not the payment effected by the promissory note for LP. 700 in fact included the satisfaction of the earlier note.

For these reasons I am of opinion that the learned President was correct in remitting the matter to the Magistrate's Court for the hearing of the necessary evidence and to give a fresh judgment accordingly.

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 27th day of February, 1942.

CIVIL APPEAL No. 114/42.

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

Before:—Gordon Smith, C.J. and Edwards, J.

Meonot Ovdim Behaifa Aguda Hadadit Ltd. Appellant

v.

Itzhak Kupfer Respondent

Claim by cooperative society against one of its member for agreed rent & for eviction — Lease for 99 years not registered & not signed — Application on appeal for remittal to trial Court with instructions to fix rent on quantum meruit basis.

1. Court of appeal will not give instructions to Magistrate's Court to assess rent on a quantum meruit basis if claim was for fixed and agreed rent and amount to be assessed might pass limits of Magistrate's jurisdiction.

2. (*Per Gordon Smith C.J.*)

Action for agreed rent and for eviction for non-payment must fail if based on an unconcluded lease or agreement.

Edit. Note:— As to 2 CA 135/41 10CtLR 183 and CA 59/42 11CtLR 235 referred to.

A. Levin & N. Lifshitz for Appellant.

D. Cohen & Gorali for Respondent.

Appeal from jdgt of DC, Haifa, sitting as a Court of Appeal, dated 13.4.42, in Civil Appeal No. 24/42, on appeal from jdgt MC dated 7..1.42, in Civil Case No. 1113/41.

JUDGMENT

Gordon Smith, C.J.

I have had the advantage of reading the judgment of my brother Edwards and, as I agree with him that this appeal must be dismissed, I need say very little. Although many points were argued by the Appellants both on the judgments of the two Courts below and on the construction of the rules and alleged lease or agreement the matter really falls within a very small compass.

The Appellants as Plaintiffs sued for rent and eviction on the basis of a lease, or agreement for a lease, and its breach by the Respondent (see the statement of claim, paragraphs 2 and 3) and it is clear that no such lease or agreement was ever concluded. In this respect I agree with the judgment of the learned President of the District Court in effect that it is impossible to define the rights of parties to such an unconcluded lease or agreement and which, in effect, does not exist. It is clear also that the Respondent has paid a considerable sum, in excess of the rent claimed, in anticipation of obtaining a lease and is in occupation, and what the rights of the parties are under the rules of the society, when the matter has not been completed by concluding a lease or agreement for lease, in accordance with such

rules, is a different matter on which we are not called upon to give a decision. In my opinion this action is misconceived and the appeal must be dismissed.

Edwards, J.

This is an appeal, by leave, from a judgment of the District Court of Haifa dismissing an appeal from a judgment of one of the magistrates of Haifa dated 7th January, 1942, whereby the Magistrate had dismissed an action by the plaintiffs (appellants) for LP. 137.009 in respect of rent.

The appellants are a co-operative society whose main object is to provide housing for its members. The respondent, who is a member of the appellant society, resides in one of the flats of a house registered under the name of the appellants. The relations of the parties are governed by the rules of the appellants and by a form of a contract attached to those rules.

The statement of claim in the Magistrate's Court is in the following terms:—

> 2. "As a member of the plaintiff society, the defendant took on lease from the plaintiff, in accordance with the regulations of the society and the contract of lease enclosed thereto, and in accordance with the decision of the society, the flat in which he resides and he had to pay the plaintiff rent as from 1.9.35 to 1.3.39 the sum of LP. 3.990 and as from 1.4.39 LP. 4.250 monthly.
>
> 3. The defendant breached the agreement between him and the plaintiff, failing to pay the aggregate amount of LP. 137.009 until 1.2.1941. This amount includes more than two consequent payments. The plaintiff sent the defendant some notices but he failed to pay the society the amount due from him.
>
> 4. It is therefore prayed that judgment be given against defendant to pay the amount of LP. 137.009....."

The Magistrate dismissed the appellants' claim on the ground that Part D, rule 3 of the Rules of the Society was contrary to the provisions of Section 11 of the Land Transfer Ordinance, and was therefore null and void, and he found that the action of the appellants in allowing the respondent to be in possession of the flat and the respondent being in possession of the flat were illegal actions within the meaning of section 18 of the Ordinance and he held that according to the principle "Ex turpi causa non oritur actio", the appellants were not entitled to receive either rent or have the respondent evicted on the basis of the illegal contract. It was admitted that no contract of lease had been registered at the Land Registry and it was even admitted that the form of contract attached to the Regulations had never been completed or filled in, still less signed. Against the judgment of the Magistrate the appellants appealed to the District Court. That appeal was dismissed by the learned Relieving President of the District Court (Judge Weldon) mainly on the ground that Rule 3 of

Part D of the Rules was itself fatal to the appeal because it provided that the payments to be made by the lessee. as well as his other rights and obligations were to be defined by the agreement of lease, and as the agreement of lease did not show when it commenced or expired and was silent as to the payment of rent and that as Clause 7 of the agreement of lease was the relevant section and as in that clause all those matters were left blank, there was nothing in the document to support the allegations in the statement of claim. The learned Relieving President went on to say: "unless and until these provisions are filled in, and the lease is registered, I do not see how the rent can be calculated and eviction claimed for such a non-payment, for the rights and obligations of the party in this respect are not yet determined". He then held that the action was clearly misconceived, having been brought under a contract of lease.

Now, at the hearing of the appeal before this Court, the appellants' advocate argued that, as the Relieving President had some doubt as to whether the Magistrate was right in holding that the lease was void under Section 11 of the Land Transfer Ordinance, and that as the learned Relieving President entertained same doubt as to whether the unregistered contract of lease might not be regarded as an agreement to lease, he should have allowed the appeal. For reasons which will appear later, I do not think that I need discuss at length the judgment of the District Court, because we are really concerned with the judgment of the magistrate. At this stage it will be well to set out Part D, Rule 3 of the rules at length.

> "3. Agreement of Lease.
> (a) Each member shall be granted a lease in respect of the flat in the common buildings and shall have to sign the agreement of lease without any delay upon being called upon to do so by the management committee. The said agreement shall define the payments payable by the member as well as all his other rights and obligations as a lessee. The agreement of lease shall be registered at the Land Registry and shall be valid for a period of 99 years.
> (b) A draft agreement of lease is attached as an appendix to the Rules of the Society and can be amended only by a resolution of a general meeting taken by a majority of 3/4 of the members of the Society and subject to the provisions of Part f, 3(e).
> (c) Until the registration of the agreement of lease being lawfully effected its provisions shall be binding so far as they are not inconsistent with the law — as if they were comprised in this part of the Rules.

At the hearing of the appeal before us, Mr. Levin, for the appellants, strenuously argued that there was no obligation on his client to register the lease. He also argued that a lease of part of a house did not require to be registered because of the Land Law (Amendment) Ordinance, 1937, which had amended Section 10 of the principal Ordinance. Mr. Levin also said that it was owing to the fault of the respondent that the lease was not registered, the respondent saying that

he did not have the money with which to pay the neccessary registration fees. I refrain, however, from deciding whether the Magistrate came to a correct conclusion when he held in this case that the lease was null and void. In fact, I prefer to express no opinion on the correctness or otherwise, of the Magistrate's judgment, on the soundness or otherwise of Mr. Levin's arguments, for the simple reason that I consider that we are not in a position to make the order which Mr. Levin in his reply asked us to make. In effect, what Mr. Levin finally urged us to do was to regard the respondent as a tenant at will, in view of the dicta in Halsbury (Hailsham) Vol. 20, pages 57, 58 and 59, and to remit the case to the magistrate with directions to him to order the appellants to return to the respondent a sum of LP. 425 or LP. 450 (I am not certain as to the exact figure) already paid by the respondent to the appellants, less a sum to be fixed by the magistrate for rent on the basis of a *quentum meruit*. In making this request Mr. Levin relied on Land Appeal 73/29 (Rotenberg Vol. 3 page 1159).

It is obvious that this was never the appellants' case before the magistrate. In view of the facts, now elicited, it *does* seem that the case as laid in the Magistrate's Court was misconceived.

Now, it is clear that the magistrate could never have dealt with such an application as Mr. Levin has made to this Court for the simple reason that to make an order for the return of LP. 425 is beyond his jurisdiction, which is limited to giving judgment in cases where the value of the subject matter does not exceed LP. 150. Moreover, it would be quite impossible to say in advance that the amount of rent to be fixed on a quantum meruit basis would not be more than LP. 150; in other words, what the appellants really now ask for is a declaration which is a matter not within the jurisdiction of the magistrate to make. Since that was not within the jurisdiction of the magistrate it is impossible for this Court to deal with the matter on these lines on appeal from the magistrate, in spite of the provisions of Rule 350 Civil Procedure Rules, 1938. It is unneccessary, therefore, to consider all the various arguments of parties' advocates. I reiterate that I wish to refrain from saying whether the magistrate was right in holding that Section 11 of the Land Transfer Ordinance applied, because I do not wish to prejudice the rights of the appellants in the event of their bringing fresh proceedings in the appropriate Court.

For all the above reasons, I consider that the appeal should be dismissed with costs...

Delivered this 24th day of August, 1942.

CIVIL APPEAL No. 144/42

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

Before:— Edwards, J. and Frumkin, J.

1. Aron Heber
2. Chaim Brzoza — Appellants.

v.

The Official Receiver, as liquidator of the Belgo-Palestine Bank Ltd. — Respondent.

Off. Receiver refusing depositor's application to be treated as preferential creditor of Bank in liquidation — Application to DC to vary Off. Receiver's order.

Although sec. 173(5) Companies Ord. prescribes no time limit application thereunder must be made within reasonable time.

Weyl for Appellants. *Many* for Respondent.

Appeal from jdgt of DC, Jerusalem, dated 2.7.42, in Motion No. 53/42.

JUDGMENT.

On 24th April, 1940, the present two appellants deposited with the Bank Belgo-Palestine Ltd., Tel Aviv, the sum of LP. 60, by a joint letter signed by both, authorising the Bank to pay out the sum to the second appellant on certain terms, and stating further that if by 24th June, 1940 the second appellant had not sent the Bank an authorisation or confirmation signed by the first appellant, then that sum should be returned to the first appellant. The Bank agreed to receive the sum and confirmed the receipt of LP. 60 together with the joint letter. The Bank stated that they (the Bank) had registered its contents, that is, the contents of the letter. On 19th May, 1940 the Bank stopped payment. On 12th July, 1940, a Winding-Up Order was made. On 18th July, 1940, the second appellant wrote to the Official Receiver asking that he be regarded as a preferential creditor. On 23rd July, 1940 the Official Receiver wrote to the second appellant refusing to accept him as such and refusing to pay him in full. The second appellant took no further steps to appeal formally to any Court against the decision of the Official Receiver as liquidator but waited till 15th January, 1942 when he submitted a proof. On the 18th February, 1942, the present appellants filed an application, namely, Motion 53/42, to the District Court, Jerusalem, for an order that the decision given by the Official Receiver be varied. On 15th May, 1942 the learned President adjourned the matter until 18th May, 1942, when he gave a ruling on certain preliminary objections. He ruled that it was then too late for the second appellant to appeal because he should have, under section 173, sub-section 5 of the Companies Ordinance, appealed either within 21 days, or at any rate, within a reasonable period, and he accordingly dismissed the application of the second appellant.

After hearing further arguments and the evidence of a witness called on behalf of the first appellant, the learned President by an order, dated 2nd July, 1942, dismissed the application of the present first appellant. It is against the dismissal of the applications of both the present first and second appellants that the present appeal has been brought.

At the hearing of the appeal before us the advocate for the respondent argued, that the appeal of the second appellant was out of time because the District Court had dismissed his application by a preliminary ruling dated 18th May, 1942, whereas the appeal was not lodged until 31st July, 1942. The respondent's advocate further argued that, the proviso to rule 317, Civil Procedure Rules, 1938, did not avail the second respondent because the order of 18th May was not an interlocutory order but was a decree within the meaning of that word in Rule 2, Civil Procedure Rules. To that argument the present appellants' advocate replied that there was only one appeal before the learned President and that he did not give judgment on it until the 2nd July, 1942. We do not think it necessary to decide this interesting point because we think that we can decide the matter on another ground, namely, that we are satisfied that Judge Shaw's judgment of the 18th May, 1942, was correct, namely, that although no time limit is prescribed by Rule 173, sub-rule 5, Companies Ordinance, yet an application to the District Court, under that sub-section, should have been made within a reasonable time after 23rd July, 1940, and that to wait for a year and half was certainly not reasonable. The appeal of the second appellant accordingly fails. With regard to the first appellant, the respondent's advocate argued that he has no right to be regarded as a preferential creditor, and that he has really no claim to this sum, he having abandoned any claim by reason of the endorsement which he made on the original document of deposit, which endorsement is not denied by the appellant. The first appellant on 1st July, 1940 made an endorsement in Hebrew, on the original document and signed that endorsement, a translation of which is in the following terms:

> "The money of this deposit is due to Mr. Brzoza Chaim and Mr. Brzoza Chaim only should be paid the amount of LP. 60.—"

We think that the contention of the respondent's advocate in this regard is sound and must be upheld. For this reason alone the appeal of the second appellant must be dismissed. It is therefore unnecessary for us to deal with the interesting arguments of the appellants' advocate as to whether the sum of LP. 60.— was clothed with the characteristics of special trust or was merely deposited in a bank in the ordinary way either on current account or on deposit.

This problem will have to be considered and decided on its merits as and when occasion arises. The appeal is dismissed with costs to be

taxed on the lower scale to include an advocate's attendance fee of LP. 10, the costs to be paid in equal shares by the two appellants.

Delivered this 21st day of October, 1942.

HIGH COURT No. 113/42

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

Before:—Copland, J. and Khayat, J.

1. Haim Moses Nomberg
2. Chana Nomberg — Applicants.

v.

1. Assistant Chief Execution Officer, Tel-Aviv
2. Estate of David Blumner, by his heir Berta Kaner nèe Blumner. — Respondents.

Heir of heavily indebted J/D declining to have anything to do with estate — CXO directing J/C to take out letters of administration re estate of deceased J/D.

1. An heir cannot be compelled to take out letters of administration or to take his share in estate, if he does not wish to do so.
2. A judgment creditor can always take out letters of administration if persons who have a prior right to do so disclaimed.

S. Lande for Applicants. Ex parte.

Application for an order to issue directed to 1st Rspdt to show cause why his orders dated 9.7.42 and 20.7.42 in execution file No. 434/42 Tel-Aviv should not be set aside & an order substituted therefor directing that proceedings against estate of David Blumner should continue provided a notification be made in a newspaper or in another substituted method of service.

ORDER

In this case the petitioner asks the respondents to show cause why an order of the Chief Execution Officer directing him to take out letters of administration of the estate of his judgment debtor should not be set aside. It appears that the estate is heavily indebted and the daughter of the deceased declines to have anything whatever to do with the estate and she declines to take out administration or to get the property registered in her name so that she can be executed against. We know of nothing to compel an heir to take out letters of administration or to take his or her share in an estate, if he or she does not wish to do so. A judgment creditor can always take out letters of administration if persons who have a prior right to do so have disclaimed, and if in this instance the judgment-creditor really wishes for his money I am afraid he will have to do as the Chief Execution Officer has suggested. The application is therefore refused.

Given this 25th day of September, 1942.

CIVIL APPEAL No. 135/42

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

Before:— Copland, J. and Abdul Hadi, J.

Mariam Ibrahim Isleibi — Appellant

v.

Sarah Elias Zablah, widow of Suleiman Musa Handal, on behalf of the estate of her said late husband. Respondent

Husband purchasing Tahsisat Waqf land by hujjeh & later making it (verbally) a gift to his wife — Question of validity of gift.

While miri land cannot be transferred by will nothing prevents a gift (or transfer without price) being made of such land during lifetime of transferror.

Ankar for Appellant. Respondent absent — served.

Appeal from jdgt of MC, Bethlehem, sitting as a LC, dated 19.6.42, in Land Case No. 40/42.

JUDGMENT

This is an appeal from the learned Magistrate, Bethlehem, sitting as a Land Court. The case is a very simple one and is really too clear for argument. In 1916 the husband of the appellant bought from the father of the respondent certain land and entered into possession of it. This sale was by means of a private sale deed or hujjeh. The husband of the appellant died 13 years ago and before his death it is alleged that he made a gift of this property to his wife. When the appellant tried recently to register this land in her name the respondent objected and claimed that part of it, at any rate, belonged to the heirs of her father. The case was undefended in the Court below but the Magistrate dismissed the appellant's claim on the grounds that this land could not be transferred by way of gift because it was a takhsisat waqf and that that being so the land fell in the category of miri land and could not be transferred except to the beneficiaries. That decision, of course, was quite wrong. It is true that miri land cannot be transferred by will, but there is nothing to prevent a gift or, as it may be put, a transfer without price, being made of such land during the lifetime of the transferror. The only question is was the gift proved.

The appellant's evidence was entirely uncontradicted before the Magistrate, and, in our opinion, the gift, of transfer without price, was proved. The gift was one by a husband to a wife, and therefore need not be in writing.

In these circumstances the appeal must be allowed and judgment given in favour of the appellant in accordance with the Statement of Claim.

The appellant is entitled to her costs...

Delivered this 1st day of October, 1942.

HIGH COURT No. 101/42.

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

Before: Copland, J.

Malka Fenigstein-Levy — Petitioner..

v.

1. Assistant Chief Execution Officer, Jerusalem.
2. Itzhaq Ben Ari Fenigstein — Aespondents.

Effect of not being registered member of Jewish Community — Jurisd. of Rabb. Court with regard to persons appearing before them — Consent of parties to jurisd. of court.

1. Jew in Palestine — not legally member of Jewish Community, if not registered as such.
2. Primary requisite for jurisdiction of Rabbinical Court whether in regard to Palestinians or foreigners — that the persons shall be members of Jewish Community.
3. No amount of consent can give a Court jurisdiction where jurisdiction dependent upon law.

Edit. Note:— As to 1 & 2 see CA 246/40 9CtLR 54.
As to 3 see HC 100/41 11CtLR 76.

Grossman for Petitioner. (Ex parte).

Application for an Order to issue Rspdts calling upon them to show cause why decision of 1st Rspndt dated 17.5.42, in Ex. File No. 114/40, staying execution proceedings of Petitioner against 2nd Rspdt on a jdgt of Chief Rabbinate, Jerusalem dated 19th Adar 5670, should not be set aside.

ORDER

This is an application for the Assistant Chief Execution Officer Jerusalem to show cause why an order of his staying execution should not be set aside.

The facts so far as they are relevant are simple. The petitioner was the wife of the second respondent. Both parties appeared before the Rabbinical Court about 1937 and the Rabbinical Court gave judgment giving the wife alimony. After some three or four years the husband bethought himself of the fact that he is not registered as a member of the Jewish Community and, thereupon, applied to the Chief Execution Officer to stay execution, on the ground that the Rabbinical Court had no jurisdiction to issue a judgment in respect of a person who was not a member of the Jewish Community. It is common ground that the husband is not registered as a member of the Community. This Court has already decided that in such circumstances he is not legally a member of the Jewish Community. The petitioner argues that jurisdiction be inferred by consent by conduct, because of the fact that the parties appeared before the Rabbinical Court, but no amount of consent can give a Court jurisdiction where that jurisdiction is dependent upon the law. In this case, the Rabbinical Court has juris-

diction in these matters of maintenance with regard to members of their community who are not foreigners. It is true that there is a following clause in the Order.in-Council which gives power to foreigners to consent to a Religious Court exercising jurisdiction, but the primary requisite for jurisdiction of a Rabbinical Court, whether in regard to Palestinians or foreigners, is that the persons shall be members of the Jewish Community. The second respondent is not, and the Assistant Chief Execution Officer was perfectly right in staying execution. The application for an order nisi must therefore be refused.

Given this 18th day of September, 1942.

CIVIL APPEAL No. 153/42

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

Before:— Rose, J.

1. Abraham Stub
2. Josef Weichselbaum — Appellants.

v.

Moses Valero — Respondent.

Misrepresentation of law amounting to fraud — Allegation of fraud not specifically made.

1. (*Obiter*) while generally misrepresentation of law affords us relief against speaker, misrepresentation by him of his view of the state of the law may amount to fraud.

2. An allegation of fraud must be specifically pleaded in precise terms; if neither alleged in pleadings nor one of issues nor application for amendment of pleadings, no place for tendering evidence to prove fraud.

H. Cohen for Appellants. *Abramovsky & Hopp.* for Respondent.

Appeal from jdgt of LC, Jerusalem, dated 21.7.42, in Land Case No. 22/40.

JUDGMENT

This is an appeal from a judgment of the Land Court of Jerusalem. The main complaint against the judgment of the learned President is that he was premature in giving his decision in that the appellants, who were plaintiffs in the Court below, did not have an opportunity of leading evidence which they wished to lead.

There is one matter in this case which gave me a little pause for thought and that was the suggestion that the appellants may have been misled by a misrepresentation of the son of the respondent, who is an advocate. In his judgment the learned President says that if there was any such misrepresentation it was a misrepresentation of law and therefore could have afforded no relief to the appellants. While generally speaking that is a correct statement of the law there are circumstances as counsel for the appellants has pointed out, in which a misrepresentation of law may amount to a misrepresentation of the speak-

er's view of the state of the law which might amount to fraud. It is, I suppose, conceivable that in circumstances such as the present, where you have unlearned persons relying upon a statement of a professional man, it might be that fraud might be present. But in this particular case that very precise allegation of fraud was not made. It was not alleged in the pleadings and it was not one of the three settled issues. It is true that during the course of the proceedings counsel for the appellants, in response to a question by the Court, said: "I did allege fraud" and then set out the facts that he now has argued before me. That, in my opinion , is clearly not sufficient. An allegation of fraud must be specifically pleaded in the most unambiguous terms. If that is not done and, as in this case, no application is made for an amendment of the pleadings, in my opinion an appellant can have no possible complaint if his allegation of fraud is not treated seriously by the Court.

Apart from this matter, it seems to me that there can be no complaint with regard to the learned President's judgment.

The litigation as a whole is an unfortunate one and it is to be hoped that even at this late stage some sort of settlement agreeable to both parties may be arrived at.

For the reasons which I have given, the appeal must be dismissed with costs...

Delivered this 29th day of October, 1942.

CIVIL APPEAL No. 145/42.

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

Before:— Edwards, J. and Frumkin, J.

Rajab Abu Ramadan — Appellant.

v.

Taha Abu Ramadan — Respondent.

Priority of interest due under mortgage.

Usual rule that interest due under a mortgage has priority along with mortgage debt does not apply where agreement between mortgagor and mortgagee provides otherwise.

Malak for Appellant. *Shehadeh* for Respondent.

Appeal from jdgt of DC, Jaffa, in its appellate capacity dated 30.5.42 in Civil Appeal No. 26/42.

JUDGMENT

We consider that the District Court came to a correct conclusion when it held that the usual rule that interest due under a mortgage should also have priority when the principal due under the mortgage is entitled to priority does not apply in this case because here there are no successive mortgages but only one mortgage and, in order to have priority at all the appellant was able to rely only on the agreement exhibited in this case, which agreement specifically limited priority to the sum of LP. 840.250 paid by the appellant on behalf of the estate

and did not extend so as to include interest. For the above reasons we dismiss the appeal with costs...

Delivered this 21st day of October, 1942.

CIVIL APPEAL No. 248/42

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

Before:— Gordon Smith, C.J., Frumkin, J. and Khayat, J.

Isaac Trachtengott — Appellant.

v.

Marco Mizrahi — Respondent.

Payment of rent by p/ns — Slight delay in payment of rent.

1. Where agreement provides for payment of rent by promissory notes, it is nevertheless payment of rent covered by provision of sec. 8(1) Rent Restrictions (Dwelling Houses) Ord.

2. A slight delay in payment of rent by promissory notes after several previous delays, not protested or objected to, in payment of rent does not warrant eviction order.

Goitein for Appellant. *Gorali* for Respondent.

Appeal from jdgt of DC, Tel-Aviv, in its appellate capacity, dated 15.10.42, in Civil Appeal No. 89/42.

JUDGMENT

This is an appeal from the judgment of the District Court, which reversed the judgment of the lower Court, which latter had granted an eviction order to the Appellant. The point really is a very short one.

We listened to Mr. Goitein's persuasive arguments at length, on the law as it was in previous years, on equity, and time being of the essence of the contract; and also as to whether this Court was a Court of law or a Court of justice, and it was apparent that Mr. Goitein himself rather thought that he was fighting an uphill battle.

The short point is whether the provision in Section 8 of the Ordinance No. 44/1940 in regard to payment of rent includes provision for payment of that rent by promissory notes, and we rule that where provision in an agreement is made for payment of rent by promissory notes, it is nevertheless payment of rent. In this case there was a slight delay in payment of the rent by the promissory notes, amounting at the end in this particular month to 13 days, but some delay had occurred and had progressively accumulated during the previous ten months, without protest or objection by the landlord. The Ordinance is of course an Ordinance to protect tenants under the special circumstances which prevail at the present time, and we are perhaps fortunate in being able to give this decision not only from the point of view of the law but also frm the point of view of justice.

The appeal will therefore be dismissed with costs...

Delivered this 18th day of December, 1942.

CIVIL APPEAL No. 242/42

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

Before:— Copland, J., Frumkin, J. and Khayat, J.

Chana Bader — Appellant.

v.

Itzhak Pines — Respondent.

Tenant subletting without consent in writing from landlord — Landlord receiving for 10 months rent while knowing of sub-letting —Clause in lease providing that lessor's failure to make immediate use of his rights shall not be considered as waiver etc. — Waiver by conduct.

a) Landlord having knowledge of facts which would give him legal cause for obtaining eviction and not making use of that knowledge and taking necessary proceedings cannot do so at later stage.

b) Even if contract of lease provides that waiver by lessor of no effect unless in writing lessor knowing of breach by lessee and yet continuing to receive rent, with or without protest, — deemed to have irrevocably elected to treat lease as subsisting and precluded from claiming forfeiture.

Edit. Note: CA 101/42 12CtLR 130; CA 110/42 ibid 73 followed.

Goitein and *Reuss* for Appellant. *Gedalevitch* for Respondent.

Appeal from judgment of DC Tel-Aviv, in its appellate capacity dated 9.10.42 in Civil Appeal No. 161/42.

JUDGMENT

This is an appeal from a judgment given by the District Court, Tel-Aviv, in its appellate capacity, in which that Court had affirmed a judgment of the learned Magistrate ordering eviction of certain premises. The eviction was ordered on the ground that the tenant had sub-let a part of the premises without the consent in writing of the landlord in accordance with clause 1(c) of the contract of lease. There is a further clause, 4(f) which says:

> "In any case where the lessor shall not make immediate use of his rights flowing from this Clause, this should not be considered as a waiver, consent or admission on his part, and he may make use of these rights at any time he desires."

The Magistrate found that for ten months the respondent, the landlord, knew that the sub-tenant was in these premises and for ten months he received the rent without any objection whatever, and that by his conduct he, the landlord, had assented to the sub letting; but the Magistrate found that he was bound by judgment given by the Land Courts and District Courts that no tacit consent may be accepted against the clear provision in the contract for a consent in writing, and he also held that clause 4(f) applied and gave the landlord relief. The District Court confirmed the Magistrate's judgment.

We think that both the Courts below came to a wrong conclusion.

From Civil Appeal 101/42 *), the Agent of Carmel Convent Haifa and another v. Kassab, and Civil Appeal 110/42 **), Malk and another v. Pensak, the position is quite clear. In both these cases it was held that, where a landlord had knowledge of the facts which would give him legal cause for obtaining a decree of eviction and had not made use of that knowledge and taken the necessary proceedings, he could not do so at a later stage. In this case in particular we have the receipt of rent for ten months with a full knowledge of the facts. That view is also supported by an English case, Rex v. Paulson and others, 1921, I Appeal cases, p. 271. That was a case where, after a breach of a contract which was known to the landlord, the landlord continued to receive rent. In such a case the landlord must be deemed to have irrevocably elected to treat the lease as subsisting and was precluded from claiming forfeiture. And this is applicable although the lease provides that no waiver by the lessor should take effect unless it is in writing. That case is a particularly strong one, and in it their Lordships referred to the case of Davenport v. Regina, 1873 Appeal Cases, p. 115, where rent had been received with a protest that it was accepted conditionally, and without prejudice to the right to insist on a prior forfeiture. It was held there that even that could not countervail the fact of the receipt of rent.

For all these reasons we think that the appeal should be allowed and the judgments of both Courts set aside and quashed and judgment entered for the appellant in the original action before the Magistrate.

With regard to costs the usual rule will apply — costs to follow the event. The appellant is entitled to his costs on the lower scale here and below, to include the sum of LP. 10 for advocate's attendance fee on the hearing of this appeal. The attendance fees awarded in the two Courts below will be payable to the appellants.

Delivered this 21st day of December, 1942.

HIGH COURT No. 78/42.

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

Before:— Gordon Smith, C.J. and Copland, J.

Zygmunt Zylberszlag — Petitioner.

v.

1. The G.O.C. Polish Forces in Palestine
2. The Officer Commanding the Polish Military Prison

Respondents.

Affidavits, counter affidavits & further affidavits in reply in HC — Effect of non-disclosure of material facts in HC — Person

*) 12 CtLR 130. **) 12 CtLR 73.

deserted from Polish Forces arrested in Pal. by Brit. Police at instance of Polish Forces.

1. No provision in High Court Rules dealing with filing of further affidavits or counter affidavits by Petitioner; Petitioner must make full statement of grounds of his application in first instance and Respondent to reply and show cause against order nisi being made absolute.

2. Nothing debars Petitioner from making fresh application of same nature, if other facts emerged after High Court refused rule nisi or declined to make rule absolute.

3. Petitioner inviting High Court's assistance, grant of which entirely discretionary, must make full disclosure of facts on which petition based; non-disclosure of material facts may result in Court ordering peremptorily discharge of rule nisi, if granted.

4. *a*) Under Allied Forces Act 1940, applicable also to Palestine, Polish Forces and their Military Courts have jurisdiction in Palestine to detain and try members of such Forces for offences committed by them.

b) Arrest by British Police at request of Polish Forces of deserter from such Forces, handing him over to, and his detention by, such Forces — lawful.

B. Joseph, Rotenstreich and *Caspi* for Petitioner.
Cattan for Respondents.

Return to a summons issued on 21.7.42, directed to respondents calling upon them to produce the body of Zygmunt Zylberszlag, and to show cause why question of investigating legality of his arrest should not be enquired into and why they should not be ordered to refrain from interfering with him.

JUDGMENT.

This was an application in the nature of a Habeas Corpus directed to the Respondents on which an order nisi had been granted, upon a petition dated the 19th July, supported by an affidavit of the Petitioner of the same date.

After an adjournment to give the Respondents further time to prepare their reply, the matter came on for hearing before us, on he 4th August, when, at the conclusion of the hearing, we discharged the order nisi and intimated that we would give our reasons later.

The affidavit in reply, to which there were attached various exhibits, was sworn by the Assistant Deputy Judge Advocate General of the Polish Forces, Middle East, and is dated the 1st August.

Further affidavits in reply were then filed by the Petitioner and by a Dr. Weintraub, dated the 3rd August, the latter being mainly on the subject of Polish Law, military and otherwise.

There is no provision in our High Court Rules dealing, in application of this nature, with the filing of further affidavits in reply, or counter affidavits by the Petitioner, and advisedly so, as otherwise the matter would be interminable, with applications for further time to file fur-

ther or counter affidavits ad infinitum, and these matters are usually of an urgent nature. The Petitioner makes, or should make, a full statement of the grounds of his application in the first instance, to which the Respondent is called on to reply and shew cause against the order nisi applied for and issued, being made absolute. There the matter of affidavits ends, as far as the Court is concerned, but I would observe that there is nothing to debar a Petitioner from making a fresh application of the same nature, if other facts have come to light, and if the rule nisi is refused or the Court declines to make the rule nisi if issued, absolute.

The following facts are not in dispute, or if disputed are which we find as facts, on the affidavit before us, unless otherwise stated:

I. The Petitioner is a Polish subject of military age who escaped from Poland in November, 1939, and after making his way across Europe, arrived at Haifa on or about the 9th January, 1941, per the S.S. "Warsaw", a military transport, and according to the passenger list he travelled as a member of the Polish Armed Forces, but he was without passport, visa, or other identity card on arrival.

II. On arrival he was handed over to the Polish Military Authorities and was taken to a Military Camp. On the 11th January he was medically examined and placed in Category D (Auxiliary). It is stated (para. 6 affidavit of the A.D. J.A.G.) that on the 15th January he joined the Polish Military Forces and was assigned to the Q.M.R.'s section at the Polish Base. This is confirmed by the Petitioner's Military Identity Book, a translation of which is attached to the affidavit, which shows the recruitment class of the Petitioner. The endorsement shows that the Petitioner attended the Rally Station of the Polish Forces at Haifa, which fact is signed by the Petitioner.

III. From the 15th January to the 27th January the Petitioner appears to have served with this Polish unit to which he had been attached. On the latter date he deserted, taking with him some of his kit that had been issued to him. From the date of his arrival at Haifa onwards there is a gap in the Petitioner's history, as detailed in the Petition, but on the 12th June, 1941, he enlisted with the British Forces as a driver in the R.A.S.C. and served until the 27th May, 1942, when he was discharged under paragraph 390 (XVI) K.R. 1940. What this clause is I do not know, but the Petitioner alleged wounds received during performance of duty and that he became medically unfit. However, his conduct had been very good and he was then given civilian complement with the R.A.S.C. Maintenance Coy. at Sarafand.

IV. At the instance of the Polish Military Authorities (the G.O.C. Polish Base Depot) the Petitioner was arrested on the 4th July, 1942, by the British Military Police at Sarafand and transferred to Polish Military custody. He was brought up before a Polish Court Martial on the 6th July, 1942, a translation of the record of the proceedings

of which is before the Court, (attached to the affidavit of the A.D. J.A.G.). From this, which was read over to and signed by the Petitioner, he appears to have admitted his desertion from his unit and offered explanations. The order of the Court Martial was for his preventive arrest in the meantime, and he was told and understood that he had a right to complain (or appeal). As previously stated, the Petitioner applied to this Court by Petition, dated the 19th July.

The above is a brief record of the history of the Petitioner, but I must draw attention to the fact that there is an entire absence of any mention of these facts in the Petitioner's Petition or Affidavit in support, as regards his connection with the Polish Armed Forces. In fact, in his Petition and Affidavit he jumps from his arrival at Haifa "on a Polish Refugee Ship in January, 1941" to the 12th June, 1941, when he enlisted with the British Forces.

This Court has said more than once, and recently also, that if Petitioners invite the assistance of the Court by this rather technical procedure, the exercise of which is entirely in the discretion of the Court, the Court is entitled to expect a full disclosure of the facts on which the Petition is based. The nondisclosure of the very material facts that this Petitioner was presumed, at least by the Polish Armed Forces, to be a member of those Forces, would have justified the Court in ordering, peremptorily, the discharge of the Rule Nisi, which in fact had been obtained 'suppressio veri' almost amounting to 'suggestio falsi'. However, the Court overlooked this matter in view of the international aspect of the affair.

The Allied Forces Act, 1940, was by virtue of Section 1(3) of such Act applied to Palestine by the Allied Forces (Application) (No. 1) Order, of the 11th October, 1940, in respect of the Polish Forces (inter alia) as set out in the Schedule to such Order. We are satisfied that under these provisions the Polish Forces and Military Courts of the Polish Forces have been vested with jurisdiction to detain and try members of such forces for offences commited by them. General military service is obligatory for Poles, as prescribed by Article 2(8) of the Polish Act of 1938 and which is also applicable to Poles abroad. All who have not voluntarily enlisted in the Polish Forces have been individually called up.

It is immaterial as to whether all the minor technicalities of enlistment had been complied with prior to the desertion, and we are satisfied that at such date the Petitioner was, de facto, a member of the Polish Forces. The subsequent arrest by the British Police at the request of the Polish Forces, and the handing over of the Petitioner to the Polish Forces, was therefore lawful, and his subsequent detention by the Polish Forces is similarly lawful.

This really concludes the matter, but we are glad to note that the Polish Authorities do not regard the matter in any vindictive spirit

against the Petitioner, in view of his excellent record with the British Forces. .. ..

For these reasons the order nisi was discharged.

Delivered this 17th day of August, 1942.

Chief Justice.

I agree and have nothing to add. *British Puisne Judge.*

CIVIL APPEAL No. 152/42

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

Before: Copland, J.

1. Saleh Ben 'Issa Abdul Salam on behalf of the estate of his father 'Issa Abdul Salam Salameh.
2. Mohommad Abdul Salam Salameh Darwish — Appellants.

v.

Shahinda Mohammad Tawfic el Khalal on behalf of the estate of her father — Respondents.

Claim not signed by Pltf or advocate — Calculation of prescription — Joint and several liability.

1. Specific authorisation by Pltf for specific act of signing his name on claim — good; unlike case of signing appeal (or claim) on behalf of other person without power of attorney.
2. Where contract relied on bears Gregorioan date prescription must be calculated in Gregorian year.
3. Liability under contract cannot be joint and several if nothing in contract to that effect.

Asal for Appellants. *Muhtadi* for Respondents.

Appeal from jdgt. of DC, Jerusalem dated 20.7.42 in Civil Case No. 151/40.

JUDGMENT

This is an appeal from the judgment of the District Court of Jerusalem for the equivalent in Palestine currency of L.E.300, awarded to the respondent on an agreement for sale entered into between her father and one of the appellants being sued as guarantors. The District Court found in favour of the plaintiff, now respondent, and gave judgment against the defendants, now appellants, jointly and severally for the full amount.

The points raised on this appeal were all raised in the Court below. The first one is that there was no case proper before the Court because the claim was not signed by the plaintiff or her legal advocate. The District Court found as a fact that the plaintiff authorised a particular gentleman to sign her name for her on the document required and the Court is of opinion that that is sufficient. It was a specific authorisation given for a specific act and therefore differs from a case where somebody signs an appeal under a power of attorney.

The second point was that the action was prescribed. The point was not pressed on appeal and indeed could not be. The contract bears a Gregorian date and the rule is that in such a case years are Gregorian years. Calculated in gregorian years the fifteen years have not expired.

The third point was that the actual agreement was in fact a security for advocate's fees and that it was to be in this particular form in order to keep within the law. The learned Judges of the District Court, after hearing witnesses on this point, came to the conclusion that this allegation was not substantiated. The appreciation of evidence is a matter solely for the Court of Trial and this Court sees to reason to interfere.

The Fourth point was that the respondent did not prove that the undertakings of her father had been implemented or carried out. It is important, therefore, to see what it was that the late Mohammad Tewfic El Khalal had undertaken to do in this contract. Clause 2 lays down that Mohammad Tewfic El Khalal accepted this sale and undertook to pay the costs which may be payable in respect of his portion of the sale. He also undertook to follow up if necessary the transactions in the official departments and pay such fees and costs as were required for completing the transfer which he could afterwards claim back from the appellants. It is sought to be argued that this clause imposed upon the late Mohammad Eff. a duty of carrying through all details of this transaction. I do not agree. The true construction of this clause, it seems to me, is that he undertook to pay the fees and accept the sale when matters had reached that stage and to pay costs later in proportion to the share transferred to him. As far as it appears from the evidence matters never reached this stage. Therefore, I cannot see that, in any way, the late Mohammad Tewfic Eff. El Khalal was in default.

The last point is that the second and third appellants, who are guarantors of the agreement, are not liable to pay. By clause 4 of the contract they guaranteed the execution of the agreement. Part of the agreement was that the sum paid in advance should be refunded if the transfer were not effected. It seems to me, therefore, that they are responsible for that part as they are responsible for the transfer, but the learned Judges made a slip in their judgment in making the liability joint and several and therefore the liability is not as stated in the judgment. Subject therefore to the exclusion of the words "jointly and severally with the said Issa", the judgment of the Court below in my opinion is correct.

Subject to the above variation the appeal must therefore be dismissed. The respondent is entitled to her costs.

Delivered this 15th day of October, 1942.

CIVIL APPEAL No. 253/41.

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

Before: Rose J. and Edwards J.

Elias Wasif Mansur — Appellant

v.

Yusif Isa Mansur — Respondent

Adducing evidence to prove that indebtedness on bill sued upon included in other bill made later.

Defendant claiming that later promissory note included satisfaction of earlier one, subject matter of action, should be allowed to adduce evidence to prove it.

Nakkara for Appellant

Levin and Lifshitz for Respondent

Appeal from jdgt of DC, Haifa, sitting as a Court of Appeal, dated 29.10.1941, in Civil Appeal No. 85/41.

JUDGMENT

This is an appeal from a judgment of the District Court of Haifa remitting the case to the learned Magistrate for the hearing of certain evidence.

Only one matter of substance is raised. The present action relates to a promissory note for LP. 100 made by the respondent in favour of the appellant. The bill matured on the 3rd July 1936 and action was not filed until the 12th December 1939. In the meantime another promissory note for LP. 700 was made by the respondent in favour of the appellant, for the amount of which note the appellant has obtained judgment.

The respondent desired to call evidence to show that the said note for LP. 700 included his indebtedness on the bill for LP. 100, which is the subject matter of the present action. The appellant admitted in evidence that this note for LP. 700 related to certain business transactions between the parties and it seems to me to be eminently a matter in which evidence should be permitted to be adduced by the parties to show whether or not the payment effected by the promissory note for LP. 700 in fact included the satisfaction of one earlier note.

For these reasons I am of opinion that the learned President was correct in remitting the matter to the Magistrate's Court for the hearing of the necessary evidence and to give a fresh judgment accordingly.

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 27th day of February, 1942.

HIGH COURT No. 74/42

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

Before:— Copland, J.,Khayat, J. and Abdul Hadi, J.

Fuad Ibrahim Muhied Din el Khatib Petitioner.

v.

1. The Four Members of the Supreme Moslem Council
2. Chairman and Members of the Awkaf Commission
3. The Director General of the Awkaf Respondents.

Petition to HC for order of reinstatement in post — Remedy of action for damages for wrongful dismissal.

Proper remedy of person claiming to have been wrongfully dismissed — action for damages for wrongful dismissal, not application to High Court for reinstatement in post.

Y. Husseini & *J. Kamal* for Petitioner *Abcarius* for Respondents.

Return to an order nisi issued on 13.7.42, directed to respondents calling upon them to show cause why they should not reinstate petitioner in his post as Chief Door-Keeper of Al-Haram Ash-Sharif, Jerusalem, on terms and remunerations attached to that post.

ORDER

This is a return to an order nisi calling upon the Members of the Supreme Moslem Council, the Chairman and Members of the Awkaf Commission and others, to show cause why they should not reinstate the petitioner in his post as chief door-keeper of the Al Haram Ash Sharif in Jerusalem. The Petitioner was apparently appointed to this post in 1933 by the Supreme Moslem Council. In 1937 he was detained under the Emergency Regulations and it was not until September, 1940, that he was released from detention From the date when he was detained in 1937 until May 1938 he was paid his salary. In May, 1938, the Awkaf Commission, appointed under the Defence (Moslem Awkaf) Regulations of 1937, wrote at the request of the High Commissioner to the Supreme Moslem Council requesting them to discharge the petitioner. This the Council did. By the Supreme Moslem Sharia Council Regulations, 1921, the Supreme Moslem Council has power to control the wakf administration and has also the power to dismiss, amongst other people, all wakf officials and all officials employed in any Moslem institution maintained from wakf funds. It seems to us that, having been appointed by the Supreme Moslem Council, his contract of service, if any, was with that Council. They have the power to dismiss him. If the petitioner claims that he has been wrongfully dismissed, then it seems to us that his proper remedy is an action in the appropriate Court for damages for wrongful dismissal. Whether or not he would succeed is another question, but in our opinion he has no right now, in view of the fact that he was appointed by the Supreme Moslem Council, of reinstatement in any particular post.

For these reasons we are of opinion that the rule nisi must be discharged. The respondents do not ask for costs.

Given this 15th day of September, 1942.

HIGH COURT No. 90/42

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

Before:— Copland, J., Frumkin, J. and Abdul Hadi, J.

Antoine Hamuda — Petitioner.

v.

The President of the District Court Haifa, in his capacity as CXO, Haifa and 2 others. — Respondents

Counter-affidavit supported by true copies of exhibits showing that certain statements in Petitioner's affidavit devoid of truth — Effect of misrepresentations in affidavit accompanying petition.

Petitioner applying to High Court must state whole truth and nothing but truth; misrepresentations in affidavit — fatal to petition.

Walid Salah for Petitioner. *Asfour* for Respondent No. 2.

Return to an order nisi issued on the 27th of July, 1942, directed to the first respondent calling upon him to show cause why the services effected upon the Petitioner in Execution File No. 1800/40 — Haifa should not be cancelled, and that the Judgment Creditor be ordered to effect new services in accordance with the law and that the proceedings of sale should be set aside, and in the alternative, that the notices of sale of property should contain a statement that the services of documents were affected upon Petitioner under protest.

ORDER

This is a return to an order nisi granted by this Court on a petition presented by one Antoine Hamouda who asked for an order that execution against his brother should be stayed. Now that order nisi was granted on the strength of an affidavit the truth of which was sworn to by the petitioner himself. The respondent has filed a counter affidavit supported by true copies of certain exhibits from which it would appear that two of the statements in the petitioner's affidavit were entirely devoid of truth. It is only fair to the advocate appearing for the petitioner, to say that it would seem that he had no knowledge whatsoever of his clients' misrepresentation. In such circumstances, of course, the applications can no longer be supported and the rule must be discharged.

As this Court has had occasion to remark on several occasions lately, petitioners when asking for orders nisi must state the whole truth and nothing but the truth. An order nisi granted on misrepresentation is a serious matter and in this particular case we propose to send the papers to the Attorney-General. The order nisi is discharged with

costs to consist of disbursements plus the usual sum of LP. 10 advocate's attendance fee to the respondent.

Given this 17th day of September, 1942.

CIVIL APPEAL No. 123/42

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

Before:— Copland, J., Frumkin, J. and Khayat, J.

Zalman Asnin & 2 others — Appellants.

v.

The Attorney-General and another — Respondents

Assessment of land intended to be appropriated by Government — Alleged estoppel by admission — Effect of declarations as to value made by owner of land in L Reg. — Assessment by CA.

1. While Court in assessing land entitled to take into consideration value declared by parties in Land Registry, such declaration — not estoppel to claim of higher amount or assessment at higher value.

2. Court of Appeal having before it all evidence as to value of land may instead of remitting case make itself estimate of appropriate real value.

Levin for Appellants. *Gavison* for Respondent No. 1

Appeal from jdgt of LC, Haifa, dated 22.6.42, in Land Case No. 25/41.

JUDGMENT

This is an appeal from the learned Relieving President presiding over the Haifa Land Court in an assessment of value of certain land which the Government wishes to appropriate in Affuleh for the purposes of a Police Station. Five plots were originally concerned, but a house where there is now no dispute, and plot 10, as to which there is no appeal, must be excepted. The appeal, therefore, is solely with regard to plots 11, 12, 17 and 18.

Now the Land Registrar of Nazareth, in whose district Affuleh lies, was called as a witness and gave evidence that the valuation of the Assessment Committee of which he was a member, which had to ascertain the price of this land, varied between 90 to 120 mils per square metre. Another senior Land Officer was called, a Mr. Ward, who also gave evidence with regard to value, and a licensed valuer was called on behalf of the owners, and two of the Appellants gave evidence and several other witnesses.

The learned Relieving President said that in his opinion the parties to the contract were clearly estopped from denying the truth of the admissions as to value made in the Land Registry. It appears that these plots or others in the neighbourhood had been sold by the Appellants, and that the values at the Land Registry were very much below the value as assessed by the Appellants' valuer and the amounts claimed, and as stated in the contracts for sale.

In this respect we think that the learned Judge was clearly wrong. The term "estoppel" is used much too loosely in pleadings in this country, and there is no real estoppel in this case. It is clear that the learned Judge was not bound by the value declared by the parties in the Deeds of Sale registered in the Land Registry, though of course he was entitled to take those values into consideration in coming to a decision as to what the real value was, and if those values, as declared, were below the real values at which the land was sold, then possibly the persons making those declarations may be liable to proceedings in another Court. That, however, is no concern of ours on the hearing of this appeal.

Normally, I suppose, we should have sent this case back to the learned President to consider all the evidence in accordance with the observations we have just expressed with regard to the question of estoppel, but all the evidence is before us, and we feel therefore that we are in just as good a position to make an estimate of the approximate real value of this land at the material time, which was February, 1941, as the learned Judge himself would be.

There is evidence that the highest declared value for a considerable number of years past in the Land Registry for land sold in Affuleh has not been more than 170 mils per metre square. There is also evidence that there is one plot in Affuleh that was sold for 333 mils, though this plot had certain special characteristics attached to it. On the whole we think that a fair value of all these plots, and we see no reason to differentiate between them, would be 250 mils a square metre, and we therefore allow the appeal in so far as the value is concerned, and substitute 250 mils per square metre for the amounts found as the values by the learned President.

The order as to costs made by the learned Judge in the Court below will be set aside, and neither party will get any costs in the Court below, but for this appeal the Appellants will get their costs at an inclusive sum of LP. 25.

Delivered this 22nd day of September, 1942.

CRIMINAL APPEAL No. 145/42

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Gordon Smith, C.J., Copland, J. and Abdul Hadi, J.

Tewfic Daoud Abu Hawash — Appellant.

v.

The Attorney-General — Respondent.

Possession of dangerous drugs — Evidence of accused — Corroboration — Contents of Information — Burden of proof.

1. Evidence of accused, if not a witness for prosecution, does not need corroboration.

2. Unwitting participant in offence — not an accomplice.

3. Information charging accused with possession of dangerous drugs need not state that possession was without lawful authority.

4. Not necessary for prosecution in proceedings for possession of dangerous drugs to prove negative, i.e. absence of authorization or authority for such possession.

Asfour for Appellant. *Crown Counsel* (*Rigby*) for Respondent.

Appeal from jdgt of DC, Haifa, dated 28.9.42, in Crim. Case No. 265/42, whereby Appellant was convicted of being in possession of dangerous drugs, contrary to Section 7 & 16 of the Dangerous Drugs Ordinance, 1936—41, and sentenced to three years' imprisonment.

JUDGMENT

In this case of unlawful possession of hashih, the appeal is against both conviction and sentence. At the conclusion of the hearing the appeal was dismissed, and the Court stated it would give its reasons therefor later, in writing.

The grounds of appeal argued were as follows:—

I. That there was insufficient evidence on which a conviction would be supported and that in fact the case should have been withdrawn without calling on the defence.

II. That the evidence of accused No. 2 was that of an accomplice and therefore required to be corroborated and that consequently, in the absence of such corroboration, the conviction could not stand.

III. That the information was defective in that it did not allege possession without lawful authority and therefore disclosed no offence.

IV. That the absence of such lawful authority was a matter of proof, the burden of which was on the prosecution.

V. That the sentence was excessive.

The accused were charged jointly. No. 1 accused, in whose physical possession the hashish was actually found in the first instance was acquitted and discharged on the ground that the Court was not satisfied that he was aware of the contents of the suit-case which he was carrying for the 2nd accused.

The case for the prosecution was that the drugs which amounted to 5.700 kg. of hashish and 2.650 kg. of opium, and which were contained in a suit-case, itself enclosed in a basket, were the property of and in the unlawful possession of the 2nd accused. P.C.920 Ahmad Ibn Mahmud Ali, who appears to have been unusually bright in this matter, seeing the 1st accused carrying a basket and being somewhat suspicious, stopped him and interrogated him. He found the locked suit-case within the basket, and the 1st accused who was a porter stated that he was carrying it for the 2nd accused but did not know its contets, but was to deliver it to the house of the 2nd accused. Although locked, the Police Constable ascertained that the suit case contained hashish. The Police Constable accompanied him in delivering it to the 2nd accused, and

on arrival the 1st accused called to the 2nd accused to come out and that he had been arrested by the Police. The 2nd accused replied from within. "Well, who gave you the suit-case." At this moment, the suit-case was within the basket and could not be seen. Accused No. 1 said, "Well, you gave it to me", whereupon accused No. 2 cursed him and told him to keep silent. According to the Police Constable the 2nd accused then came out and in the course of conversation took out a LP. 5 note which he offered to the Police Constable, who took it but said he would produce the note in Court.

The Police Constable then arrested No. 2 accused and took both No. 1 and No. 2 accused to the Police Station.

The Police Constable was subjected to a prolonged cross-examination but was not shaken at all as to his story, and as remarked by the learned District Judge, gave his evidence very well and he was satisfied that the Police Constable was speaking the truth. Apart from other formal evidence, this was the case for the prosecution.

No. 1 accused gave evidence on his own behalf and confirmed his statement to the Police Constable that accused No. 2 had given him the suit-case to deliver to No. 2 accused at his house for a consideration, No. 2 accused having described the house to him; that he was a porter, and that this had taken place in the Suk. He also confirmed the Police Constable's evidence that when he, No. 1 accused, said that No. 2 accused had given him the suit-case, No. 2 accused had cursed him and told him to keep quiet.

No. 2 accused denied knowing No. 1 accused, giving him the suit-case or having left the house that morning prior to the Police Constable's arrival. His father and another witness were called to confirm the latter fact. The Police Constable had stopped No. 1 accused about 10,30 a.m. in the street. The learned trial Judge did not believe the story told by No. 2 accused but did believe that of No. 1 accused, and convicted No. 2 accused, holding that he was in possession of dangerous drugs which were being carried by No. 1 accused on his behalf.

It is clear that on the evidence for the prosecution a strong prima facie case had been established, which required an answer.

It is also clear that, according to Rex v. Barnes, 1940, A.E.R. Vol. 2, page 229, the evidence of No. 1 accused did not need corroboration as he was not a witness for the prosecution. Further, it is also clear from the judgment of the learned District Judge that he did not regard No. 1 accused as an accomplice in the ordinary sense and that, if anything he was only an unwitting participant in the offence. In effect, however, there was corroboration by the Police Constable of a material part of No. 1 accused's evidence — or to put it the other way round, there was strong corroboration of the Police Constable's evidence by No. 1 accused as to what No. 2 accused said on arrival

of the Police Constable and No. 1 accused at the latter's house.

No. 1 accused did not know the name of No. 2 accused. but the house where he lived had been described to him by No. 2 accused and he led the Police Constable straight there. On arrival, and without having seen the suit case which was enclosed in the basket, No. 2 accused asks from within the house, "who gave you the suit-case", which had not then been mentioned or disclosed.

Further, the production of the LP. 5 note with which No. 2 accused attempted to bribe the Police Constable is damning evidence against him, although this accused attempted to explain this by saying that the Police Constable searched him on the way to the Police Station and relieved him of LP. 10.495, a passport and an identity card. This would be a most strange proceeding for any Police Constable to do on his way to a Police Station, and the latter says he searched No. 2 accused at the Police Station and handed the LP 5 note and the balance of cash found, to his superior officer, who confirms the evidence of the Police Constable in this respect .

Neither is there any substance in the third ground of appeal. The information charged the accused with the offence of possession of dangerous drugs contrary to Section 7 and 16 of the Dangerous Drugs Ordinance. Any possession of dangerous drugs except in accordance with this section is an offence, that is to say, if such possession is unauthorised.

As regards the last ground of appeal, again there is no substance in this submission as the matter is covered by Section 17 of the Ordinance which reads as follows: —

> "In any proceedings against any person for an offence under this Ordinance or the rules made thereunder, it shall not be necessary to negative by evidence any certificate, licence, authorization, register or document produced as a matter of exception or defence, and the burden of proving such matter shall be upon the person seeking to avail himself thereof."

This provision might have been worded more plainly and less ambiguously, but I think it is clear that it is not necessary for the prosecution to prove a negative. That is to say, it is not necessary for the prosecution to prove an authorization or authority for the possesion of dangerous drugs *except* for which an offence is committed under Section 7, as in this case, and the concluding words of the section plainly put the burden of proof of such matter upon the accused. It was for these reasons that we dismissed the appeal.

As regards the sentence of three years' imprisonment, the maximum under this section is seven years, and a sntence of three years in this case is by no means excessive. The accused is of a superior type and it is evident that the possession of the hashish and opium was not for his own use. It follows therefore that he has been engaged in this illicit traffic in these drugs for lucrative reasons and it is well

known that such traffic is extremely lucrative and largely engaged in. The sentence of three years' imprisonment, which is less than half the maximum, will stand.

Delivered this 4th day of November, 1942.

CRIMINAL APPEAL No. 181/42

IN THE SUPR. COURT SITTING AS A COURT OF CRIM. APPEAL.

Before:— Copland, J., Edwards, J. and Abdul Hadi, J.

Suleiman G. Daoudi — Appellant.

v.

The Attorney-General — Respondent.

Plea of guilty to charge under War Risks Insurance Ord, — Accused, though member of same firm not identical with person charged.

Where charge under War Risks Insurance Ord, brought against particular person, conviction of other person, though member of same firm and pleading guilty, cannot stand, whole proceedings being a nullity.

Goitein & *Chussein* for Appellant.

Solicitor-General (*Griffin*) for Respondent.

Appeal from jdgt of DC, Jerusalem, dated 24.11.42 in Crim. Case No. 233/42 whereby appellant was convicted under sec. 6 of War Risks Ord., 1941, and sentenced to a fine of LP. 860.

JUDGMENT

In this case a charge was brought against one Haj Daoud Taher el-Dahoudi, for an offence under the War Risks Insurance Ordinance, 1941. Suleiman G. Daoudi, a grandson of Haj Daoud Taher el-Daoudi, appeared in Court and apparently answered to the charge and pleaded guilty. Whilst it is true that the appellant Suleiman is admitted to be a member of the firm of Haj Daoud Taher el-Daoudi and Sons, yet the firm was not charged. Haj Daoud has been dead for more than ten years. In these circumstances, the Solicitor General, very properly if I may say so, intimated to the Court that he cannot support the conviction. The proceedings are obviously a nullity.

The appeal must therefore be allowed, the conviction quashed on the ground that the whole proceedings were a nullity, and the appellant is discharged.

Delivered this 17th day of December, 1942.

CIVIL APPEAL No. 92/42.

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

Before:— Gordon Smith, C.J. and Rose, J.

The Municipal Council of Jerusalem — Appellant.

v.

Hevrat Harcabat Hayishuv B'Eretz Israel — Respondent.

Collection of Municipal rates through XO — Action before MC for declaratory jdgt that Pltf not liable to pay the rates claimed — Allegation of irregularities in procedure in relation to imposing and levying Municipal rates — Effect of adoption or purported adoption by Munic. Council of Urb. Prop. Tax Assessment list — Question of power of MC to issue declaratory jdgt.

1. In view of sec. 2(1) of Municipal Rates (Validation) Ord. where Municipal Council adopted or purported to adopt Urban Property Tax assessment list for purpose of levying rates, whether or not there were irregularities in procedure in passing resolutions, publication, etc. makes no difference.

2 *Obiter* a) Magistrate's civil jurisdiction, contained in sec. 3(b) of Magistrate's Court Jurisdiction Ordinance 1939, cannot otherwise exist or be varied except by provision of equal force and effect.

b) Rule 41 of Magistrates' Courts Procedure Rules can only apply to declarations ancillary to other relief asked for which is within Magistrate's jurisdiction.

c) Magistrate's power, if any, to grant declaration — purely discretionary.

I. Said for Appellant. *Shereshewsky* for Respondent.

Appeal from jdgt of DC, Jerusalem, sitting as a Court of Appeal, dated 14.4.42 in Civil Appeal No. 136/41.

JUDGMENT

This appeal raises various points of importance under the Municipal Law as it exists to-day and as it existed prior to amendment in 1940, and validation in 1941. The power of a Magistrate's Court to give a declaratory judgment has also been argued before us.

Before referring to the various enactments it is desirable to refer briefly to the history of the case.

Proceedings commenced by the Respondents as Plaintiffs (but hereinafter referred to as "the owners") filing a statement of claim in the Magistrate's Court, Jerusalem, on the 24th April, 1941, which, after setting forth various averments, prayed for relief in the following terms:—

> "...that declaratory judgment be entered, declaring that the Plaintiff is not liable to pay the Defendant Municipal rates for the year 1937—38, and particularly the amount of LP. 71.700 the subject matter of Jerusalem Execution file No. 3107/39, and

> that the defendant was therefore not entitled and is not entitled to take against the Plaintiff any steps in the Execution Office with a view to collect the above-mentioned sum" and for costs.

No defence was filed, but counsel for the Defendants appeared on the hearing and argued that as no relief was sought there was no need to file a defence, but if the Court thought otherwise he asked for an extension of time. (Hereafter I shall refer to the Defendants as "the Council"). The Magistrate gave judgment for the owners in default of defence, but subsequently on application being made, the Magistrate, on the 4th July, 1941, set aside his judgment by default, giving the Council ten days within which to file a defence. This was done, and after various adjournments and hearing witnesses and argument, the Magistrate gave a lengthy judgment on the 28th November, 1941, in which he dismissed the owners' claim. The owners appealed against this decision, so it is necessary to examine the judgment briefly.

In the concluding part of his judgment the Magistrate said:

> "The matter before me is a claim for declaratory judgment, and I do not think in the light of all the circumstances of fact and of law I am able to grant the plaintiffs' application",

and in the final paragraph he states that he is unable to give such a declaratory judgment, and in my translation of the judgment this is further explained, in brackets, that it is not within his jurisdiction.

In my opinion, in view of the former paragraph I have quoted and of many illuminating remarks and expressions the Magistrate has made in his judgment, I interpret his judgment as meaning that, not only had he no jurisdiction to give a declaratory judgment but that even if he had had a discretion in the matter, he would not have exercised that discretion "in the light of all the circumstances of fact" in favour of the owners. I would only quote one such expression. On page 6 of his judgment he states:

> "It is easy for Plaintiff now, after the expiration of four years, to criticize the work of the defendant. But one thing is clear that, if she criticizes, she has first of all to come with clean hands and to declare that she has done what she had to do and was not heard (granted relief), and secondly, to prove the grounds of the criticism. The Plaintiff has not adduced such proof."

I refer to this now because the learned President in his judgment on appeal held that the Magistrate was wrong in that a Magistrate's Court has power to make a declaratory judgment, which the learned President then proceeded to make, thereby exercising the discretion which, if at all, should have been exercised by the Magistrate.

From this judgment of the Magistrate the owners appealed, and after considerable argument in the District Court the learned Relieving President delivered a long and considered judgment, dated the 14th April, 1942, in which the appeal was allowed. The matter now comes before us on a further appeal.

It will be necessary to make various references to the Municipal Corporations Ordinance, No. 1 of 1934 (hereinafter referred to as "the Ordinance") which has been considerably amended, but so far as this appeal is concerned the more relevant amendments were made in 1940 by Ordinance No. 3 of 1940, in respect of various sections, more particularly Sections 107, 115, 116 and 117, and further references to the "old" or "new" sections will refer to the original or the amended sections of such Ordinance, as the case may be. Further, it will be necessary to refer at times to the Municipal Rates (Validation) Ordinance, No. 9 of 1941, which I will refer to as the Validation Ordinance.

Briefly, the complaint of the owners is that they have been wrongfully charged rates for the fiscal year 1937/38 on numerous plots which were unoccupied, and of which they say they were not the owners, and they seek a declaration to that effect.

They make numerous charges of irregularities by the Council in the assessment and imposition of such rates, publication of lists and notices, etc., etc., but by reason of the Validation Ordinance it is quite unnecessary to examine all these charges in detail. The effect of Section 2(1) of this Ordinance is that where in compliance or purported compliance with the proviso to Section 107 of the Ordinance the Council has adopted the assessment of any building or occupied or unoccupied land under the provisions of the Urban Property Tax Ordinance as the rateable value of such building or land, then notwithstanding the provisions of Sections 105 to 112 of the Ordinance, such assessment shall be deemed to have been a valid assessment, and the rates imposed on such basis are legally recoverable.

Therefore, on this point, all we are concerned with is, whether the Council adopted, or purported to adopt, the Urban Property Tax assessment list for the purpose of levying the rates, and if we are satisfied in that respect then there is no need to bother about whether there were irregularities in procedure in passing resolutions, publication, posting, serving of notices or otherwise, in regard thereto.

The Magistrate found the following facts on the evidence.

(a) That there was "prima facie" proof of ownership in the plots in the owners.

(b) That in fact the owners were not the true or reputed owners but that this did not conclude the question in view of the neglect of the owners to take any steps whatsoever in the matter until claim was filed in April, 1941. (There was some evidence that the owners wrote to the Execution Officer on the 15th August, 1939, denying liability, but neither this letter nor its receipt was properly proved, and in any case it was not the proper procedure for raising the question of liability or otherwise, under the old Section 117).

(c) That there was a formal decision of the Council on the

31st May, 1937, to impose rates on unoccupied lands.

(d) That there was publication of the imposition of the rates.

(e) That the owners names were included as owners in the Urban Property Tax assessment list.

Then, on the question of the nonadoption of these lists, as was submitted by Counsel for the owners, the Magistrate states as follows:—

> "This argument, in view of Section 107 of the Ordinance, cannot help the Plaintiffs (owners) because, in my opinion, no such decision is necessary. If the law gives the Municipality power to use the lists of the Urban Property Tax, this is sufficient, and the resolution of the Council cannot add or detract, and is ipso facto not necessary."

A little further on in the judgment the Magistrate says:—

> "If the Municipality has adopted the assessment lists of the Urban Property Tax, and its resolution to impose the rates was on 31.5.37, it is therefore clear that the lists had already been prepared."

I have extracted these remarks verbatim because of the following remark in the learned President's judgment:

> "The Magistrate apparently accepts it that there was no adoption and proceeds to give reasons, with which I cannot concur, why he thinks such a course is not necessary. There clearly was no adoption by either the Assessment Committee or the Council."

This is the whole crux of the matter, namely the adoption or purported adoption by the Council of the Urban Property Tax assessment list. I think that the learned President erred in his construction or interpretation of the Magistrate's remarks. In effect the Magistrate says, there is no necessity for a formal resolution adopting the list if, as is the case, the law gives the Council power to use the list, and which they have done, and then a few lines further on he refers to the Council having adopted the list.

Speaking for myself I think there was clear evidence that not only was there adoption of the list but formal adoption in that there was the resolution of the Council No. 432 of the 28th May, 1937, in regard thereto, and the letter of the same date from the Mayor to the Municipal Treasurer, enclosing a copy of this resolution, and instructing him to take the necessary action thereon. (See Exhibits P. 8 and P.8/1). The City Treasurer also gave evidence of the publication and posting of the assessment list, and also that the notice giving the terms of resolution of the Council and the approval of the District Commissioner were similarly posted and published.

In my opinion this is ample evidence of adoption, or at least purported adoption as provided for in the Validation Ordinance, and this is sufficient. It follows also from this Ordinance that in consequence the imposition, collection and levying of the rates is validated, and the rates are recoverable. There is no necessity, therefore, to go into other matters of procedure in relation to the levying and imposition of rates,

but I would observe that, in the main, and according to the facts found by the Magistrate, the provisions of the Ordinance were carried out.

Nor is there any necessity to go into, at any length, the question of the old sections or new sections providing for objections to assessment, or the levying of the rates. The owners took no proper steps either under the old or new sections to raise any such objection, and on the merits of the case have no claim to any sympathy. There is ample provision in both old and new sections for raising the question of liability and for objecting to assesment or to the levying of the rates.

This really concludes the matter, but a further point was raised as to whether the Magistrate was correct in his decision that he had no jurisdiction to make a declaratory judgment. The learned President found that the Magistrate had such jurisdiction, but did so with hesitation and without the matter being fully argued before him. He refers to this point on page 9 of his judgment and quotes Rule 41 of the Magistrates' Courts Procedure Rules, 1940. He then quotes remarks by Lord Atkin in de Vries v. Smallbridge, 1 K.B. 1926, and Ketter v. Attorney-General, H.C. No. 51/41, both of which appear to me to be authorities against granting the relief asked for in the case before us and on the facts. Counsel for the owners quoted London County Council v. Mayor etc. of Hackney, L.T. 139, p. 407. But I would point out that that was not an action before the Justice for a declaratory judgment but an action in the High Court for damages for alleged wrongful distress. It is true that on page 411 of the judgment in that case it was held that there were inconsistent decisions and that practice had varied in the past, and it was held that on an application for a distress warrant in respect of rates, the Justices had jurisdiction to enquire into the occupancy of the premises so rated. As an authority in the case before us, it serves no useful purpose.

The civil jurisdiction of Magistrates' Courts is contained in Section 3(b) of the Magistrates' Courts Jurisdiction Ordinance, 1939. It is therefore a statutory jurisdiction, and except as is contained within this section or some other statutory provision of equal force and effect, it cannot otherwise exist or be varied. It appears as if the learned President was influenced in his decision that there was such jurisdiction by reason of the terms of Rule 41 supra, which reads, "No action shall fail on the grounds that the relief claimed is declaratory only". This rule follows O. 25, R 5 of the English Rules. It necessarily follows that almost every decision given in any Court must in some form or other be declaratory of the rights of parties to the action but the subject-matter of such action must be within the jurisdiction of the Court. There may therefore be cases before a Magistrate in which it would be proper for him to make a declaration as ancillary to other

relief asked for which is within the jurisdiction of the Court.

It is, however, unnecessary to decide the point, and we do not decide as to whether a Magistrate has power to grant a declaration pure and simple, without other relief being sought, as we decide this appeal on other grounds. In any case, if there is such power, the exercise of the same is purely discretionary, and one can hardly conceive of such discretion being exercised in favour of a party who has had other means of obtaining equivalent relief, has neglected to avail himself of such other means, and moreover when the granting of such declaration may have repercussions in respect of persons or property not the subject of the declaration asked for.

This appeal is therefore allowed, the decision of the District Court reversed, and the original decision of the Magistrate is upheld to the extent that the declaration asked for is refused.

The respondent will pay the costs of both appeals, and we allow LP. 10 advocate's fee for the hearing before us.

Delivered this 31st day of July, 1942.

HIGH COURT No. 129/42

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

Before:— Gordon Smith, C.J. and Rose, J.

Mustapha Bey Khalidi and another — Petitioners.

v.

1. The Director of Land Registration, Jerusalem.
2. Registrar of Lands, Jerusalem.
3. Dr. Mahmud T. Dajani and 2 others. — Respondents.

Registrar of Lands refusing to register land in name of petitioner — Discretionary jurisd. of HC.

a) Before granting relief High Court must be satisfied not only that no alternative remedy and that respondent under legal obligation to do or refrain from doing subject matter of complaint, but also that matter necessary to be decided for administration of justice.

b) Where petition to High Court primarily for technical reasons, such as avoiding petitioner being plaintiff in subsequent proceedings before appropriate Court — this is not a consideration weighing with High Court to exercise their discretion in favour of petitioner.

Goitein & Ousta for Petitioners.

Crown Counsel (Hogan) for Respondents Nos. 1 & 2.

Abcarius, Haddad & Atalla for Respondents Nos. 3, 4 & 5.

Return to an order nisi issued on 20.11.42, directed to first and second Respondents calling upon them to show cause why they should not register the lands set out in lists 'A' and 'B' attached to the

affidavit accompanying this petition in the names of petitioners in equal shares.

ORDER

This is a return to an order nisi directed to the first and second respondents calling upon them to show cause why they should not register certain lands in the names of the petitioners in equal shares. The jurisdiction of the Supreme Court, sitting as a High Court of justice, is contained in Article 43 of the Palestine Order-in Council and Section 7 of the Courts Ordinance, 1940. Before granting relief to a petitioner this court must be satisfied not only that there is no alternative remedy and that there is a legal obligation on the respondent to do (or refrain from doing) the subject matter of the complaint, but also that the matter is necessary to be decided for the administration of justice. It is true that under Section 7(b) of the Courts Ordinance the High Court has exclusive jurisdiction to make an order directed to a public officer to do or refrain from doing certain acts in regard to the performance of his public duties, but this in no way alters the fact that this Court has a complete discretion as to whether it should make such an order or not.

In the present matter it is clear that the property, the subject matter of the proceedings, is in no danger of being disposed of by the mutawallis of the alleged waqf and alternatively, if the lands were registered in the names of the petitioners, it would be quite easy to obtain an order restraining any subsequent transfer by them, pending the settlement of the dispute. Further, as Mr. Goitein conceded in argument and as is obviously the case, this petition was made primarily for tactical reasons, that is to say in order to avoid the petitioners being the plaintiffs in the subsequent proceedings instituted before the appropriate Court. In our opinion this is not a consideration which should weigh with us in exercising our discretion in favour of the petitioners. Speaking for myself, although I am somewhat hesitant to say that the petitioners have not established a legal right to registration in their names, it is clear that it is not necessary to decide this matter for the administration of justice. I agree, therefore, that in the exercise of our discretion we should refuse the application.

For these reasons the rule will be discharged with costs...

Given this 3rd day of December, 1942.

CIVIL APPEAL No. 106/42.

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

Before:— Gordon Smith, C.J., Frumkin, J. and Khayat, J.

The Local Council of Ramath Gan — Appellant.

v.

Moshe David Hanoch Halevi — Respondent.

Local Council claiming rates and taxes from non resident — Dfdt denying imposition of taxes claimed — Proviso entitling rate-payer to compound — Ambiguous authorisation to levy tax — Necessity of proving that taxes duly determined.

1. A taxing provision must be clear and unambiguous in its terms; it is void if uncertain or absurd.

2. Where section of Order authorising Local Council to levy rates does not itself fix rate but only limit within which it may be determined Council must prove that rate was duly fixed and determined.

Harari for Appellant. *Ankorion* for Respondent.

Appeal from jdgt of DC, Tel-Aviv, dated 20.5.42, in Civil Case No. 136/40.

JUDGMENT

This was an appeal from the decision of the Relieving President of the District Court of Tel Aviv, dated the 20th May, 1942, in which he dismissed the claim of the Appellants. The claim was in respect of rates and taxes amounting to LP. 415.409 due over a period extending from the year 1925/26 to the year 1939/40. Action was commenced by the Appellant (hereinafter referred to as "the Council") filing a statement of claim on the 13th of May, 1940, to which was attached an account of the rates and taxes alleged to be due, and it is somewhat note-worthy to remark that further and better particulars of the same were ordered by the Registrar, which were filed and later used as proof of the imposition of such rates. This document is Exhibit P. 1, to which later reference will be made. The claim was resisted, and after protracted hearings the learned President dismissed the claim, on grounds of both law and fact.

A local Council for Ramat Gan was established by the Local Councils (Ramat Gan) Orde: of the 16th March, 1926, (q.v. Drayton, Vol. III, p. 1852) and under which Order authority was given to levy rates as set out in Section 7(1) in respect of the following matters:—

(*a*) a poll tax on voters, not exceeding 500 mils per head;
(*b*) a house tax, with limits. and with which we are not concerned;
(*c*) a tax on building land, also within limits;
(*d*) a fee on building permits. also within limits;
(*e*) fees in respect of trade licences prescribed by Ordinance in respect of any trade or business carried on in the village;
(*f*) rates for water, light, "or other similar services provided by the Council, payable by the persons enjoying the benefit of such services."

As there was considerable argument on sub-section (2) of this section I set it out in full and it reads as follows:—

"The taxes and fees prescribed in sub-section (f) shall be payable by all owners of property in the area of the counil, whether resident or not, and by the inhabitants:

Provided that any owner of property not resident in the village may compound for all the taxes and fees which would be due from him on payment of a fixed tax on the property owned by him to be determined by the council, but not exceeding the following rates —

	Mils per dunum
on cultivable land within the boundaries of the village	150
on uncultivable land	50

Section 9 is also relevant, and reads as follows:—

"No other tax, rate or fee shall be levied by the council except with the approval of the district commissioner:

Provided that the council shall have the power to increase the rate of the taxes prescribed by this order, which are credited to, and expended by, the Council, if seventy-five per cent of the general assembly of the ratepayers agree to the increase and the consent of the district commissioner is obtained; and

Provided further that no fees shall exceed the maximum amount prescribed by the municipal tax law."

It was not disputed either before the District Court of before us that the Defendant was not a resident of the village. Therefore, the Defendant came within the proviso to sub-section (2). Nor was it disputed that the Defendant claimed to compound the rates as provided for in this proviso, by payment of 50 mils for each dunum of land (see Ex. D. 7 of the 9th June, 1929). In this letter the Defendant claimed that the demands made upon him were not in accordance with law and he asked for an amended statement of his account to be prepared, and in which letter he also claimed to compound for all the rates in accordance with the proviso. Apparently long and prolonged correspondence took place but no action was taken to test the validity or otherwise of the claims until, as I have stated, the Council commenced this action on the 13th of May, 1940. Anyhow, the Defendant although willing has been unable to compound with the Council in terms of this proviso.

Before us Counsel for the Council strenuously argued at great length that this proviso was manifestly absurd, as regards the rate at which compounding could be affected, was ambiguous, was of no legal effect in consequence, and I think he added, ultra vires in addition, but he suggested that we, the Court, should amend this section by our interpretation of it so as to accord with the Council's wishes. Even our efforts to shorten this submission were of little avail until the Court had, in effect, to tell Counsel peremptorily, that he was talking nonsense and to continue on other points.

As regards the different items of the rates as per amended particulars (P.I) to the statement of claim, even before the District Court the Council had to abandon their claim, as appearing on these particulars in respect of road construction, and to reduce the claims in res-

pect of poll tax and the education rate. This seems rather extraordinary in view of the later submission, both before the District Court and before us, that this Exhibit P.I was the evidence that supported the imposition of all the rates. There was no evidence at all that the Council had fixed or determined the amount of the rates authorised by Section 7(1), and it is to be noted that this section does not itself fix the rates but fixes a limited amount within which the Council may determine the amount. There was no evidence of any decision, any meeting or any resolution in regard thereto, and until this had been carried out and the rates so fixed and determined, any claims in regard thereto were invalid and of no effect. It is absurd to contend that mere delivery of a demand for rates with particulars, is evidence of the imposition and levying of such rates, but this is what Counsel submitted. As regards the claim for sanitary services rendered, the same remarks apply, and also these fees were compoundable under the proviso to Section 7(2). Moreover the evidence for the Defendant was that he had not enjoyed the benefit of these services, which was unrebutted.

In addition, however, to claims under Section 7(1), which could be compounded by the Defendant, there were apparently two other items, namely (a) an education rate, and (b) a public works tax or charge. It was claimed that these were authorised by the District Commissioner in terms of Section 9 of the Order.

In support, Exhibit P. 2 was put in, being a letter dated the 14th February, 1927, from the District Commissioner, in which paragraphs (a) and (b) read as follows: —

> "*a*) Educational rate of not more than 40 E.P. will be paid by every person having a right to vote at the elections to the Local Council.
>
> *b*) Rate of L.E. 25 will be paid only once by each plot owner within the Local Council area for public works within the area."

This is further supported by Exhibit P. 3, purporting to be a resolution of the Council of the 21st February, 1927, as follows:—

> "It is resolved to make liable every owner of a plot of land to pay a tax for public works in the sum of (25) twenty-five L.E. for each separate plot in accordance with the District Commissioner's certification dated 14.2.27, and the Local Council hereby certifies the tax liabilities made in 1926 as if they were created now; and to debit all accounts which have not been debited heretofore."

As regards (a), education rate, there is no evidence whatsoever of the fixing of the rate, and the same remarks apply to this as on Section 7(1) of the Order; and as regards (b), the authorisation is ambiguous, as it refers to each plot owner and not to plot or the size of the plot. It follows that one owner of a plot of say one-third of

a dunum might have to pay the same charge or amount as another owner of a plot in size say, three dunums.

The Council gave no evidence at all as to the division into plots but from the evidence of Defendant's sister it can be gathered that the Defendant owned three plots, part of which were expropriated later by Government. Whether Defendant might have been liable in respect of one plot or more is doubtful, but still more doubtful is the legality of the imposition of this rate or charge.

Under the Local Councils Ordinance (Cap. 84) under which the Council was constituted, the powers of taxation by a Council are prescribed by Section 5, and these are limited except as therein specified (and this section was amended in 1937) to matters prescribed in the Order issued under Section 2 of such Ordinance. There is no such authorization of such a charge, rate or tax in the Ordinance, nor in the Order, except possibly under Section 7(1)(c). There is no evidence whatsoever that this charge was made under this paragraph, nor that it complied with the terms of such paragraph, and as I have said, the terms of the authorization by the District Commissioner are in themselves ambiguous. A taxing provision must be clear and unambiguous in its terms, and moreover is construed in favour of the person taxed. Moreover if it is a tax under this paragraph (c) then it comes within the proviso to Section 7(2) and can be compounded for a maximum of 50 mils as against a purported charge of LP. 25 or possibly LP. 75 in respect of three plots.

This shows that not only is the provision as to the imposition of this charge void uncertainly, but on the face of it, it is also absurd.

For all these reasons, which perhaps I have gone into at unnecessary length, the appeal must be dismissed. Nor do I wish to criticize the actions or proceedings of the Council, but I think I am justified in expressing the hope that local councils might pay some attention to the laws under which they are constituted, and have some regard for the provisions of those laws, particularly when they provide for the levying of taxes payable by the public.

The Council will pay the costs of the appeal on the lower scale, to include LP. 15 advocate's fee.

Delivered this 31st day of July, 1942.

Frumkin, J.

On the matter of compounding the rates I agree that the Respondent was entitled to claim that right, afforded to him by law. The Proviso is to my mind clear and unambiguous. It may be that under present values of property there is no reasonable proportion between the rates payable under the rule and the compoundable figures. There was nothing, however, to show that such disproportion existed at the

time of the promulgation of the Order. If a change in value occurred since it was for the Council to seek alteration of the law in order to keep with the time.

As regards the education rate no evidence was specifically tendered by the Council to prove the imposition of that rate. The onus was upon it since there was a general denial on behalf of the Respondent.

As regards the fee for the removal of refuse this was to my mind lawfully levied and I accept on this point the reasoning of the learned Judge of the Court below. The only question as regards this point is whether the Respondent benefited of this service. It does not appear from the record that on behalf of the Appellant evidence was offered on this point in particular.

There remains the amount charged once only for Public Works. The only ground given by the learned Judge in the Court below for disallowing that amount was that it was a contribution and not a tax rate or fee. No reasons were given for this finding. In my view this amount, however it is called, was properly levied. The question which would arise as regards this point would be whether in the case of one person holding more than one plot he should pay the amount fixed, once only or for each plot in his possession. In view of the judgment of my learned brethren this point, however, is now not relevant.

Except for this point I concur in the result with the judgment of the learned Chief Justice.

Delivered this 31st day of July, 1942.

CIVIL APPEAL No. 93/42.

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

Before:— Rose, J., Edwards, J. and Abdul Hadi, J.

Issac S. David — Appellant

v.

Rivka David, daughter of Michael Binya — Respondent.

Action on cheque — Claim by amended statement of claim for return of loan — Jdgt for Pltf on Court finding that Defdt received loan — CA finding that Pltf's story palpably untrue & reversing finding & jdgt.

1. Court of Appeal on being convinced having regard to all documents produced and extreme unliklihood of state of affairs as alleged by respondent, that his story palpably untrue, will reverse finding and judgment of trial Court.

2. Mere giving of a cheque — not presumptive evidence of a loan.

Goitein & Mizrahi for Appellant.
Levitsky & Abramovsky for Respondent.

Appeal from jdgt of DC, Jerusalem, dated 19.5.42, in Civil Case No. 132/40.

JUDGMENT

Edwards ,J.

At the close of the arguments on the 30th July, 1942, we intimated that this appeal must be allowed but that we would give our reasons later.

This is an appeal from a judgment of the District Court of Jerusalem whereby the present appellant was ordered to pay to the respondents the sum of LP. 900 with interest from the date of filing the statement of claim and costs etc. The facts are that the present respondent brought an action in the District Court of Jerusalem on the 28th October, 1940, in which she alleged that the appellant owed her LP. 900 on a cheque. After the defence to that action had been filed the respondent's advocate applied to the District Court for permission to file an amended statement of claim. Permission was given and respondent then alleged in the new statement of claim dated the 6th February, 1941, that she claimed from the present appellant the sum of LP. 900 given to the appellant by way of loan and delivered to him by a cheque on Barclays Bank dated the 5th February, 1942, and signed by the respondent to the order of Mr. Shmuel David which cheque she, respondent, took back from Shmuel David and endorsed to the present appellant.

One of the grounds of appeal is that the District Court erred in granting permission to file the amended statement of claim because the order in effect allowed the respondent to change her cause of action. We prefer, however, to express no opinion as to this but base our judgment on a broader and more substantial ground. Now it was admitted that the respondent was married to the son of the appellant in November, 1935, and there was produced a contract of marriage dated the 28th Tishrei, 5696. By that contract the bride-groom (the son of the appellant) undertook to buy with his own money furniture for a sum of not less than LP. 100. The respondent undertook to pay to the bridegroom on the day of the wedding the sum of LP. 1000 in cash to provide for her trousseau and jewellery etc., and half of a house which was registered in her name was to remain registered in her name as her own property. It will be convenient if, at this stage, we say what was the defence to the action. The defence is to be found in the evidence given before the District Court not only by the defendant but also by his son, the bridegroom. It was that the respondent's father had paid him LP. 900 by cheque. The cheque had been signed by the respondent and delivered to the bridegroom. The bridegroom took the cheque, put it in his pocket and thereupon went to the hotel where the marriage took place. On that day there was no misunder-

standing between parties. On the day following the wedding the appellant having come to the hotel to bid the newly married couple goodbye, the bridegroom told him that as he, the bridegroom, could not go out, the appellant should take the cheque and cash it at the bank. The appellant took the cheque and went out and after the lapse of an hour returned and informed the bridegroom that he was not able to get the money because the bank did not know his signature and the bank had accordingly asked him either to bring the respondent herself or to let her sign again on the cheque so as to testify that the signature of the bridegroom on the cheque was in fact that of the bridegroom. The respondent thereupon signed on the back of the cheque and the appellant took the cheque, went to the bank and after a short time returned and delivered to his son (the bridegroom) the whole sum of LP. 900. Thereafter, i.e. from the 5th November, 1935 onwards, the newly married couple lived without any dispute until the end of 1939. Trouble then arose and the respondent brought an action against her husband in the District Court claiming maintenance. In the course of those proceedings she attached goods belonging to her husband which were in his shop. She lost her case and (according to her husband) she thereupon started threatening him that she would take proceedings against his father arising out of this cheque. We might add that the husband (the appellant's son) seems to have used the money in his business. So much for the account of the matter given by the appellant and his son.

The respondent gave evidence in the District Court, in the course of which she said:

> "This is a copy of a cheque which I signed on 5.11.35 drawn on Barclay's Bank to the order of Shemuel Isaac David, who was not then my husband. I signed the cheque in the morning and in the afternoon married the said Shemuel. He received the cheque from me. I did not go to the Bank neither did he go. At that time I had money in Barclay's Bank. The value of the cheque was LP. 900.— I gave the money to Shemuel because he was going to be my husband as a security for our joint future. On the back of the produced copy there is the signature of Shemuel Isaac David. After the marriage and on the same day of the wedding a person who was present during the wedding and who was of my husband's friends came to me and told me that my husband might lose ths money. I told my husband to come with me to our room in the Amdursky Hotel in which we had married, and I sent for my father to come to the room. There I told my husband that I am not confident of leaving the money with him as one of the friends told me that he might lose it. Here my husband got angry from what I said and answered me saying: "If you wish to take the money and you are afraid for it take the cheque and do with it as you wish". He then took out the cheque from his pocket, signed it on the back

and delivered it to me. I took the cheque and put it in my purse and closed it. Afterwards the three of us, i.e. my father, husband and myself went out. Certainly the cheque belonged to me at that time. On the next day, 6.11.35 at 9 a.m. I went with my husband to the house of my father and ate breakfast there. At 10 o'clock my father-in-law Isaac David came and told me that his son informed him of what happened between us with regard to the cheque and asked me what I wished to do with this money, and I answered him that I shall give it to a rich man in whom I have confidence and get for it 9% interest. My father-in-law told me that I will not find a better man than he is, and asked me to give him the money and he will give me 7% interest and he will return to me the money at any time I wish with the condition that the sum will be paid to me in Jerusalem, and if the sum remains with him for more than a year he will pay me the interest once every six months. Accordingly I signed on the back of the said cheque and delivered it to him in the presence of my father and my husband and he received the value of the cheque from the Bank on the same day as I remember. After two months I asked him to return the sum as I was willing to buy a house, but he did not pay until now. Whenever I asked him to pay me he used to promise from one day to another until I was forced to bring this action. I wrote a letter to the bank asking and the bank answered that my father-in-law received the sum from the bank on 6.11.35. This is the letter sent to me from the bank, marked "B". I gave him the sum as a loan. He does not wish to return to me this sum and wishes to deprive me of my right. We did not discuss the date of the payment of interest but we agreed that it should be paid once every six months if the sum remains for more than a year".

The only evidence given on behalf of the respondent in the District Court, apart from her own evidence, was that of her father and that of an employee of Barclay's Bank, a Mr. Karlin. For the defence there gave evidence (in addition to the defendant) the defendant's son (the husband of the respondent), and a Mr. Mizrachi, an employee of Barclay's Bank. The appellant's advocate, Mr. Goitein, argued several grounds of appeal; but we consider that we should confine ourselves to the main ground, namely, that the story as told by the respondent was so obviously fantastic as to be quite unworthy of credence. It is clear from the judgment of the learned Judges of the District Court of 19th May, 1942, that they realised that it was very odd that in a "marriage de raison" (as they called it) the husband should have foregone the dowery. Nevertheless, they considered that the defendant's story with regard to the signature of the plaintiff on the back of the cheque in order to be identified by the defendant, was not convincing. That fact alone seems to have been what decided them to find for the plaintiff. We realise that a Court of Appeal should rarely interfere with the findings of fact of a trial Court.. We are, however, guided

by the dictum of Lord Kingsdown in the case of *The Julia* referred to by Lord Sumner in the case of the S.S. Hontestroom (1927) A.C. page 37 at page 47. Lord Kingsdown said "We must in order to reverse not merely entertain doubts whether the decision below is right but be convinced that it is wrong". Applying that test, we are convinced that the story told by the respondent was palpably untrue and that the District Court was quite wrong in accepting it.

In coming to this conclusion we think it is astounding that no interest was ever paid to the respondent and that no demand was ever made for interest from 1935 onwards when one remembers that interest should have been paid every six months after the lapse of a year from the date of the cheque. Another extraordinary feature is the absence of any document in exchange for the cheque, that is, on the assumption that the respondent's, story is true. One would have thought that a document would have been demanded at the very outset, but, even if it is conceded that it might be reasonable to suppose that no document need have been demanded, one would have at least expected that a document would have been demanded once there had been failure to pay interest at 7% on the LP. 900.—. We are, therefore, convinced, having regard to all the documents produced and having regard to the extreme unlikelihood of the state of affairs as alleged by the respondent, that her story cannot possibly be true. In view of the documents, and in view of the absence of any demand for interest over this long period, and in view of the failure to demand any document, e.g. a promissory note in return for the cheque, and in view of the inherent improbability of the story told by the respondent (that is, its inherent improbability from the outset) we are convinced that her story was untrue and that the District Court was accordingly wrong in accepting it. We would add that the mere giving of a cheque is not presumptive evidence of a loan.

For all the foregoing reasons we allow the appeal, set aside the judgment of the District Court appealed against, with costs, here and below, the costs of this appeal to be taxed on the lower scale and to include the sum of LP. 15 as advocate's attendance fee at the hearing of this appeal.

Delivered this 22nd day of September, 1942.

CIVIL APPEAL No. 191/42

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

Before: Rose and Edwards, JJ.

Sharif El Fahum — Appellant

v.

Najib Qanaze' — Respondent.

Evidence re contents of lost document — belated objection to evidence — unjustified interference with findings of fact.

1. Party alleging that document is lost and asking leave to call evidence as to its contents must first of all prove that there was a document and that it was lost.

2. Party failing to object in trial Court to evidence tendered cannot argue on appeal that the evidence should not be heard.

3. If there was evidence of one party as to the value of a chattel and no evidence for other party, and Court made a finding of fact accordingly, Appellate Court should not interfere and say the evidence was insufficient.

4. Failure to name witnesses whom party proposes to call — no good reason for declining to hear them.

5. Court may refuse to grant adjournment to party who failed to have his witnesses present on day and time when case was down for determination.

El-Husseini for Appellant. *Asfour* for Respondent.

Appeal from judgment of District Court, Haifa, in its appellate capacity, dated 31.7.42. in Civil Appeal No. 2/42.

JUDGMENT.

This is an appeal from a judgment remitting the case to the Magistrate . . . The Magistrate found as a fact that the jewellery, the subject matter of the action, was pledged by the Appellant with the Respondent as a security for a loan of LP.50 with a receipt which was obtained for this jewellery; and that that receipt was in fact lost in the circumstances alleged by the Appellant and set out in the judgment. He also found as a fact that the value of the jewellery was LP.150. When the matter came on appeal to the District Court for the second time... the princpal point upon which the matter was remitted being that the Magistrate did not comply with Article 82 of the Ottoman Code of Civil Procedure; and it is no doubt true, that if a Plaintiff alleges that a document is lost, and is therefore going to ask leave to call evidence as to the contents, he must first of all prove that there was a document, and then that it was lost, but before the respondent in this case can successfully raise that as a ground for remitting the case, it is, in my opinion, necessary for him to have objected to the evidence in the Court below.

The 2nd point . . . was that the evidence as to the value was insufficient. On that matter we have to remember that the pledge was in respect of a loan of LP.50 and it is, therefore, only reasonable to assume that the value of the pledged goods was in excess of that amount. There is the evidence of the appellant, supported by another witness, that the jewellery was worth LP.150. There is no evidence for the respondent at all as to value. There is no reason, therefore, to interfere with the findings of the Magistrate.

Mr. Asfour further contends that the evidence on the face of it is insufficient to support the findings of the Magistrate on the ground that the Appellant's story is absurd in that the loan was as long ago as 1929 and that the action was instituted in 1940. That is an element which no doubt the Magistrate took into consideration in coming to his conclusion, and in the absence of any contrary evidence on behalf of the respondent, there can, in this matter also, be no ground for interfering with the Magistrate's conclusions.

A further point was taken that the reason why evidence was not called was that the Magistrate did not permit it to be called. The record shows, however, that all the Magistrate had really decided was that he did not propose to grant an adjournment to the Respondent owing to his failure to have his witnesses present, and he gives as his reasons for refusing the adjournment that the Respondent had not named the witnesses whom he proposed to call on his behalf. That, of course, is not a good reason for declining to hear the evidence of the Respondent, but there is nothing on the record to lead me to believe that had the Respondent adduced evidence on the day and time when the case was down for determination the Magistrate would, in fact, have refused to hear them. I, therefore, think that there is no substance in this point.

For these reasons I am of opinion that the District Court was wrong in remitting the matter to the Magistrate to make further findings and that the judgment of the Magistrate of 13.12.41, adequately covered the matters before him and that he made findings of fact with which an appellate Court should not interfere, and which were sufficient to support his judgment.

The appeal must, therefore, be allowed and the judgment of the Magistrate... restored.

Delivered this 23rd day of November, 1942.

British Puisne Judge.

Edwards J.: I concur.

IN THE SUPR. COURT SITTING AS A H. COURT OF JUSTICE. HIGH COURT No. 96/42.

Before: Copland J.

Baruch Birstein — Petitioner.

v.

1. Chief Execution Officer, Tel-Aviv
2. Credit Hadadi, Tel-Aviv, Cooperative Society, Ltd. — Respondents.

Rules of Society not bindng past members — Appearance of party before Court or arbitrator acting without jurisd.

1. Person holding a declaration under seal of a Cooperative Society that he was a member up to a specified date cannot be bound by rules made after that date, i.e. after he ceased to be a member.

2. A party can refuse to appear before a Court having no jurisdiction or attend under protest; in either event he can come to High Court when question of execution arises.

3. Arbitration proceedings objected to by party for lack of jurisdiction and based on rules not binding upon him — a nullity.

Eliash, Olshan and Dickstein, for Petitioner.
Goitein for Respondent.

Return to an order nisi, issued on 16.9.1942 directed to the first Respondent calling upon him to show cause why his order in Execution File No. 496/42, Tel Aviv, dated 28th July, 1942, should not be set aside, and why the execution proceedings in this file should not be discontinued.

ORDER.

This is a return to an order nisi granted to the Petitioner to test certain arbitration proceedings which took place between him and the 2nd Respondent, which is a cooperative society.

The first point to be decided was whether the Petitioner was a member of the society at the time the arbitration proceedings took place or not. It is not disputed that the rules made under section 52 of the Cooperative Societies Ordinance, Cap. 24, may provide that settlement of disputes may be made by arbitrators with regard to claims by members or past members of the society. Such rules referring disputes to arbitration with regard to this society were not made until May, 1941. The question, therefore, arises, do these rules made in 1941 bind the present Petitioner or not? I am of opinion that they do not. Though the present chairman of the management of the society says in his affidavit that the allegation that the Petitioner had ceased to be a member of the society is untrue, yet we have a declaration under the seal of the same society in which this statement occurs: — "We hereby declare that the Defendant mentioned in the statement of claim, Mr. Barukh Birstein, has been a member of our Society from its formation up to 18.3.38." I do not see how this can mean anything other than that . . . on 18.3.38 he ceased to be a member in the view of the society

itself. For these reasons I hold that he was not a member at the time these so-called arbitration proceedings took place, and a past member cannot be bound by new rules made after he ceased to be a member.

The second point... is that by his conduct and delay the Petitioner is now too late in coming to this Court. In reply Dr. Eliash has referred us to High Court 104/41, Sarakat v. Maronite Ecclesiastical Court, Jaffa, and others (8 PLR 593) where, in somewhat similar circumstances, this Court held that a Petitioner could object to a Court and refuse to attend or he could attend under protest, and that in either event he could still come to this Court when the question of execution arose. I think that that case applies, *mutatis mutand's,* to this present case before me now. Arbitration under the rules of the society is a statutory arbitration. If, as I have found, the Petitioner was not bound by these rules, then the arbitrator had no standing at all and in effect there was no such thing as an arbitration. The Petitioner elected to appear before him possibly to make a nuisance of himself. He maintained that the arbitartor had no jurisdiction to deal with this matter. The view that I form is that there were no arbitration proceedings so called, and there is, therefore, nothing to execute.

The rule Nisi must be made absolute with costs . . .

Given this 30th day of September, 1942.

British Puisne Judge.

CIVIL APPEAL 2/42.

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

Before: — Copland and Rose, JJ.

Najib Adib Hassan Nabulsi — Appellant

v.

1. Joseph Klein,
2. Israel Ashef Shafer,
3. Hamdi Adib Hassan Nabulsi — Respondents.

Amendment of judgment.

Order after judgment delivered cannot come under slip rule, if it is a substantial alteration or addition to the judgment.

Ed. Note: On an application by way of motion the Court amended its judgment by granting interest and confirming a provisional attachment.

Abcarius and *Nakhleh* for Appellant. *S. Felman* for Resp. No. 1 and 2.

Resp. No. 3 — *Absent* — served.

Appeal from judgment of District Court, Jaffa, dated 9.12.1941, in Civil Case No. 92/37.

J U D G M E N T

. . . . The order of the District Court of 9.1.42 is a nullity having been given after jugment was delivered and it cannot come in under the slip rule since it is a substantial alteration or addition to the original judgment.

Delivered this 22nd day of April, 1942.

P.C.L.A. No. 2/42.

IN THE SUPR. COURT SITTING AS AS COURT OF APPEAL.

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

Spiros Yanoulatos, Master of the S/S "Atlantic" — Applicant.

v.

The Attorney-General — Respondent.

Appeal to Privy Council in a criminal action.

Supreme Court has no power to grant leave to appeal to Privy Council in criminal cases.

Weinshall and *Abcarius* for Applicant.

Crown Counsel — (*Hogan*), for Respondent.

Application for leave to appeal to His Majesty in Council from the judgment of the Court of Criminal Appeal dated 26.1.1942, in Criminal Appeal No. 1/42.

ORDER

. . . . . we are definitely of the opinion that we are not in a position to grant leave to appeal to the Privy Council, the case being a criminal action. It is true that this Court in earlier proceedings — I refer to Criminal Appeal No. 119/41 — was, so to say, hesitative in forming an opinion as to the nature of these proceedings, but it nevertheless decided that the application for forfeiture should be made to the District Court on its criminal side.

In spite of the fact that by Article 2 of the Palestine (Appeal to Privy Council) Order-in-Council, "judgment" includes "sentence", it must be pointed out that the recital of this Order-in-Council refers to the provision of the previous Palestine Order-in-Council whereby the right to appeal to the Privy Council is restricted only to civil claims. Therefore we see no reason for departing from the judgment of this Court in P.C.L.A. 4/39 . . . .

The application for leave to appeal to the Privy Council is, therefore, dismissed and we make no order as to costs.

Given this 16th day of February, 1942.

Chief Justice.

CIVIL APPEAL No. 68/42.

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

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

Omar Haj Ibrahim Dirhally — Appellant

v.

Muhammad Rafat Dirhally — Respondent.

Counterclaim — Cause of Action.

Rule 52, Civil Procedure Rules — inapplicable to a person who had entered a counterclaim as Defendant in another action and is now claiming as Plaintiff on a separate cause of action.

Cattan for Appellant.

Elia for Respondent.

Appeal from judgment of District Court, Jaffa, in Civil Case No. 84/41.

JUDGMENT

. . . . We feel that the District Court has been wrong in taking the view it has of Rule 52 and that the Defendant is not, in this case, in the same position as a Plaintiff, within the meaning of this Rule, nor did he relinquish any part of his claim by entering his counterclaim. We agree that he has a separate cause of action and that the District Court should deal with this on the merits, and on the issues before it. It should, therefore, be remitted . . . .

Delivered this 23rd day of June, 1942.

Chief Justice.

CIVIL APPEAL 180/42

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

Before: Copland, Edwards and Frumkin, JJ.

Miriam Grossfeld — Appellant

v.

Otto Pach — Respondent.

Appeal and leave to appeal under Arbitration Ordinance — Arbitrator proceeding ex parte — Written submission to arbitration — Raising new point on appeal.

1. Applications for leave to appeal in cases tried by Magistrate in arbitration matters are governed by provisions of Arbitration Ordinance and Civil Procedure Rules, not Magistrates' Courts Procedure Rules.

2. A party should be warned once (unnecessary to warn twice or more) that if he does not attend, proceedings will be continued in his absence.

3. If it appears from agreement signed by both parties that there was a submission to arbitration, it is not essential that actual submission itself should be signed.

4. Too late to argue on appeal that document is insufficiently stamped after allegation in lower Court that it was unstamped.

Ben-Yaminy for Appellant. *Hake* for Respondent

Appeal from judgment of District Court of Tel-Aviv, in its appellate capacity, dated 24.7.1942 in Civil Appeal No. 106/42.

JUDGMENT

This is an appeal from the District Court of Tel Aviv which allowed an appeal from a judgment of the Magistrate ordering the enforcement of an award of an arbitrator. With regard to the preliminary point which was raised that the application for leave to appeal should have been made to the Chief Justice, and secondly that it was out of time, both those points are dealt with in Civil Appeal 239/41, Najjar v. Salah and another, reported in 8 PLR

p. 590*) and the matter is, therefore, covered by authority and there is nothing in it.

Two points have been raised on this appeal. The first is that the District Court were wrong in holding that there was no signed submission to arbitration, and secondly the District Court were wrong in holding that it was necessary to warn the Respondent several times, that the arbitrator would proceed ex parte if he did not attend. The District Court held that the arbitrator ought to send notices twice at least and warn him that the dispute would be proceeded with in his absence, if the party did not attend.

To take the second point first, no authority had been quoted to us for this somewhat startling proposition in law, and we certainly know of none ourselves. It is necessary that a party should be warned once that if he does not attend then proceedings would be continued in his absence, and that he was so warned in this case appears from the arbitrator's award. Paragraph 3 of that award is in the following terms: —

> "After adjournament of the first hearing, Defendant got in touch with the arbitrator and justified his non-appearance . . . Having obtained the agreement of Paintiff, the arbitrator summoned the Defendant for the day and time aforesaid, informing him that if he fails to appear without sufficient cause, then he (the arbitrator) would proceed with the merits of the case in the absence of Defendant".

It is, therefore, quite clear that the necessity for the notice specified in the case quoted to us, Gladwin v. Chilcote (1841), has been complied with and that the Respondent did have the proper notice; he did not appear and the arbitrator proceeded in his absence, and on that point the District Court was wrong in holding that he should have been warned twice or more.

With regard to the first point of signing the submission, the agreement is . . . endorsed . . . with three receipts, "received on account LP.25, . . . received total LP.40", and attached to that there are two clear signatures of the Respondent. Further there is in writing a prolongation of the agreement, which would have expired on the 13th September, until the 9th October, in consideration of LP.1.- being paid. The prolongation is signed by the Respondent. Now, it is not essential that the actual submission itself should be signed if it appears from the document itself that there was actually a submission to the arbitration. In our opinion, that agreement to submit to arbitration appears quite clearly from these signatures of the Respondent on this document itself.

...On further perusal of the record there is only one further point of substance raised in which it was alleged that there was was no stamp on the agreemnt. That is incorrect because the agreeemnt bears a 50 mils stamp. If the argument is that

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*11CtLR37

the document is insufficiently stamped, then it is too late to raise it now.

For these reasons we are of opinion that the appeal must be allowed... and the order of the learned Magistrate restored...

Delivered this 27th day of November, 1942.

CIVIL APPEAL 206/42.

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

Before: Rose, J.

1. Moshe Nathaniel,
2. Menachem Shlomo Awed — Appellants.

v.

Avia Ratner — Respondent.

Judgment for repayment of money in an allegedly premature claim — Declaratory relief — Right of recourse — Interest.

1. Judgment ordering Defendant to pay a sum certain to Plaintiff after Plaintiff discharges a debt which he (Plaintiff) was ordered to pay in another case cannot be attacked as granting the Plaintiff provisional relief in a premature claim or as being in effect only declaratory.

2. Person ordered to repay together with costs money received by him for himself and others is entitled to recover from his partners their proportional shares also in costs, if he acted reasonably and in partners' interest in resisting the claim brought against him.

3. Interest on money claimed can (where there is no agreement or any provision of law) be awarded only as from date of action.

Z. Fellman, for Appellants. *Eliash* for Respondent.

Appeal from the judgment of the District Court, Tel-Aviv, dated 12.8.42 in Civil Case No. 166/41.

JUDGMENT

. . . . . The main point of appeal is that the Court erred in granting provisional relief in this case as the claim of the Respondent was premature. The form of the learned Judge's order is as follows:

> "I therefore, order that upon the judgment debt in Civil Case (Tel-Aviv) 108/38 being discharged by the present Plaintiff to the amount of LP.833.800 the present first Defendant do pay to the Plaintiff the sum of LP.179.698 with interest thereon at 9% per annum from March 25, 1938, and that the present 2nd Defendant do pay to the Plaintiff the sum of LP.89.849.- together with interest thereon at 9 per cent per annum from March 25, 1938."

It would seem that authority for the form of the learned Judge's order is provided by Wolmershausen v. Gullick, (1893)

2 Ch. 514, which is referred to in Halsbury's Laws of England, Vol. 16, p. 115. Further, Rule 52(4) of Civil Procedure Rules, expressly provides that no action shall fail on the ground that the relief claimed is a declaratory only.

The remainder of the case raises pure questions of fact . . .

There remains that portion of the order of the trial Court relating to the costs of Civil Case No. 108/38, District Court, Tel-Aviv. It would seem that the learned Relieving President came to the view that the Respondent acted reasonably and in the interest of the other 6 persons to whom I have already referred in resisting the claim of Eliezer Bolotin and Zeita Weizman. I am not prepared to say that he was wrong in coming to this conclusion as there is nothing to indicate that he did not apply his mind to the proper considerations. Further, I do not consider that the position is affected by the fact that the present Appellants were not actually parties to the case.

There is one matter, however, on which, in my opinion, the judgment of the trial Court is open to objection. The Appellants were ordered to pay interest at 9% per annum on the amounts adjudged to be payable by them as from March 25, 1938, being the date of the filing of the previous action. I agree with counsel for Appellant that the proper order should be that interest should only be payable as from the date of the filing of the previous action. The judgment of the trial Court must, therefore be varied accordingly.

The Appellant will have 1/4 of the costs of this appeal . . .
Delivered this 30th day of November, 1942.

C.A. 228/42.

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

Before: Copland and Abdul Hadi, JJ.

Anglo-Palestine Bank, Ltd. — Appellant.

v.

Mahmoud Mohammad Yunis — Respondent.

Alleged prescription of claim on a promissory note — Beginning of action — Interruption of prescription.

1. The beginning of an action is the date on which it is filed in Court.
2. Filing of action interrupts prescription.
3. Fact that judgment on promissory note could not be served on Defendant until after more than 5 years does not render the claim prescribed.

Grunwald for Appellant. — *Berouti* for Respondent.

Appeal from the judgment of the District Court of Tel-Aviv, dated 28.9.42 in Civil Appeal No. 150/42, on appeal from the judgment of the Magistrate's Court of Tel-Aviv, dated 23.6.42 in Civil Case No. 3824/36.

JUDGMENT

This is an appeal from an appellate judgment ... in which he reversed a finding by the Magistrate that the present Respondent owed the Plaintiff a sum of LP.90.900 mils on a promissory note. ... The District Court upset the judgment on the ground that the promissory note was prescribed. The matter depends very largely upon dates. The action was entered in the Magistrate's Court, in March, 1936, on a promissory note due on 25.9.35. The first hearing took place within about two months and judgment was finally given on 28.12.36 for the Plaintiff and was entered in the Execution Office for execution. Subsequently difficulty was found in effecting service owing to the fact that the judgment-debtor disappeared from his normal haunts, and it was not until January 1942, that the judgment was served on Respondent. The Respondent immediately took steps to have proceedings set aside, and judgment was set aside on March 9, 1942.

The case really depends upon this fact, what is the date when prescription must be held to be interrupted when an action is filed? In our opinion, the beginning of an action is the date on which it is filed in the Court, and in this case, in view of the commentaries which have been quoted to us, of Ali Heider and Baz, the Appellant, who was the Plaintiff, took all possible steps in the Court below to have the case set down and judgment given. Owing to a fault of somebody other than himself, for which he can be held in no way to blame, the first proceedings became ineffective, but we are of opinion that that action which had been followed up, so far as the Plaintiff was able to follow it up, broke the period of prescription, and consequently the learned Judge on appeal in the District Court was wrong in saying that there was prescription.

For these reasons the appeal must be allowed, the judgment of the District Court on appeal quashed and the judgment of the Magistrate restored ....

Delivered this 26th day of November, 1942.

CIVIL APPEAL No. 154/42.

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

Before: Edwards, Frumkin and Khayat JJ.

Bashir Mohammad Yasin — Appellant.

v.

Abdel Raouf Abu Shamat — Respondent.

Application to District Court to set aside award — Allegation of misconduct on part of arbitrator — Waiver of right to allege misconduct.

1. An application under rule 305, 311, Civil Procedure Rules, 1938 to set aside award sufficiently complies with sec. 15 (4), Arbitration Ordinance (providing for all applications to be made by "petition").

2. Arbitrator's action in constantly allowing party to arbitration to visit him alone and to be seen whispering to him can be construed as indicative of partiality and unfairness.

3. a) Waiwer of right to allege misconduct applies only to "constructive misconduct" or misconduct in matters of procedure but cannot extend to what may be called "essential misconduct".

b) Objection to "essential misconduct" of arbitrator cannot be waived.

Atalla for Appellant — *Koussa* for Respondent.

Appeal from judgment of District Court of Haifa, dated 6.7.42. in Civil Case No. 84/41.

JUDGMENT

. . . . Respondent's advocate . . . took a formal objection, namely, that there was no proper application before the District Court by the present Appellant to set aside the award. It is clear, however, from the papers that there was before that Court a proper application under Rule 311 of the Civil Procedure Rules, 1938. Section 15(4) Arbitration Ordinance, requires that there should be a "petition" and the law of Palestine requires that the petition under section 15(4) should be in the form provided by the Civil Procedure Rules for Petitions. The Civil Procedure Rules, 1938, however, have not specifically provided for procedure by Petition.

Following a long line of recent decided cases on the matter of Rule 305, we consider that the present Appellant sufficiently complied with the procedural law of this country.

Several grounds were advanced by the Appellant's advocate . . . . but we think that the appeal can be disposed of on one ground alone, namely, the alleged misconduct of the arbitrator. There is a clear finding of fact by the District Court in its judgment in the following terms, namely: —

> "With regard to the first allegation, it has actually transpired to us that the arbitrator met several times with the judgment creditor separately in his room and in the corridors of the Court House, in the course of the arbitration proceedings. It also transpired to us that counsel for the judgment Debtor, . . . were aware of those meetings, and they actually saw the arbitartor and the judgment creditor meeting together several times, and they stated that they used to notice the arbitrator and the judgment creditor whispering with each other and that when they came near to them, they stopped talking. They further testified that they did not feel at ease by the conduct of this arbitrator . . . Fuad Bey further stated that after the arbitration sittings came to an end and there only remained the giving of the award, he met the arbitrator who spoke to him certain expressions from which he inferred that the arbitrator was intending to injure his client or rather to take revenge on him, but that he did not submit an application for changing him at that time, simply because the arbitration sittings had come to an end . . .

> "But Hanna Eff. Nakkarah testified that several times he saw Abdel Raouf Abu Shamat with the arbitrator in his room in the Court House, particularly when the arbitration proceedings were about to come to an end, and that he used to see the two of them talking together separately, that when he came near to them they stopped talking, that he blamed the arbitrator because of those meetings, that the latter assured him that his meetings with the other side (the adversary) did not influence him . . . "

Furthermore, Mr. Koussa quite frankly admitted at the Bar before us that the arbitrator and the Respondent did meet together in the Law Courts Building, Haifa "a good number of times" (to quote Mr. Kousssa's own words). The arbitrator was a clerk on the Law Courts Staff, Haifa. Mr. Koussa, however, said that the conversations related merely to the fixing of dates and to requests for the early pronouncemnt of an award.

Now, it is quite clear that the Appellant could not be expected to know the nature or subject matter of these conversations, nor is it easy to imagine what steps he could have taken at the time once he became aware of the conversations. The District Court held that the Appellant's advocate was aware of those meetings between the arbitrator and the Respondent and the learned Judges of the District Court further held that the Appellant had waived his right of alleging misconduct. To that the answer of the Appellant's advocate is that waiver applies only to matters of what one might call "constructive misconduct" or misconduct in matters of procedure, but cannot extend to what one might call "essential misconduct". We think that this contention is sound. We think that the action of the arbitrator in constantly allowing the Respondent to visit him alone and to be seen whispering to him certainly amounted to an act which could be construed as indicative of partiality or unfairness (see Russel on Arbitration, 13th (1935) Ed. pp. 178 and 179).

It would have been very easy for the arbitrator to send the Respondent away or to tell the Respondent that he would only see him in the presence of the present Appellant or his advocate. We have no doubt whatsover that the finding of the District Court amounts to a finding that the arbitrator's action did constitute misconduct and misconduct of such a nature that objection to it could not be waived (see Russel p. 58). We think it unnecessary to deal with the other substantial matter raised in the appeal, namely, that the arbitrator called upon the Appellant (who had already paid LP.30) to pay a further sum of LP.20 towards his fees, whereas the total fee eventually charged was only LP.60.

For the foregoing reasons we allow the appeal and set aside the judgment of the District Court . . . .

Delivered this 16th day of November, 1942.

CIVIL APPEAL No. 131/42.

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

Before: Rose, J.

Haya Kaplan — Appellant.

v.

Meir Kaplan — Respondent.

Membership in Jewish Community — Opting out of Community — Probate of will in civil form.

1. A person whose name appears on the last register of members of the Jewish Community is to be regarded as still being a member of the commmunity, if it cannot be shown that he effectively opted out of it.

2. Only effective method of opting out of Jewish Community is prescribed in Rule 17 (as amended), Jewish Community Rules.

3. While electoral legislation must be strictly interpreted, a Court, in case of any ambiguity, will lean against a conclusion which would be greatly inconvenient.

4. Where statutory provision is open to alternative constructions, construction which is supported by practice should prevail.

5. Will in civil form prescribed in sec. 12, Succession Ordinance, may be probated by District Court, whether or not testator, not being a Moslem, was a Palestinian citizen or a member of a religious community.

Eliash and Goitein for the Appellant.

B. Josep, Caspi and Kahana for Respondent.

Appeal from the judgment of the District Court of Tel-Aviv, dated 25.6.1942 in Probate Case No. 20/42.

JUDGMENT

. . . The matter concerns a petition for probate of the will of a Mr. Haim Kaplan, who died in January, 1942. His widow, the Opposer and the Appellant in the present proceedings, contends that the deceased was a Palestinian citizen and a member of the Jewish Community and therefore exclusive jurisdiction for confirmation of his will was vested in the Rabbinical Court. It is common ground that deceased was a Palestinian citizen.

The first point to be determined is whether the deceased was a member of the Jewish Community. There is no dispute that the name of the deceased was contained in the register of 1936, which was the last register properly revised in accordance with the Jewish Community Rules.

It is also clear that the deceased regarded himself as being a member of the Jewish Community as late as the 25.5.1941, when by a letter addressed to the Community Council of Tel-Aviv he attempted to opt out of the Community. The only effective method of so opting out is prescribed in Rule 17 (as amended) of the Jewish Community Rules, and the Court below found as a fact that the attempt to opt out was ineffective as the deceased was out of time. There was a certain amount

of argument both in the Court of trial and in this Court as to what the true position was on this head but I am not prepared to interfere with the finding of the District Court on the matter. It follows therefore, that if the deceased was a member of the Community at the date when he attempted unsuccessfully to opt out he must still have been a member of the Community at the time of his death in January, 1942.

The trial Court, however, acceded to Dr. Bernard Joseph's argument that the only method of determining whether a person is a member of the Jewish Community is to refer to the register. The provisions as to the compilation of this register are contained in Rules 17 and 18 (as amended) of the Jewish Community Rules, and it would seem undoubtedly to be the case that the requirements as to revision of the 1936 register had not been complied with at any rate up to the date of the deceased's death. It was, therefore, argued and the trial Court accepted that the Appellant, upon whom the onus lay, had failed to prove that the deceased was at the time of his death a member of the Jewish Community, in that the fact that he had been a member of the Community during the currency of the 1936 register was not sufficient to show that he was still a member at the time of his death in 1942. In support of his argument Dr. Joseph contends that had it been intended that the existing register should continue in force until the issue of a duly revised register there should have been a provision to that effect in the rules themselves, a similar provision, as he rightly points out, being found in the (English) Ballot Act, 1872, Section 7 and the Representation of the People Act, 1918, Section 11(3). It is indeed surprising that there is no such provision in the Jewish Community Rules and Dr. Joseph's is a powerful legal argument. If, however, his view, which was adopted by the District Court, is right it would follow that for a considerable number of years there was in fact, in the legal sense, no member of the Jewish Community at all. This is a result to which a Court would naturally come with reluctance and while it is perfectly true that electoral legislation must be strictly interpreted, a Court, in the event of any ambiguity, will naturally lean against such an inconvenient conclusion. Mr. Goitein has referred to Article 5 of the Mejelle which reads: "It is a fundamental truth that a thing shall remain as it was originally" and asks me to apply that maxim to the present case in order to keep alive the 1936 Register. Having regard to this provision and to the undoubted fact that the deceased regarded himself as being a member of the Community after the validity of the register had expired I have come to the conclusion, although not without hesitation, that the provisions of Rules 17 and 18 are not so free from ambiguity as to compel me to take the view that the failure punctually to revise the register means that there was, in the legal sense, no member of the Jewish Community for a period of at least 4 years. I am, therefore, of opinion that the District Court was wrong in holding that the Respondent had failed to establish that the deceased was a member of the Jewish Community at the time of his death.

It is now necessary to consider the 2nd point as to whether, the deceased being a member of the Jewish Community, the confirmation of his will is exclusively within the jurisdiction of the Rabbinical Court. On this matter the trial Court regarded itself as bound by Civil Appeal 106/40, P.L.R. Vol. 7, p. 310*, in which this Court said: —

> "In our opinion Section 12 is intended to provide . . . which a testator may desire to make."

It is urged by counsel for the Appellant that although these words are in the widest form they should nevertheless be limited to the facts of that particular case, where the testator was a "foreigner" within the meaning of Article 59 of the Palestine Order-in-Council, 1922, and that the point is still open as regards a Palestinian citizen who is also a member of the Jewish Community. I consider this to be a sound contention, and the Court in the earlier case did not have the advantage of listening to the very full arguments which have been addressed to me on this point in the present appeal.

The relevant part of Article 53 of the Order-in-Council reads as follows: —

> "The Rabbinical Courts of the Jewish Community shall have: — (1) exclusive jurisdiction . . . .

And Section 7 of the Succession Ordinance (Cap. 135 of the revised edition) would seem to re-affirm this jurisdiction.

Section 12 of the Succession Ordinance reads as follows: — .

And Section 14(1) provides that "no will made in civil form shall be deemed to be valid unless it has been proved before a District Court."

Dr. Bernard Joseph has referred to a number of District Court cases extending over several years and it is in my opinion clear from these authorities that in practice the Courts have regarded themselves as being entitled to grant probate of a will in civil form irrespective of the fact that the testator was a Palestinian citizen and a member of the Jewish Community and I was referred to no authority of either a District Court or the Court of Appeal to the contrary. This point itself, of course, is in no way conclusive but in my opinion Dr. Joseph is right when he says that if the Succession Ordinance is open to alternative constructions then the construction which is supported by practice should prevail.

Can the Succession Ordinance reasonably and fairly be interpreted to support the practice of the District Court? Dr. Joseph contends that Article 53 of the Order-in-Council relates only to wills made in religious form and in support of his argument he says that the word "confirmation" has a different meaning from the word "probate", confirmation relating only to form and not to contents whereas probate covers both the validity and the contents of the will. Mr. Goitein, who replied for the Appellant, argues that the word "confirmation" is included in the word "probate" although probate may have additional elements. The matter is difficult and in my opinion the provisions of the Succession Ordinance are in many instances

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*8CtLR51

obscure and their wording ambiguous, but after careful consideration of all the arguments adduced before me I am of the opinion that, at the least, Dr. Joseph's argument can reasonably be supported by the wording of the Ordinance; and that the intention of the legislature, adequately implemented by the terms of the Oridnance, is that, apart from Moslems, any testator, whether or not he is a Palestinian citizen or a member of a religious community, who makes a will according to the civil form prescribed in Section 12 may, in an appropriate case, be granted probate in respect of it. This conclusion seems to me to be supported by Section 20 of the Ordinance, which provides that the provisions of Part IV (i.e. Sections 11 to 20 inclusive) shall not apply to successions to Moslems, there being no such exclusion in the case of members of the Jewish Community.

The matter, as I have already said, is one of complexity and I have come to my result with considerable hesitation.

For the reasons which I have given the appeal is dismissed...

Delivered this 30th day of November, 1942.

British Puisne Judge.

CIVIL APPEAL No. 24/42.

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

Before: Rose J, Frumkin J, and Khayat J.

1. Ibrahim Abu Shindi
2. Khalil Abu Shindi — Appellants.

v.

Israel Gordon — Respondent.

Denial of signature on promissory note — Evidence of expert witnesses — Calling opponent as witness — Allegation of material alteration on promissory note.

1. While judgment cannot be given on evidence of one witness, — not necessary that every point in a case be proved by more than one witness.

2. Where expert called by one party says signature on document is genuine while opponent's expert says it is not and Court believes former, one cannot say judgment was based on insufficient evidence.

3. Party — not bound by answers of opponent whom he called as witness, if he also adduced other evidence.

4. Addition of guarantor with consent of maker of bill — not a material alteration within meaning of Bills of Exchange Ordinance.

Siksek for Appellants. *Ayon* for Respondent.

Appeal from judgment of District Court Tel Aviv, in Civil Case No. 134/40, dated January 29, 1942.

JUDGMENT

. . . The claim was on a promissory note for LP.500 and Appellant raises 3 points.

First, that as regards the 2nd Appellant, who is alleged to have been the guarantor of the note, there was no evidence that the signature was his . . . Two experts were called one of whom said it was his signature and the other said it was not. The Court believed the evidence of Dr. Maloul, who was called for the Plaintiff-Respondent, who said that in his opinion it was the signature of the guarantor. Counsel urged before us that in view of Section 6, Evidence Ordinance, this evidence is not sufficient, but there can be nothing in that point because all that this section says is that judgment cannot be given on the evidence of one witness; it does not say that every point in a case must be proved by more than one witness.

It was further urged that as the Respondent took the risk of calling the Appellants themselves as his witnesses, he is bound by their answers. We do not think that that is a correct view of the law in a case such as the present, where other evidence was adduced on behalf of the Respondent which the Court was entitled to weigh. We think, therefore, that the Court was entitled to come to its conclusion that the signature of the alleged guarantor was in fact that of the 2nd Appellant.

The 2nd point urged was that there was a material alteration on the note sufficient to invalidate it. Apart from the merits of the case, we do not think that in the absence of forgery, which we have already negatived in disposing of the first point, the addition of a guarantor with the consent of the 1st Appellant, the maker of the bill, can possibly be held to be a material alteration. We are of opinion that there was material before the Court from which it could infer that the signature of the 2nd Appellant was added with the consent and the knowledge of the 1st Appellant.

The 3rd point raised is that this bill . . . was merely given as security, and that there was no consideration for it. That contention seems to be disposed of by two documents . . . .

For these reasons the appeal must be dismissed . . .

HIGH COURT No. 71/42.

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

Before: — Edwards J, Frumkin J, and Khayat J.

Raoufeh Mustafa Zakari — Petitioner.

v.

1. The Chief Execution Officer, Magistrate's Court, Jaffa.
2. Khalaf Hussein El Mugrabi and 4 others.

Respondents.

Consent judgment for giving up possession of land against immediate payment of specified sum — Order by Magistrate while functus officio — Chief Execution Officer entitled to disregard judgment which is a nullity.

1. No order of a Magistrate's Court, other than a judgment (or decree), is appealable, there being nothing in Magistrates' Courts Procedure Rules, 1940, analogous to Rule 317 of Civil Procedure Rules, 1938.

2. Rule 284 (enlargement of time) of Magistrates' Courts Procedure Rules — intended to deal with orders made during pendency of proceedings.

3. Chief Execution Officer entitled to disregard an order of Magistrate which is a nullity, such as made by Magistrate when functus officio.

4. Subsequent order varying the judgment to the prejudice of one party cannot be regarded as merely interpreting the judgment.

Siksik for Petitioner. *Germanus* for Resp. 2-6.

Return to a rule nisi directed to 1st respondent calling upon him to show cause why his order dated 24.6.42., in Execution File 397/42, should not be set aside, and why he should not refrain from executing the judgment of the Magistrate's Court, Jaffa, in Civil Case No. 3343/40, dated 27.1.42, as altered on 4.3.42.

ORDER

. . . The facts are that on 27.1.42., the present petitioner arrived at a compromise with the present respondents, numbers 2 to 6, whereby petitioner agreed to give up possession of certain land in dispute against immediate payment to her of LP.20 and of a further sum of LP.18.250 mils within a month. This was a consent judgment in the Magistrate Court. The respondents failed to pay the LP.20 immediately as agreed. The word 'immediately' is susceptible of only one meaning. The total sum of LP.38.250 mils was paid in the Execution Office on 10.2.42. It may be said that the respondents, having failed to pay the LP.20 immediately, later offered to pay the LP.20 within 10 days from January 27, but this offer was refused by the petitioner. Subsequently, the respondents applied to the Magistrate asking for an extension of the period for payment. On 4.3.42, the Magistrate made an Order extending the period for another 15 days.

Now, by his order of 24.6.42, the Execution Officer decided to execute the judgment of 4.3.42, instead of 27.1.42. The present petitioner now alleges that the Order of the Magistrate of 4.3.42 was bad, in that it varied the consent judgment of 27th January, and it is further argued that the Magistrate was *functus officio* after he had made the Order of 27.1.42. We think that both contentions are sound. The right to appeal is statutory and is governed by Section 11(5) of the Magistrate's Courts Jurisdiction Ordinance, 1939. Under that Ordinance the Order of 4.3.42 could not be appealed against, as there is nothing in the Magistrates' Courts Procedure Rules, 1940 analogous to Rule 317 of the Civil Procedure Rules 1938. We consider that Rule 284 of the Magistrates' Courts Procedure Rules is intended to deal with orders made during the pendency of proceedings.

The question, therefore, is whether the Execution Officer was entitled to disregard the order of the Magistrate of 4.3.42. We think that he was, because he was faced with an order

which was a nullity, it having been made after the Magistrate was no longer seized of the matter.

The respondents' advocate has argued that the matter is covered by Civil Appeal 96/41*), P.L.R. Vol. 8, p. 256. We are of opinion, however, that the order of 4.3.42 did not merely interpret the order of January 27th, but varied it definitely to the prejudice of the present petitioner. Parties must be kept to their agreements, and it seems reasonably clear that the petitioner might not have been willing to agree to the compromise of 27.1.42, unless she had been certain that she would receive the LP.20 immediately.

. . . . As the possession of land was involved in the consent judgment of 27.1.42, we think that the petitioner is entitled to succeed. We therefore think that the Execution Officer should have held himself bound by the consent judgment of 27.1.42 and not by the order of 4.3.42.

We accordingly make the order absolute with costs . . .

Given this 27th day of July, 1942.

British Puisne Judge.

HIGH COURT No. 109 of 1942.

IN THE SUPR. COURT SITTING AS A H. COURT OF JUSTICE

Before: The Chief Justice Mr. Justice Copland, Mr. Justice Edwards, Mr. Justice Frumkin and Mr. Justice Khayat.

Between: Vaad Adat Ashkenazim, Beit Din Hassidim, through its President, Rabbi Abraham Schorr.
Petitioner

v.

1. The District Commissioner, Jerusalem.
2. The Chief Secretary, Government of Palestine.
Respondents.

and Between:

Vaad Adat Ashkenazim, Beit Din Hassidim, through its President, Rabbi Abraham Schorr.
Petitioner

v.

1. The District Commissioner, Jerusalem.
2. The Chief Secretary, Government of Palestine.
3. The Jewish Community of Jerusalem, through its Executive Committee.
Respondents.

(By order of the Court dated 26.10.42.)

What Rabbi can act as "registering authority" for Jewish marriages? — Binding force of previous decisions of Supreme Court.

1. Supreme Court — bound by its previous decisions; unless case under consideration is distinguishable or fresh arguments are presented which were not before the previous Courts.

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*9CtLR188

2. a) Before a person can claim to be a "registering authority" under Marriage and Divorce (Registration) Ord. he must prove that he is legally empowered to celebrate marriages ; fact that he used to do so for a considerable number of years and that he has been furnished with books of registration certificates — irrelevant, there being no prescriptive right in such matters. (per Copland, J.)

b) Effect of Jewish Community Rules — to give legislalative guidance as to who should be regarded by Government as rabbis for all purposes, including those of Marriage and Divorce (Registr.) Ord. (per Edwards J.).

3. a) The Jewish Community Rules, 1928, did not break new ground as regards recognition of only one Jewish Community for the Jewish Religion they only confirmed and attempted to regularize the status quo ante in existence at the time of the Occupation.

b) For the Jewish Religion the Ottoman as well as the Palestine legislature provided for one community and one community only. (per Frumkin, J.).

Goitein for petitioner.

Crown Counsel (*Rigby*) — for respondents Nos. 1 and 2.

Levanon — for respondent No. 3.

Return to a Rule Nisi issued on the 2nd day of October, 1942, directed to 1st Respondent calling upon him to show cause why he should not deliver, upon request, necessary registration forms for registration of marriage and divorce performed by Petitioner.

ORDER.

Gordon Smith, C.J.,

The majority decision* is therefore that the Rule Nisi will be discharged, with costs . . .

Delivered this 24th day of November, 1942.

F. Gordon Smith, *Chief Justice.*

ORDER

Copland, J.

. . . I can see no difference in principle between this case and the two cases on the same point already decided by this Court, and, to my mind, with all respect to those who take the contrary view, the question of principle in all the three cases is identical. The petitioner is, in my opinion, in no better position than the petitioners were in the Central Agudath Israel case, (H.C. 110/42), and as for the Rokach case (H.C. 5/42), the only difference between the present petitioner and the 2nd and 3rd respondents in that case is that the former has been celebrating marriages for a longer period than the latter. The general rule is that the Court of Appeal is bound by its own previous decisions — see Jerusalem Municipal Corporation v. Cattan, C.A. 158/38** (5 P.L.R. 488, at pp. 494-6) and the Eng-

*Gordon Smith C.J., and Khayat J., dissenting.

**4CtLR169

lish cases therein quoted, where the English law on the subject was exhaustively reviewed. The same principles must apply to the High Court. I do not think that these two cases can be dismissed as of no authority or consequence, unless they can be distinguished from the present case, which I am unable to do, or further arguments have been presented which were not before the two previous Courts. It is sought to be stressed that if those Courts had had the original wording of the Marriage and Divorce (Registration) Ordinance, 1919, before them, their decisions would have been different. I am again unable to see why. The 1919 Ordinance merely made use of the then existent census arrangements for the continued registration of marriages and divorces, and no more. It had no effect whatever on appointments to the office of Rabbi nor to any other religious or civil position.

It seems to me that appointments to the office of Rabbi must be governed primarily by the Jewish Religious Law, subject to any legislation by the State. The question before us is whether Rabbi Schorr is entitled to be a registering authority of marriages and divorces and consequently entitled to be furnished with books of certificates for registering them. A "registering authority" is defined in the Ordinance, Cap. 88, in the case of Jewish marriages as the Rabbi who celebrates the marriage. This must obviously mean the Rabbi who is lawfully authorised to celebrate marriages, for it can hardly be contended that the Government has set up an authority to register illegal or unlawfully celebrated marriages. Before, therefore, the petitioner can claim to be a registering authority, he must prove that marriages celebrated by him are lawful marriages, that is to say, that he is legally empowered to celebrate marriages. The only proof advanced on this matter is that he has for a considerable number of years celebrated marriages and has been furnished with books of registration certificates.

As I remarked in the Central Agudath Israel case (supra) I am unaware of any prescriptive right in such matters; because for many years Rabbi Schorr has been celebrating marriages, that does not, and cannot, by itself give him the legal power to celebrate them. If Mr. Goitein's arguments were correct, that no Rabbi in Palestine has any legal power to celebrate marriages, that alone would necessitate the dismissal of the petition, for there cannot be registration of an illegal "marriage," which of course is no marriage at all. The argument, needless to say, is not correct.

The above remarks apply with equal, if not greater, force to the question of divorces. Whatever one's views may be on the subject of divorce, I can imagine no greater evil than that there should be hundreds of persons with powers to arrange divorces, uncontrolled by any superior authority, persons self-appointed or appointed by dissident members of the Jewish community. Unless compelled to adopt such an interpreta-

tion, no Court in my opinion should countenance such a situation.

I have not dealt with the question of alleged hardship because I do not think that it has any bearing on the question before us. But if there should be thought to be hardship, the matter can be put right by a simple validating Ordinance or by an amendment to the Palestine Order-in-Council, 1922, if such should be considered necessary. Whether such a course is desirable is, however, not a matter on which I am competent to express an opinion.

For these reasons, in addition to those given by my brothers Edwards and Frumkin, I would discharge the rule.

Given this 24th day of November 1942.

British Puisne Judge.

ORDER.

Edwards J.

I have carefully considered the judgment of the learned Chief Justice and the matter which I have now to decide is whether I should, in consequence, alter the opinion which I expressed in High Court 5/42. I consider that whoever is to be regarded as "the rabbi" for the purposes of Sec. 2 (Cap. 88), that person only becomes a registering authority after he has celebrated the marriage. He must, therefore, have been from the outset a rabbi, and moreover, in my view, a rabbi capable of celebrating a marriage. I would also say that he must be recognized by the Civil Authorities, that is, the Government of Palestine, as being so capable. It is true that the Ordinance does not prescribe who should celebrate marriages; but it seems to me that before the District Commissioner at the end of any month can accept one of the four copies of registration of the marriage, under Sec. 4(b), he must satisfy himself that the copy which is given to him to file, is a copy of a certificate of a marriage celebrated by a rabbi lawfully entitled to celebrate the marriage. If this be not so, any person calling himself a rabbi could insist on the District Commissioner accepting copies and the District Commissioner might be inundated with any number of certificates of purported marriages which might have been performed by any person. I quote from the judgment of the learned Chief Justice:

> "It seems to me, however, that all the District Commissioner has to do is to satisfy himself that a rabbi of a non-recognised community is regarded as such by that community and celebrated marriages amongst the community which are recognized by Jewish Religious law and beliefs as being valid marriage contracts. If such is the case then it would appear that *ipso facto* he becomes a registering authority within the meaning of sec. 2 of the Ord."

For myself, I find it difficult to appreciate on what principles the District Commissioner is to act and what considerations are to affect him before he so satisfies himself. He might be faced by a particular person claiming to be the rabbi of a congregation of, say, 35 or 40 people, or he might receive a petition from 35 or 40 people asking that a particular person be recognised as their rabbi. But if the learned Chief Justice is correct, it seems to me necessarily to follow that the District Commissioner after having satisfied himself as to the matters above mentioned, would then, in effect, be recognising a community which the statute law of Palestine regards as unrecognised and expects the Courts not to recognise till a change in the law has been made.

The learned Chief Justice says that there is no marriage law enacted on the subject of Jewish Marriages. I respectfully agree; but the position seems to be that the only law on that subject which there can be is that to be found in the whole body of Rabbinical Jurisprudence. The effect of the Jewish Community Rules made under section 2 of the Religious Communities (Organisation) Ordinance, Cap. 126, in my view, is to give legislative guidance by supplying an answer to the question as to who (at any rate from the coming into force on 1.1.1928, of those rules) should be regarded by the Government of Palestine as rabbis for all purposes, including the purposes of sec. 2, Cap. 88.

With all respect to the opinion of the learned Chief Justice, I am unable to accept the view that my brother Frumkin and I, by our order in H.C. 5/42, did in effect attempt to amend the law. As I view the matter, it is rather that Government has been able to fill up a *lacuna* in sec. 2 by saying: "Now, at last we are able to offer guidance as to the class of persons to be recognised as rabbis."

It seems to me to be a good example of the by no means uncommon case of prior legislation having to be read subject to later legislation, in our case, sec. 2 of Cap. 88 having to be read subject to the Jewish Community Rules.

So far as I can see, neither my brother Frumkin nor I, in H.C. 5/42, purported to alter a line of sec. 2 of Cap. 88, nor did we even attempt to alter the previous regulations referred to by the learned Chief Justice in para. 3 of his order, that is when His Lordship referred to the Ottoman Law in force prior to the coming into operation of Cap. 88.

With reference to the learned Chief Justice's words "I can see nothing which debars official recognition to separate communities within the Jewish Religion," I respectfully agree; but such official recognition, in my view, can only be given under sec. 2 of Cap. 126. (See Art. 65.A. (a) Palestine Order-in-Council, 1922, as amended by Art. 13 Palestine (Amendment) Order-in-Council, 1939). The learned Chief Justice refers to Rules 20, 26 and 27 of the Jewish Community Rules. Rules 26 and 27 deal with ritual killing and burials. The position there is

not denied by the present respondent. It seems to me that the "local community" contemplated by Rule 20 can only be a part of the recognised community of the Jews in Palestine referred to in Rule 3, and I cannot believe that Rule 20 contemplates a local community of persons of the Jewish Religion who were not already members of the larger community, namely, the recognised community of the Jews in Palestine referred to in Rule 3. I think that Rule 8 is of the utmost importance as regards this case, viz., "The local Rabbi or Rabbinical Office shall be the recognised religious representative of the local Community in relation to the district administration."

I fully realise that it may be illogical and perhaps even wrong for either the Jewish Community or the Government of Palestine not to object to rabbis of the Central Agudath Israel being issued with registration books. Be that as it may, it does not affect our duty to interpret the law as we find it, nor are we concerned with the legal effect on, or the validity or otherwise of, marriages celebrated prior to the coming into force on 1.1.1928, of the Jewish Community Rules, or marriages of Jews outside the Jewish Community celebrated either before or after 1928. With regard to the formal objection taken in H.C. 5/42 that there is no statutory provision for the issue of books of registration forms, I refer to my brother Frumkin's and to my own remarks in the judgments in that case.

For the foregoing reasons I am still not convinced that the decision of the majority of the Court in H.C. 5/42 was wrong. I accordingly concur in the order proposed by my brother Copland.

Given this 24th day of November, 1942.

British Puisne Judge.

ORDER.

Frumkin J.

In view of the judgment of this Court in H.C. 5/42, I need only consider two points: (a) whether this case is distinguishable from the case just mentioned; and (b) if it is, were fresh arguments adduced which should lead this Court to arrive at different conclusions from those in the previous case.

I can see no difference in so far as the law is concerned between the two cases. Like the Rabbis in H.C. 5/42 the present Petitioner is not a Rabbi designated by the Jewish Community to act as a registering authority, nor is he a Rabbi affiliated to the Agudath Israel. There is, however, one distinction in that Rabbi Schorr exercised the privileges of celebrating marriages and divorces for a much longer time than the Rabbis in the first case, and the question is whether by the length of time he acquired a right not warranted by law.

As already pointed out by Copland J. in H.C. 110/42, practice does not create a prescriptive right. The position might perhaps have been different were Government to consider it desirable to continue the privilege accorded to Rabbi Schorr, but far from being so the District Commissioner — and very rightly so — considered himself bound by the law as laid down in H.C. 5, and refused to extend the privilege to Rabbi Schorr any longer.

On the other point I do not consider that any fresh law, not considered by the Court previously, has been advanced by Mr. Goitein, in spite of his strenuous effort. He has referred us to Ottoman Legislation in force prior to the Occupation and prior to the promulgation of the Marriage and Divorce Ordinance, and he suggested that under that law a Rabbi was just like a Mukhtar whom any dozen of people could elect and impose authority upon the person so elected. Although all this has no relevance on the situation under the present legislation, this is far from being so. Even a Mukhtar derived authority from "Authority."

As regards Rabbis, Mr. Goitein, has completely overlooked the position of Rabbis under the Turkish Régime. Both the Ottoman Law and the Turkish Government recognised only one Jewish Community for the entire Ottoman Empire including both Sephardim and Ashkenazim, Hasidim and Perushim, and whatever other sub-fractions there might be. This community was headed by the Chacham Bashi at Constantinople as the Supreme Religious Head of the Jewish Religion in the Ottoman Empire. Jerusalem, like two or three other big cities, with a larger Jewish population had their own Chacham Bashi officiating under the control of the Chacham Bashi of Constantinople. Each Chacham Bashi, upon his appointment, was vested with a special firman from the Sultan vesting upon him very wide religious powers, including the exclusive right to control marriages and divorces to such an extent that no Rabbi could have celebrated a marriage or performed a divorce without the authority derived directly or indirectly from the Chacham Bashi. Furthermore, there was, as there is still at present, only one set of Religious Courts for the Jewish people recognized by law and authority. So much so that the Ottoman Penal Code (see addendum to Art. 200 of 14 Ramadan 1321) made it a criminal offence for anybody to celebrate a marriage without the authority of the competent Court and the competent Court for Jews was obviously the Jewish Religious Court under the control of the only one recognised Jewish Community. It follows, therefore that no Rabbi under the Turkish Régime could have celebrated a marriage if not designated for that purpose.

After the occupation of Palestine the Allied Powers, as it is well-known, the Ottoman Law and Status of the Religious Communities remained in force until varied. It follows that when the Marriage and Divorce Ordinance dealt with a Rabbi

it must have meant a Rabbi authorised under the law then in force, namely, the Ottoman Law.

The Jewish Community Rules, 1928, did not break new ground and as regards the recognition of only one Jewish Community for the Jewish Religion they only confirmed and attempted to regularize the *status quo ante* in existence at the time of the Occupation.

Without embarking on the somewhat delicate sphere of analogies between religions, I am, with all due respect, unable to agree with the learned Chief Justice that just as there are separate communities for the Catholic and Protestant Religions, there might be separate communities within the Jewish Religion. In the first place communities are provided for by statute, but even if a comparison is to be made at all, the question one has to ask himself would be this, would the law recognise more than one community within say the Catholic or Protestant Religion, or rather Church? Suppose a group of Greek Orthodox, unhappy with their religious head, form what they might call a community and elect their own Patriarch, would Government recognize it? Obviously not. The Jews have one religion for the entire Jewish people, which religion is unlike, perhaps, the Christian Religion, not divided into different churches. True, the Jewish Religion knows of different sections divided according to the countries of dispersion, like Sephardim and Ashkenazim, or according to certain variations in rites and forms such as Perushim and Hassidim, but all these sections belong to only one religion. A Religious Community means, in my humble opinion, the Community of the particular Religion. For the Jewish Religion the Ottoman as well as the Palestine legislature, provided for one community, and one community only. The different sections within the community are in the terms of the Jewish Community Rules named congregations as distinct from Community. There are several congregations within the framework of the One Community.

In view of the above, in addition to my judgment in H.C. 5/42, the order should be discharged.

Given this 24th day of November, 1942.

Puisne Judge.

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