THE
LAW REPORTS OF PALESTINE

Volume 14

1947

JANUARY

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate,
and Member of the Palestine Bar.

Price 250 mils.

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THE
LAW REPORTS OF PALESTINE

OF CASES DECIDED BY
THE SUPREME COURT OF PALESTINE
THE SPECIAL TRIBUNAL
AND
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME COURT OF PALESTINE

Volume 14

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Published by the authority of the Chief Justice and Judges of the Supreme Court of Palestine.

Obtainable from the Government Printer, Jerusalem.

Price 250 mils.

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Special Tribunal No. 2 of 1946.

In the Special Tribunal constituted under Article 55 of the Palestine Order-in-Council, 1922, and Section 9 of the Courts Ordinance, 1940.

Before: The Chief Justice, Edwards J. and Chief Rabbi Herzog.

DELLA GOLDENBERG . . . . . *Petitioner.*

v

MOSHE GOLDENBERG. . . . . *Respondent.*

1947
7th January

FitzGerald C. J.
Edwards J.
and
Chief Rabbi
Herzog

ST 2/46
Goldenberg
v
Goldenberg

Personal status — Action in Rabbinical Court by a stateless Jewess against her Palestinian husband for final settlement of matrimonial and financial disputes — Action by husband in District Court for separation and other reliefs — Wife at time of action in Rabbinical Court a member of Jewish Community — Prior to action in Rabbinical Court husband opted out of the Jewish Community — Matter within exclusive jurisdicion of Rabbinical Court.

In 1945 a Palestinian Jew and a stateless Jewess got married. As the marital life was not *comme il faut* the wife resorted to the Rabbinical Court and obtained a judgment ordering the husband to make certain payments towards her maintenance. That judgment was put into execution, but it was successfully challenged in High Court 105/45, 13 P.L.R. 180 on the ground that the Rabbinical Court had no jurisdiction since the wife was not a member of the Jewish Community. The wife then applied to have her name added to the register of members of the Jewish Community and she received a reply from the proper officer of the Vaad Leumi that her name had been duly registered, subsequent to which reply she brought an action in the Rabbinical Court for the final settlement of the matrimonial and financial disputes. The husband initiated proceedings in the District Court for an order of separation and for a declaratory judgment exonerating him from paying petitioner any sum towards her support. The wife thereupon applied to the Special Tribunal to determine which Court has jurisdiction to decide the issue between the parties.

In deciding that the Rabbinical Court has exclusive jurisdiction to deal with the matter, the Special Tribunal,

HELD that since prior to bringing the action in the Rabbinical Court for the final settlement of the matrimonial and financial disputes the wife could properly be regarded as a member of the Jewish Community, the matter was one of personal status within the exclusive jurisdiction of the Rabbinical Court.

Followed: HC 124/43, 11 P.L.R. 54.
CA 274/45, 13 P.L.R. 111.

Referred to: HC 105/45, 13 P.L.R. 180.
CA 44/46, 13 P.L.R. 585.

M. Levanon for petitioner.

Respondent in person.

Judgment: These are proceedings under Rule 354 Civil Procedure Rules, 1938, and fall within the last sentence of Article 55 Palestine Order-in-Council, 1922. The respondent took the formal objection that, as the memorandum contemplated by Rule 354 was not drawn up and signed by consent of parties, the petitioner should have asked the District Court of Tel Aviv to draw it up. The fact is that the petitioner herself has drawn up and signed the memorandum. Although technically there is something in the respondent's objection we do not think that it ought to vitiate these proceedings since it is not seriously contended that the memorandum does not set out all relevant matter. We accordingly dismiss this preliminary objection.

The last sentence of Article 55 is in the following terms:

> "Whenever a question arises as to whether or not a case is one of personal status within the exclusive jurisdiction of a Religious Court, the matter shall be referred to a Special Tribunal of which the constitution shall be prescribed by Ordinance".

The petitioner and respondent, who are husband and wife, were married in Jerusalem on the 9th day of January, 1945, by a Rabbi authorised by the Chief Rabbinate of Palestine.

All the formal requirements of the Rabbinate had been complied with and there can be no doubt that the parties, who are both Jews, were properly married according to the rites of the Jewish Religion. The respondent is a Palestinian citizen and was at the time of his marriage a registered member of the Jewish Community. The petitioner is stateless. At the time of the marriage she considered herself to be a member of the Jewish Community; but she later discovered that her name was not on the list of members as provided for by Rule 18 of the Jewish Community Rules as amended by the Jewish Community (Amendment) Rules, 1937. The effect of this omission was fully discussed in High Court No. 105/45 Vol. 13 P.L.R. p. 180, a case between the same parties. Having been unsuccessful in High Court 105/45, the present petitioner applied to the Jewish Community to have her name added to the register under Rule 17 of the Jewish Community Rules, as amended, and she thereafter brought an action in the Rabbinical Court of Tel Aviv, in which she asked for the final settlement of the matrimonial and financial disputes. The present respondent on his part brought an action in the District Court asking for a declaratory judgment that the parties be separated and that he be exonerated from paying petitioner any sum towards her support. Hence the proceedings before this Special Tribunal.

We may say that the respondent in paragraph 2 of his affidavit in reply has sworn that the petitioner knew long before

the date of her affidavit, that is, before 9th August, 1946, that he (the respondent) had opted out of the Jewish Community and had his name struck off the register. We shall at once deal with the argument of the respondent that, as he is no longer a member of the Jewish Community, a Rabbinical Court has no jurisdiction. The answer is to be found in Section 4 (2) of the Religious Community (Change) Ordinance and in High Court 124/43 Vol. 11 P.L.R. p. 54. We accordingly reject the contention of the respondent on this point. Civil Appeal 274 of 1945 Vol. 13 P.L.R. p. 111 would seem to be an authority for Mr. Levanon's proposition that the District Court does not have jurisdiction in a case like the present.

The next question is whether we are satisfied that at the time when she brought the action now pending in the Rabbinical Court, the present petitioner was a member of the Jewish Community. The action was brought on the 12th June, 1946. The respondent contends that there was no publication of the amended list of members until some time in July, 1946. The respondent states that he opted out in May, 1946, so that on 12th June, 1946, neither party (he contends) was a member of the Jewish Community. We have already stated that the respondent's action in opting out cannot avail him in these proceedings. The sole question therefore is whether the petitioner was on the 12th June, 1946, a member of the Jewish Community. She has satisfied us that, prior to the 12th June, 1946, she had applied under Rule 17 (2) to be added to the register and she has also satisfied us that she had, prior to the same date, received a reply from the proper officer of the Vaad Leumi to the effect that her name had been duly registered. We accordingly conclude that, on 12th June, 1946, she could properly be regarded as a member of the Jewish Community.

For these reasons we think that the matter is one of personal status within the exclusive jurisdiction of the religious court, namely, the Rabbinical Court of Tel Aviv. We rule accordingly. We think that our decision is in consonance with the spirit of of the decision in Civil Appeal 44/46.

Civil Appeal No. 253 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Frumkin J.

1947
13th January

FitzGerald C. J.
and
Frumkin J.

CA 253/46
Sanad
v
Abdel Aal
and another

AWAD HASSAN SANAD . . . . . *Appellant.*

v

1. SAID ABDEL AAL,

2. MAHMOUD ABDEL FATTAH SALEH . . *Respondents.*

Immovable property — Awlawiyeh — Value of land claimed by awlawiyeh as shown in kushan, in absence of proof that entry in kushan is either fraudulent or fictitious, is a more trustworthy indication of the actual market value of the land than any estimate made by experts.

In Land Case No. 976/45 of the Magistrate's Court of Ramle sitting as a Land Court, a claim of awlawiyeh was preferred. The kushan issued by the Land Registry showed the value of the land at LP. 190 per dunum. The claimant's experts valued the land between LP. 40 to LP. 80 a dunum, while those of the purchaser valued it at about LP. 200 per dunum. The Magistrate took the figure shown in the kushan as representing the value of a dunum of the land claimed and gave judgment accordingly. The claimant appealed.

In dismissing the appeal, the Court of Civil Appeal,

HELD that the value of the land claimed by awlawiyeh as shown in the kushan, in the absence of proof that the entry in the kushan was either fraudulent or fictitious, was a more trustworthy indication of the actual market value of the land than any estimate made by experts.

Jawdat Kazimi for appellant.

Rashad Maswadi for respondents.

Judgment: This case concerns a claim under Art. 41 of the Ottoman Land Code. The Appellant in the Court below successfully established his claim under the article and his appeal is solely on the question of the amount of equivalent value under the article. The purport of the article is quite clear. In certain circumstances it gives an option to an owner of an undivided share to buy in the other owners on payment of equivalent value. In this case the Magistrate in the Land Court assessed the equivalent value at LP. 190 per dunum which was the amount set out in a registered kushan as the actual amount paid for this land on its transfer. The appellant's case is that he adduced expert evidence to prove that the value of the land was much less than LP. 190. The issue before the Magistrate therefore was one purely of fact. In the result the Magistrate accepted the evidence of the registered kushan as against that

of the experts summoned by the appellant. In our opinion not only was the Magistrate entitled to accept the amount stated in the kushan as against that estimate made by the experts, but it is difficult to appreciate how he could have avoided doing so as, in the absence of proof that the entry in the kushan was either fraudulent or fictitious, it would be a more trustworthy indication of the actual market value of the land than any estimate made by experts.

1947
13th January

FitzGerald C. J.
and
Frumkin J.

CA 253/46
Sanad
v
Abdel Aal
and another

In this case the appellant was unable to satisfy the Magistrate that the amount stated in the kushan as having passed in consideration of the sale was either a fraudulent or fictitious sum. Moreover, there was further evidence that other land in the neighbourhood was sold at prices of more than LP. 190.

It follows that the appeal must fail. Costs on the lower scale to include LP. 10 advocate's attendance fees.

Criminal Appeal No. 162 of 1946.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Shaw J. and Frumkin J.

1947
15th January

FitzGerald C. J.
Shaw J.
and
Frumkin J.

CRA 162/46
Awwadeh
and another
v
Attorney General

1. HUSNI SHAKER AWWADEH,

2. HUSSEIN HAMED ET-TAQUI . . . . . *Appellants.*

v

ATTORNEY GENERAL . . . . . *Respondent.*

Criminal law — Compensation — Maximum amount of compensation awardable under Section 43 of the Criminal Code Ordinance, 1936, to a complainant against several accused — Criminal Code Ordinance, 1936, Section 43.

The District Court of Nablus, constituted of the Acting Relieving President thereof (Acting Judge Rogers), in Criminal Case No. 71/46, convicted two accused of doing grievous harm and of assault causing actual bodily harm contrary to Sections 238 and 250 of the Criminal Code Ordinance, 1936. Each of them was sentenced to three years imprisonment and each accused was also ordered to pay LP. 100 by way of compensation to the complainant, who lost his eye as a result of the accused's attack, under Section 43 of the Criminal Code Ordinance, 1936. The accused appealed.

In dismissing the appeal in so far as the sentence of imprisonment was concerned and varying the judgment of the District Court with regard to the compensation payable to the complainant, the Court of Criminal Appeal,

1947
15th January

FitzGerald C. J.
Shaw J.
and
Frumkin J.

CRA 162/46
Awwadeh
and another
v
Attorney General

HELD that the maximum amount payable to an injured person by way of compensation under Section 43 of the Criminal Code Ordinance, 1936, is LP 100. It follows therefore that in the case of several accused convicted of the offence charged, the total amount of compensation *all* are liable to pay to the injured person should not exceed LP. 100.

Naim Touqan for first appellant.

Afif Khoury for second appellant.

Crown Counsel (A. Hooton) for respondent.

Judgment: In this appeal two questions arise, one as to the conviction generally of the appellants and the second as to the interpretation of Section 43 of the Criminal Code Ordinance. The only point that can arise out of the conviction generally is the question as to whether those two were engaged in a common purpose and whether the injury which resulted can be said to have flowed naturally from that common purpose. Now, the existence or otherwise of a common purpose between two persons jointly indicted, must be inferred from a consideration of the surrounding circumstances of the offence. We think that in the circumstances of this case there can be no doubt that the trial Judge came to a correct conclusion when he decided that the two were engaged on a common purpose.

One other point remains to be dealt with. Naim Bey Touqan raised a technical objection that the Information was amended at the close of the trial. There may indeed be substance in this argument, but the accused could equally have been convicted without the amendment of the Information at all under the provisions of Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance.

Turning now to the interpretation of Section 43. It will be observed that the Court ordered each of the accused to pay LP. 100 to the injured person making a sum of LP. 200 in all. Naim Bey has argued that the limit which could be awarded under the Section to an injured person is LP. 100. We think that the argument is sound because we are of opinion that the dominant words in sub-section 1 are the words "satisfaction or compensation"; those are the words which are limited by LP. 100. We are reinforced in this opinion by the wording of subsection 2. It follows that the decision of the trial Court in this respect must be altered to LP. 50 compensation from each of the accused to the victim.

Civil Appeal No. 228 of 1945.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and de Comarmond J.

DANIEL WEINMANN . . . . . *Appellant.*

v

ASSIS PALESTINE FRUIT PRODUCTS Co. BEJARANO BROS. . . . . *Respondent.*

1947
17th January

FitzGerald C. J.
and
de Comarmond J.

CA 228/45
Weinmann
v
Assis Palestine
Fruit Products
Co.

Immovable property — Expropriation — Proceedings concerning expropriated land commenced in Land Court when the Land (Expropriation) Ordinance was in force — Determination of proceedings after repeal of said Ordinance and promulgation of the Land (Acquisition for Public Purposes) Ordinance, 1943 — Provision in the 1943 Ordinance that proceedings commenced before its coming into force under the repealed Ordinance may be continued as if the 1943 Ordinance had not been passed — Proceedings which were commenced before promulgation of the 1943 Ordinance governed by the Land (Expropriation) Ordinance.

Proceedings which concerned expropriated land were commenced in the Land Court of Tel Aviv (Land Case No. 11/42) before the repeal of the Land (Expropriation) Ordinance, Cap. 77, by the Land (Acquisition for Public Purposes) Ordinance, 1943. Such proceedings came to an end in June 1945. The party aggrieved by the assessment of the compensation which the Land Court found to be payable appealed to the Supreme Court, but not within the period fixed by Section 11 of the Land (Expropriation) Ordinance. On appeal the point was taken that the appeal was out of time. The point for decision was the effect of the last proviso to the Land (Acquisition for Public Purposes) Ordinance, 1943, which provides that any proceedings commenced before the date of commencement of the Land (Acquisition for Public Purposes) Ordinance, 1943, under any of the Ordinances repealed by that Ordinance (the Land (Expropriation) Ordinance, Cap. 77, being one of the repealed Ordinances) may be continued and enforced under the respective repealed Ordinances as if the Land (Acquisition for Public Purposes) Ordinance, 1943, had not been passed.

In dismissing the appeal for being out of time, the Court of Civil Appeal,

HELD that the meaning of the last proviso to the Land (Acquisition for Public Purposes) Ordinance, 1943, is that the repealed Ordinance, i.e. the Land (Expropriation) Ordinance, Cap. 77, remains in force and is applicable to proceedings commenced under it for the assessment of compensation payable for expropriated land until its various sections are exhausted in so far as the land in question is concerned.

E.D. Goitein and E. Karwassarsky for appellant.

M. Eliash for respondent.

1947
17th January

FitzGerald C. J.
and
de Comarmond J.

CA 228/45
Weinmann
v
Assis Palestine Fruit Products Co.

Judgment: This is an appeal from a decision of the Land Court of Tel Aviv given on the 15th June, 1945, in a case arising under the Land (Expropriation) Ordinance, Cap. 77.

The appellant was the owner of the land expropriated and was therefore the defendant in the Court below. An award was made by the Land Court. The respondent has raised the preliminary objection that the appeal was lodged after the expiration of the period of 15 days fixed by Section 11 of the Land (Expropriation) Ordinance, Cap. 77, which lays down that any person who is dissatisfied with the award of the Court shall, if the amount awarded exceeds LP. 200, be entitled, within 15 days of the notification of that award, to appeal to the Supreme Court sitting as a Court of Appeal.

In the present instance the appeal was lodged 21 days after judgment had been delivered in presence of the parties.

These proceedings were commenced before the date of enactment of the Land (Acquisition for Public Purposes) Ordinance, 1943, and we have now to consider the effect of the last proviso to that Ordinance which reads as follows:—

> "Provided further that any proceedings commenced before the date of commencement of this Ordinance under any of the Ordinances hereby repealed may be continued and enforced under the respective Ordinances hereby repealed as if this Ordinance had not been passed".

It seems to us that the meaning of the proviso is that the repealed Ordinance remains in force and is applicable to this land until its various sections are exhausted in so far as this land is concerned. The main provision of the Ordinance is of course the provision in regard to compensation, contained in s. 10. It is, in fact, the only section which at all brings the Court into the picture. It is, however, quite clear that there can be no finality in regard to the matter with which s. 10 deals, that is compensation, until the time limit for appeal under s. 11 has passed because the moment a person expresses his dissatisfaction with the compensation awarded under s. 10 the award cannot be enforced until s. 11 has been exhausted. We are, therefore, forced to the conclusion that since the compensation was assessed under s. 10 of the repealed Ordinance, any appeal against that compensation must be brought under s. 11 of the repealed Ordinance. This being the case, it follows that the appeal is out of time and must be dismissed.

Civil Appeal No. 70 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Edwards J. and Shaw J.

NASRI SAMARA. . . . . *Appellant.*

v

1. GEOVANNIA SAADEH
2. MALAKEH SAADEH
3. TEWFIQ SAADEH. . . . . *Respondents.*

1947
24th January

Edwards J.
and
Shaw J.

CA 70/46
Samara
v
Saadeh and others

Personal status — Wills — Succession Ordinance — Ultra vires — Confirmation of wills, in whatever form made, of members of the recognised communities within exclusive jurisdiction of the Religious Court of the community of the testator unless the jurisdiction of the Religious Court varied as provided in Article 57 of the Palestine Order-in-Council — Succession Ordinance does not vary the jurisdiction of the Religious Courts with regard to confirmation of wills of members of their communities — Question that the Succession Ordinance is ultra vires the Palestine Order-in-Council does not really arise in view of the provisions of Article 57 of the Order-in-Council — Religious Court not bound to confirm a will made in civil form — Palestine Order-in-Council, 1922, Articles 54 and 57 — Succession Ordinance, Sections 2, 4, 7, 21 and 16.

A petition for the probate of the will of the late Zaki Saadeh who was at the date of his death a member of the Greek Orthodox Community and of Palestinian nationality was made to the District Court of Jaffa (Probate Case No. 29/45) by the executor of the will. The petition was opposed by three persons having an interest in the estate. An objection to the jurisdiction was raised by the opposers. It was based on either of two propositions both of which appear hereunder and the gist of which was that by reason of the provisions of Article 54 of the Palestine Order-in-Council the will must be confirmed by the Religious Court of the Community of the testator, while the argument on behalf of petitioner against the objection was that because the will was in civil form it did not require to be confirmed by the Religious Court but could be taken straight to the District Court for probate. The District Court, constituted of the President thereof (Judge Hubbard), held that the matter was one which should be referred to the Special Tribunal as provided in Article 55 of the Palestine Order-in-Council. The petitioner appealed by leave.

In dismissing the appeal, the Court of Civil Appeal,

HELD (1) that the confirmation of all wills of members of a recognised community other than foreigners is within the exclusive jurisdiction of the Religious Court of that community unless the jurisdiction of that Court has been varied as provided in Article 57 of Palestine Order-in-Council, 1922, and as the legislator had not intended by the enactment of the Succession Ordinance to vary the jurisdiction of the Religious Courts with regard to the con-

firmation of wills of members of their communities other than foreigners, the jurisdiction which the Order-in-Council clothed those Courts with with regard to their exclusive jurisdiction in confirming the wills of members of their communities other than foreigners remained unvaried.

(2) that there was no true question of that part of the Succession Ordinance alleged to vary the jurisdiction of the Religious Courts being *ultra vires*, since in view of the provisions of Article 57 of the Palestine Order-in-Council such question could not arise.

(3) that a Religious Court is not bound by law to confirm a will made in civil form.

Approved: CA 4/37, 4 P.L.R. 165.

Discussed: CA 131/42, 9 P.L.R. 752.

Not followed: CA 106/40, 7 P.L.R. 310.

Referred to: CA 120/31, 1 P.L.R. 776.
LA 52/35, 4 P.L.R. 21.
CA 87/36, 4 P.L.R. 196.
CA 158/38, 5 P.L.R. 488.
CA 55/40, 7 P.L.R. 291.
CA 246/40, 8 P.L.R. 55.
CA 236/42, 10 P.L.R. 383.
CA 279/42, 10 P.L.R. 96.
HC 42/43, 10 P.L.R. 239.
CA 229/45, 13 P.L.R. 175.
ST 3/45, 13 P.L.R. 133.
In re Shoesmith (1938) 2 K.B. 637.

The judgment of the Court was delivered by Shaw J.

E. Georges Elia for appellant.

George Berouti for 1st respondent.

Issa Nakhleh for 2nd and 3rd respondents.

Shaw J: This is an appeal from the judgment dated 16.2.46 of the learned President of the District Court, Jaffa, in Estate Case No. 29/45. In that case the appellant, Nasri Samara, asked for probate of the will of the late Zaki Saadeh who was, at the date of his death, a member of the Greek Orthodox Community and of Palestinian nationality. The petition was opposed by three persons having an interest in the estate.

An objection to the jurisdiction of the District Court was raised by three opposers. George Eff. Elia, advocate for the petitioner, alleged that the will was in civil form, and he admitted that if it were not, then the District Court would have no jurisdiction. The learned Judge did not decide whether or

not the will complied with Section 12 of the Succession Ordinance, and he observed that this would be a matter for hearing on the merits if the case proceeded.

The objections were based on either of two propositions. That is to say —

(1) that by virtue of section 7(1) of the Succession Ordinance the will must be confirmed by the Greek Orthodox Court, with the arguable possibility that, if it is in civil form, it can or must be subsequently proved in the District Court under the provisions of Part IV of the Ordinance, or

(2) that if the Succession Ordinance does in fact allow a person in the position of the testator to make a will in civil form, and bring it to the District Court for probate without prior confirmation by the Religious Court, then to that extent the Ordinance is *ultra vires* Article 54 of the Palestine Order-in-Council, 1922.

The learned Judge, referring to Civil Appeal 106/40 (7 P.L.R. 310) and Civil Appeal 131/42 (9 P.L.R. 752), held that it could not now be disputed in the District Court 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 in civil form in accordance with Section 12 of the Succession Ordinance, may, in an appropriate case, be granted probate of it. He observed, however, that as far as his information went the question whether the Succession Ordinance was *ultra vires* Article 54 of the Palestine Order-in-Council had never been expressly dealt with by the Court of Appeal. The Judge considered the matter was one which should be referred to a Special Tribunal as provided in Article 55, but in case it should be held on appeal that this was not a proper case for such a reference, he indicated his views on the question of *ultra vires*. In doing so he expressed the opinion that the words "confirmation" and "probate" mean substantially the same thing, the former being the appropriate technical term in a Religious Court and the latter in a Civil Court. After further argumentation the learned Judge came to the conclusion that it was not a tenable proposition that a will in civil form, made by a member of a religious community, should be first confirmed by the Religious Court and then subsequently taken for probate in the District Court.

With regard to the question of *ultra vires*, the learned Judge said —

"As regards the question of "*ultra vires*", Article 54 speaks in general terms of 'confirmation of wills of members of their community other than foreigners', and in my view to enact by Ordinance that such members of a religious community may, by following a prescribed form of will, escape the obligation of having it confirmed by the Court

of their community, is to enact something which is directly contrary to the provisions of Article 54."

And finally he said —

"In the result, therefore, I am of opinion that the relevant part of Part IV of the Succession Ordinance, as interpreted by the Court of Appeal, is *ultra vires* Article 54 of the Order-in-Council, and that the will in this case must be confirmed by the Court of the Greek Orthodox Community."

It will be convenient, I think, at this point to set out the provisions of the relevant part of Article 47, and of the whole of Article 57 of the Palestine Order-in-Council. Article 47 provides as follows:-

"The Civil Courts shall further have jurisdiction, subject to the provisions contained in this Part of this Order, in matters of personal status as defined in Article 51 of persons in Palestine. Such jurisdiction shall be exercised in conformity with any law, Ordinances or Regulations that may hereafter be applied or enacted and subject thereto according to the personal law applicable ....."

Article 57 reads as follows:-

"Subject to the provisions of any Ordinance or Order establishing a Supreme Council for Moslem Religious Affairs, the constitution and jurisdiction of Religious Courts established at the date of this Order mey be varied by Ordinance or Order of the High Commissioner."

In Civil Appeal 106/40 (7 P.L.R. 310) the Court said (see page 313 of the report) —

"In our opinion, Section 12 is intended to provide an alternative method of making a will to that provided under the law governing the personal status of a testator; in other words, to enable a testator, if he so wishes, to avoid the restriction of his personal or religious law, with regard to the dispositions which he may wish to make, that is to say, a person can make a will according to his personal law or his religious law, but, on the other hand, if he makes a will according to the provisions of Section 12, that is equally valid, and is an alternative method of testamentary disposition. And we do not think that Section 11 in any way limits or restricts the provisions of Section 12. And Section 12 contains no restriction as to the dispositions which a testator may desire to make."

In Civil Appeal 131/42 (9 P.L.R. 752) the learned Judge who tried the case was one of those who had given the judgement in Civil Appeal 106/40. After quoting the passage set out above, the learned Judge says —

"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."

Later on the learned Judge says —

"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".

Finally the learned Judge says —

"..... 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 Ordinance, 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."

In Civil Appeal 131/42 the question whether the restrictions of his religious law upon a testator's power of disposition are applicable in the case of a will made in civil form was not specifically decided. But Civil Appeal 131/42 did not overrule Civil Appeal 106/40 in this respect.

Before dealing further with Civil Appeal 106/40 and Civil Appeal 131/42, I would like to express my views on certain preliminary matters. The starting point in all cases in regard to the jurisdiction of the Courts of the religious communities is the Order-in-Council, 1922, Article 54 of which provides that the Courts of the several Christian communities shall have "exclusive jurisdiction in matters of ..... confirmation of wills of members of their community other than foreigners as defined in Article 59."

The first thing to be observed is that the word "wills" is not limited in any way and, in my judgment, it follows that the confirmation of *all* wills of members of their community

other than foreigners is within the exclusive jurisdiction of the Religious Court of that community, unless the jurisdiction of that Court has been varied as provided in Article 57. The Order-in-Council does not make any exception in regard to a will in civil form. A will in civil form might also happen to be a will in the form required by the law of a particular religious community, but if it were not, I apprehend that the Religious Court would refuse to confirm it.

I also hold the view that although it is competent to the legislator, under the powers conferred by Article 57 of the Order-in-Council, to vary the jurisdiction of a Religious Court, such variation could only be enacted by Ordinance or Order of the High Commissioner showing in clear terms an intention to vary the jurisdiction.

Maxwell, on the Interpretation of Statutes (7th Ed.) at page 136, says —

> "An author must be supposed to be consistent with himself and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect the work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction where the words may be capable of proper construction without it."

I have not overlooked the Palestine (Amendment) Order-in-Council, 1923, dated 4.5.23, (Vol. 3, Laws of Palestine, p. 2590). Article 4 of that Order-in-Council in explicit terms validated Ordinances, etc., which had been issued on or after 1.9.22. The Succession Ordinance was enacted on 8.3.23, so it was enacted within the period covered by the Palestine (Amendment) Order-in-Council, 1923. In Civil Appeal 4/37 (4 P.L.R. 165) it was, however, held —

> "That the Palestine (Amendment) Order-in-Council, 1923, did not validate any inconsistencies between the Succession Ordinance and the Palestine Order-in-Council, 1922, because there could be no doubt that the intention of the legislator was to validate the enactment of the various Ordinances and other measures which had been issued between the 1st of September, 1922, and the 29th of May, 1923, regarding the regularity of which enactment doubts had arisen, but the main principles and limitations in the principal Order-in-Council remained unaffected."

I must be guided by this decision, and I would also say that I am in full agreement with it. But the point does not appear to me to be important in view of the fact that, by

virtue of Article 57, the jurisdiction of Religious Courts can be varied by Ordinance, and the Ordinance which introduces a variation does not require to be validated.

This brings me to a consideration of the question — What does confirmation mean? The learned Judge in the Court below considers that this term has substantially the same meaning as probate, the former being the appropriate technical term in a Religious Court, and the latter in a Civil Court. I cannot altogether agree. In the first place it must be observed that the Civil Courts too, as shown in Section 3 of the Succession Ordinance, have jurisdiction to confirm certain wills. Secondly, it appears to me possible that a Religious Court may have jurisdiction to confirm a will while the testator is still alive. That would depend on the law by which that particular Religious Court is governed. Probate, on the other hand, is never granted until the testator is dead. There appears to me to be a very close analogy, however, between the act of a Civil Court when it holds that a will is valid in civil form, as provided under Section 12 of the Succession Ordinance, and the act of a Religious Court when it confirms a will. The provisions of Section 7(2) of the Succession Ordinance support me in this view. That sub-section provides that —

> "(2) A certificate of the court of the community confirming a will shall be deemed to be conclusive evidence that the will is valid in form and that the testator had the capacity to make the will and was not affected by mistake, fraud or undue influence, but confirmation by the Court shall not make valid any disposition of property thereby which is contrary to law."

If this wording is compared with the wording of Section 12 the analogy will be obvious.

I can find in the Succession Ordinance (Cap. 135) no indication of any intention that a will should ever have to be both confirmed in religious Court and found valid in civil form in a Civil Court. If a will is confirmed in a religious Court, and provided that the testator is dead, I would expect a certificate, similar in effect to an instrument granting probate as defined under Section 2 of the Succession Ordinance, to issue to the executor on his application, and that certificate would be the executor's authority for administering the estate. I am supported in this view by the terms of Section 9 of the Succession Ordinance. The words "or from dealing further with", and the first proviso to that section, clearly show that the legislator visualized a dealing with the estate other than the mere confirmation of the will. So also Section 3(iii) provides that the Religious Courts have jurisdiction in such matters con-

currently with the Civil Courts. In so dealing with the estate the Religious Court would of course be bound by its own law. Any person interested in the estate could if he so desired apply, under Section 9, for the removal of the proceedings into the District Court.

As I have previously observed, in view of the provisions of Article 57 of the Palestine Order-in-Council there can here be no true question of *ultra vires*. The only question is whether the legislator intended to vary the jurisdiction of the Religious Courts, and whether he used words which are capable of being construed as giving effect to that intention. In my judgment the legislator had no such intention. The guiding section with regard to the "form" of a will is Section 4 of the Succession Ordinance and not Section 12. Mr. Elia has submitted that the first proviso under Section 4 should be read as if it applied to paragraphs (i), (ii) and (iii) of that section, whereas it is to my mind perfectly clear that it applies only to paragraph (iii)(b). It could not possibly have been inserted between paragraphs (iii)(b) and (iii)(c) in the way in which it is inserted, if it had been intended to apply to persons of the classes referred to in paragraphs (i) and (ii). Strong support for this view is afforded by the manner in which the proviso was originally printed when the Ordinance (No. 4 of 1923) was originally published (see page 129 of the Official Gazette, dated 1.4.23). There the proviso forms part of Section 2(ii)(b) which has now become Section 4(iii)(b). The effect of this proviso is that a foreigner can make his will either in accordance with his national law or in civil form. If he were, for example, a foreign Jew, and if his national law provided that his will should be in Jewish form, he could make it in that form. But it would also be valid in form if he made it in civil form.

The first proviso to Section 4 clearly means that if the will is made in civil form it shall be held to be valid *in form*.

With great respect to the learned Judges who sat in Civil Appeal 106/40, I feel bound to express the strongest dissent from their decision so far as the passage previously quoted is concerned. In the first place Section 12 does not provide that a testator can avoid the restrictions of his personal law by making a will in civil form. It only sets out the conditions which must be satisfied before a Civil Court will hold the will to be, not valid in law as regards the dispositions which it makes, but merely "valid in civil form". That is what the section says, and that is what it means. It may be observed that Section 12 is in Part IV of the Succession Ordinance, and the heading of Part IV is "Estates administered and distributed

by Civil Courts". Part IV does not purport to deal with the exclusive jurisdiction of a Religious Court to confirm wills of members of their community other than foreigners. The preamble to the Succession Ordinance (Cap. 135) is of interest in this connection. That preamble reads as follows:-

> "An Ordinance to provide for the succession on death of persons in cases where the Courts of the Religious Communities do not exercise such jurisdiction and otherwise to provide for the succession to persons dying possessed of immovable or movable property in Palestine."

There is, in this preamble, no suggestion of an intention to vary the exclusive jurisdiction of Religious Courts in regard to the confirmation of wills. And Section 7 expressly reserves that jurisdiction.

In Maxwell on the Interpretation of Statutes (7th Ed.) the following appears at page 37.

> "The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it; and, as it usually states, or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt.'

In Civil Appeal 279/42 (10 P.L.R. 96) the following quotation appears:

> "Now there is a presumption that the legislator does not intend to make any substantial alteration in the law beyond what it explicitly declares either in terms or by clear implication; or, in other words, beyond the immediate scope and object of the statute."

If the Court had considered and correctly appreciated the effect of the first proviso to Section 4, and if its attention had been drawn to the provisions of Section 16, I am unable to believe that the learned Judges would have come to a conclusion so revolutionary. I refer to Section 16 because of the following words which appear in sub-clause (c):

> "..... reducing legacies and bequests proportionately, if it appears that the testator affected to dispose by will of property belonging to him in excess of the limits allowed by the law applicable to him ....."

If it had been the intention of the legislator to provide a means of escape from the restrictions of a testator's personal law a proviso to this effect must assuredly have been added to this sub-section. Furthermore, if Section 12 meant what the learned Judges in Civil Appeal 106/40 held it to mean, I am unable to believe that this meaning could have remained hidden for so many years. The Succession Ordinance was enacted

in 1923, that is to say, some seventeen years before the judgment in Civil Appeal 106/40 was delivered. If the legislator had intended to provide a means of escape from personal law he would have expressed his intention in clear terms. He could not have left it to be deduced from a section which only deals with the validity *in form* of a will.

It would be entirely contrary to the normal rule of construction to hold that a legislator, whose intention to preserve the personal law is so clearly shown in Sections 7(2), 11 and 16(c), had provided a means of escape from that personal law in a manner so oblique and so calculated to conceal that intention.

In Civil Appeal 87/36 (4 P.L.R. 196) the following appears at page 199 of the judgment:-

> "I shall deal briefly with this last argument first. Under the Succession Ordinance I think a District Court, in matters relating to wills, is invested not only with probate jurisdiction, but also with all matters relating to succession. Even if a will has been admitted to probate, a District Court has jurisdiction to declare that notwithstanding any testamentary disposition, the property is to descend in a certain way. That is, it combines the jurisdiction of the Probate, Divorce and Admiralty Divisions in England (so far as probate and administration are concerned) with that of the Chancery Division. As regards this part of the case the appellant is in effect seeking a declaration that, despite the dispositions in the will, the minor grandchildren of the testatrix are entitled to two thirds of her property. A District Court exercising jurisdiction under the Succession Ordinance has jurisdiction to make such a declaration."

There is no suggestion in that passage that the testator can escape from his personal law by making his will in civil form. So I am faced with two conflicting decisions.

In Civil Appeal 158/38 (5 P.L.R. 488) Copland J. says (at page 496) —

> "I am very far from saying that this Court can never overrule its own decisions. There are certain cases where it undoubtedly can and should do so. One such instance I have already mentioned, namely where one decision appears to be inconsistent with previous decisions on the same point. Another instance, which could never occur in an England Court, and is therefore not to be found in any of the text books, but of which there are certain unhappy examples to be found in the records of this Court, is where no reasons are given in the previous judgment. It is then impossible to know upon what principle or principles the case has been decided: one cannot be certain if the facts or the circumstances are reasonably the same, and the matter must then be considered on its own merits. Another example would be where it was obvious that the decision was wrong, as where the law had been completely disregarded and it was generally agreed that this was so."

And Trusted, C.J., in the same case (at page 493) says:-

> "I have had the advantage of reading the judgment which my brother Copland is about to deliver. I agree with him that Courts of Appeal generally follow their own precedents and those of other divisions of the same Court. Where, however, despite this principle, there are, or may be thought to be, conflicting judgments, they must enquire into the whole question, and in my view are not necessarily bound by the latest judgment."

In the case of In re Shoesmith (1938, 2 K.B., p. 637) the following appears in the judgment of Slesser L.J. (at page 645) —

> "I start with the opinion expressed by Lord Ellenborough, in the case of Moorsom v. Kymer, that 'It is extremely dangerous to shake the authority of decided cases', more particularly when they deal with questions of jurisdiction, although I respectfully agree with my Lord that there is no rule of law that prevents this Court, either sitting with a full compliment of its members, or with a quorum of its members, from reviewing its own decisions."

I have not overlooked Civil Appeal 236/42 (10 P.L.R. 383) in which the question whether a Court of Appeal is bound to follow its earlier decisions was discussed at some length (see pp. 390 and 391) by Gordon-Smith, C.J.

In Land Appeal 52/35 (4 P.L.R. 21) the Court stated (at page 26) —

> "A perusal of decided cases shows that this Court has not always regarded itself as bound by its own decisions. I agree in principle that this Court ought to follow its own decisions. But the law of Palestine may be said to be still in its infancy, and I think that this Court is not precluded from overruling its previous decisions, unless they have remained unchallenged for a considerable length of time."

Having given the matter the most careful consideration, and with the greatest respect to the learned Judges who gave the judgment in Civil Appeal 106/40, I find myself unable to accept that judgment as a binding authority.

I come now to the point which was decided in Civil Appeal 131/42. In that case the Court was constituted of a single Judge who happened to have been one of those who formed the Court in Civil Appeal 106/40, and that Judge said that he had come to his result "with considerable hesitation", that result being a finding that "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 under Section 12, may, in an appropriate case, be granted probate in respect of it."

I have been referred to High Court No. 42/43 (10 P.L.R. 239) in which the Court held (see p. 241) that —

> "..... practice and convenience cannot alter the law, and if the law lays down one system of proceedings, practice, even if more convenient than the law, when challenged, cannot override the provisions of the law."

Although in my judgment the legislator did not intend to take away from the Religious Courts their exclusive jurisdiction to confirm wills, I do not think that sufficient reason exists for my not being bound by the decision in Civil Appeal 131/42, the more so since the learned Judge found that in practice District Courts have for several years regarded themselves as being entitled to grant probate of wills in civil form, irrespective of the fact that the testator was a Palestinian citizen and a member of the Jewish community. The learned Judge observed that he had been referred to no authority of either the District Court or the Court of Appeal to the contrary. To upset such a well-established practice might result in grave injustice to testators who made their wills in civil form, having every reason to believe that if they did so their wills would not be held to be invalid in form. The form of a will is obviously of far less importance than its substance, provided that such form is designed adequately to provide against mistake, fraud, etc. and there is no reason why a will in civil form should be less adequate in this respect than a will in religious form would be.

I have remarked above that a will in civil form might also happen to be in religious form. In that case the Religious Court would presumably confirm it. But if it is not in religious form the Religious Court is not bound by law to confirm it. Goadby, in his book entitled "International and Inter-Religious Private Law in Palestine", says at pages 124 and 125 —

> "The confirmation of a will by a Religious Court is conclusive as to form, capacity and absence of fraud, etc. ... The Religious Courts will presumably decide the question according to their own law. It would be convenient if wills made in "Civil" form set forth in the Ordinance should be treated as valid in the Religious Courts, even though this form be unknown to the Communal Law. But though the Civil Courts are directed ..... to treat a will in that form as valid in form where the case is within their jurisdiction, this direction does not bind the Religious Courts."

I have still, however, to decide whether this is a matter which should be referred to a Special Tribunal. Article 55 of the Palestine Order-in-Council, 1922 (Vol. 3, Laws of Palestine, p. 2582) provides that —

> "..... Whenever a question arises as to whether or not a case is one of personal status within the exclusive jurisdiction of a Religious Court, the matter shall be referred to a Special Tribunal of which the constitution shall be prescribed by Ordinance."

So the position is that if such a question does arise the matter must be referred to a Special Tribunal, that being the only Tribunal clothed with authority to decide it. Now, if it appeared that a Special Tribunal had already decided this

precise question, I think that the Court below might properly have held that no question arises. It is certainly for the Court to rule on that point. In this connection we have been referred to Civil Appeal 246/40 (8 P.L.R. 55) where the District Court, Haifa, held that the question whether a person was or was not a member of the Jewish Religious Community, which arose on an application for probate of his will in civil form, was a matter to be decided by a Special Tribunal. The Supreme Court held that it was clear that the deceased was not a member of the Jewish Community, and therefore the only Court having jurisdiction in the matter of the probate of his will was the District Court, and that Court came to a wrong conclusion in declining jurisdiction and referring the matter to a Special Tribunal. See also Civil Appeal 120/31 (1 P.L.R. 776).

We have also been referred to analogous cases which arose under the Palestine (Holy Places) Order-in-Council 1924 (Vol. 3, Laws of Palestine, page 2625). In Article 3 of that Order the words "If any question arises" appear. In Civil Appeal 55/40 (7 P.L.R. 291) it was held that it was for the Court of Trial to make up its mind whether a question has genuinely arisen within the meaning of Article 3, and that the Court would be right to reject a mere allegation by one party which was unsupported by any show of reason. It was further held (see p. 294) that it is for the Court of Appeal to interfere if it thinks that the Court of Trial has come to a mistaken view on this matter.

In Civil Appeal 229/45 (13 P.L.R. 175) it was held that there was no need to submit the question to the High Commissioner since there was not even a *prima facie* case for argument that the shrine in question was a holy place within the meaning of the Order-in-Council.

But the question in issue in this case does not appear to have been specifically decided by the Special Tribunal. In Special Tribunal No. 3 of 1945, although the matter was referred to a Religious Court this was not the only issue, since the testator had made an earlier will which purported to be irrevocable.

Here we have a case in which one party argues that because a will is in civil form it does not require to be confirmed by a Religious Court but can be taken straight to a District Court for probate, while the other party submits that by reason of the provisions of Article 54 of the Order-in-Council the will must be taken to the Religious Court for confirmation. Clearly then a question does arise as to whether or not this case is one of personal status within the exclusive jurisdiction of a Religious Court. That being so I find that the learned President rightly ordered the matter to be referred to a Special Tribunal.

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24th January

Edwards J.
and
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and others

In the result the appeal must be dismissed with costs on the lower scale to include an attendance fee of LP. 15 for the advocate of the first respondent, and a similar fee for the advocate of the second and third respondents.

Edwards J: I have had the advantage of perusing the judgment just delivered by my brother Shaw. I agree with the reasons which he gives why the appeal should be dismissed. I only wish to guard myself against being thought to have any definite views as to what is the nature of confirmation of a will in Palestine. That is by no means clear. So far as I know, confirmation of a will in Scotland is more or less analogous to the grant of probate of a will in England: but whether or not there can be by any of the Religious Courts of Palestine confirmation of a will before the death of the testator is a matter which, to my mind, is certainly not clear. Subject to these remarks, I concur in the judgment just delivered by my brother Shaw.

Civil Appeal No. 292 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J., Frumkin J. and Abdulhadi J.

1947
28th January

de Comarmond J.
Frumkin J.
and
Abdulhadi J.

CA 292/46
Saleh
v
Ali

FAWZI SALEH . . . . . *Appellant.*

v

ZAKEH HASSAN MUHAMMAD ALI. . . *Respondent.*

Section 6 of the Land (Settlement of Title) Ordinance — Interpretation of section in question.

Retrial — Effect of decision of appellate Court ordering retrial of a case.

In allowing this appeal from the judgment of the Magistrate's Court of Jenin sitting as a Land Court given in Land Case No. 3/43, whereby the Magistrate proceeded with the hearing of the case which was remitted by the Court of Appeal for a retrial although evidence was adduced before him which showed that settlement operations had begun in the area in which the land the subject-matter of the dispute is situate, and dismissed the action, the Court of Civil Appeal,

HELD (1) that in view of the provisions of Section 6 of the Land (Settlement of Title) Ordinance, as amended by the Land (Settlement of Title) (Amendment) Ordinance, 1939, the Magistrate, on the date he started hearing the case, which was remitted to him for retrial by the appellate Court, and which was after settlement operations had started in the area in which the land the subject matter of the case is situate, had no power to hear it since on the date on which he started retrying the case, which, in view of the decision

of the appellate Court ordering a retrial, the effect of which was to do away completely with the original hearing, had to be treated as a case entered prior to notification of settlement but the hearing of which had not begun, settlement operations in the area in which the land the subject matter of the case is situate had already begun, and he should either have stayed the case and deferred judgment until the publication of the Schedule of Rights, or should have ordered that the matter be determined by the Land Settlement Officer.

(2) that the effect of a decision of an appellate Court ordering a retrial of a case is to do away completely with the original hearing.

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Mrs. Abramovsky and S.T. Cohen for appellant.

Fouad Atallah for respondent.

Judgment: This is an appeal from a decision of the learned Magistrate of Jenin, by which he dismissed an action brought by the present appellant. The statement of claim was filed in January, 1943, and the case was first heard and decided in June, 1945. An appeal was then lodged by the plaintiff (who had lost his case) and, on the 28th March, 1946, the Court of Appeal allowed the appeal, set aside the judgment, and remitted the case for retrial before another Magistrate. When the new trial was due to begin the learned Magistrate was informed that the land which is the subject-matter of the dispute formed part of an area in respect of which a notification of settlement had been given under Section 5 of the Land (Settlement of Title) Ordinance, Cap. 80. The learned Magistrate, after hearing evidence establishing that settlement operations had begun, decided that it was just to hear the case. The case was then proceeded with and judgment given dismissing the claim.

Several grounds of appeal have been formulated against this last mentioned judgment, but the only ground argued before us today is the one touching upon the interpretation of Section 6 of the Land (Settlement of Title) Ordinance, as amended by Ordinance No. 48 of 1939. The appellant's contention put shortly is that the Magistrate had no power to hear the case and should either have stayed it and deferred judgment until the publication of the Schedule of Rights, or should have ordered that the matter be determined by the Settlement Officer.

We are of opinion that this submission is correct. The effect of the decision of the Court of Appeal ordering a retrial was to do away completely with the original hearing: therefore on the 17th of May 1946, when the case came up for retrial, it had to be treated as a case entered prior to notification of settlement but the hearing of which had not begun. In our opinion Section 6 makes it quite clear that where an action

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has been entered before the notification of settlement, but where the hearing has not actually started, the Magistrate has the choice of the following courses: If it is possible for him to hear and determine the case before the settlement operations begin he should do so; if there is not enough time for hearing and determining the case prior to the start of settlement operations, the Magistrate should either stay proceedings or order that the matter be determined by the Land Settlement Officer. Where, however, the hearing of an action has actually begun when notification of settlement is published, there is nothing to prevent the Court from completing the hearing. In the present case, as already mentioned, the hearing had not begun when the notice of settlement was published. On the 17th of May, 1946, settlement operations had already begun, so that it was not possible for the Magistrate to hear and decide the case before the settlement operations began in the village. The Magistrate, therefore, had only the choice of staying proceedings or referring the matter to the Land Settlement Officer. For the above reasons, the learned Magistrate should not have proceeded with the hearing.

The judgment is therefore set aside, and as we have been informed that the settlement proceedings are still in progress, we hereby order that the case be referred to and determined by the Land Settlement Officer.

High Court No. 111 of 1946.

In the Supreme Court sitting as a High Court of Justice.

Before: Edwards J., Shaw J. and de Comarmond J.

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Edwards J.
Shaw J.
and
de Comarmond J.

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and another

MUHAMMAD MAHMOUD JA'AR,
and others. . . . . *Petitioners.*

v

1. ASSISTANT DISTRICT COMMISSIONER, BEERSHEBA.

2. OFFICER IN CHARGE OF CENTRAL PRISON, JERUSALEM. . . . . *Respondents.*

High Court — Time, Extension of — Time for filing affidavit in reply to a High Court petition extended by Court when granting order nisi to more than time fixed by Rule 6 of the High Court Rules, 1937 — Failure to file affidavit within time — Application for extension made after expiration of extended period fixed by Court — Power of High Court to grant extension — High Court Rules, 1937, Rule 6.

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When granting an order nisi on the 6th December, 1946, the High Court granted the respondents fifteen days from the date of service within which to file an affidavit in reply. No affidavit in reply was filed within the time fixed by the Court, but after the expiration of the time so fixed an application was made for extension of time within which to file an affidavit in reply. At the hearing of the application, petitioners' advocate opposed the application for extension on the ground that the Court, when granting the order nisi, extended the time within which to file an affidavit to fifteen days instead of the eight days provided in Rule 6 of the High Court Rules, 1937.

In refusing the application for extension of time, the High Court,

HELD that if when granting an order nisi the High Court extends the time to more than eight days within which to file an affidavit in reply, it cannot, after the expiration of the extended time, extend the time within which to file an affidavit in reply. The remedy open to a respondent in such instances is to move the Court on the return day to allow him to be heard in opposition to the petition under the last sentence of Rule 6 of the High Court Rules, 1937.

Tedi Mogannam for petitioners.

Assistant Government Advocate (J. Pinhassowitz) for respondents.

Order: On 6th December, 1946, this Court issued an Order Nisi calling upon the 1st respondent to show cause why his order of 18th November, 1946, under Sections 2, 3 and 15 of the Crime (Prevention) Ordinance against the four petitioners should not be set aside. The first respondent was ordered to file an affidavit within 15 days of service. The first respondent was served on the 12th of December, 1946, so that the time for filing an affidavit expired on the 27th December, 1946.

The first respondent did not file an affidavit. Instead of filing an affidavit he sent to the Chief Registrar of this Court a written reply which was received here on 19th of December, 1946. So that, had the written reply been sworn to, it is quite clear that it would have been in time.

On the return day, namely, 14th January, 1947, the first respondent appeared in person. It is, of course, customary when Assistant District Commissioners are served with Orders Nisi of this nature for them to consult Crown Counsel before the return day, and it is usual for Crown Counsel to draft the affidavit in reply, and it is also customary for Crown Counsel to appear for the Assistant District Commissioner on the return day. This Court on the 14th January, 1947, apparently realising that it would be preferable for the Assistant District Commissioner to be respresented by Crown Counsel, granted an adjournment of the return day. Mr. Mogannam, for the petitioners, now informs us that there was no suggestion on the 14th of January that this Court was at that time dealing with any application for an

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extension of time for filing an affidavit. After this Court had granted an adjournment Mr. Mogannam and the Assistant District Commissioner, Beersheba, apparently left the Court. It is reasonable to assume that the Assistant District Commissioner (Mr. Kleibo) then consulted Crown Counsel because on the 16th January Crown Counsel (Mr. A. Hooton) filed a written application in this Court asking for an extension of time until the 26th of January, 1947, within which to file an "amended reply" by which words we assume he means an affidavit in reply. we might add that this application, filed on the 16th January, was in fact dated the 14th January, 1947. Mr. Pinhassowitz, Assistant Government Advocate, has informed us today that when Crown Counsel, on 16th January, filed this application, he was under the impression that the application would be fixed for hearing before the 26th of January. Unfortunately, the Registry of this Court were apparently unable to fix the hearing of this application before today which is the 29th January, that is to say, three days after the 26th. We wish to make it clear that we are not sitting here today for the purpose of hearing the return to the petition. We are (as Mr. Mogannam says) hearing the application of 14th January which was filed on 16th January.

Mr. Mogannam opposes the grant of this application on the ground that the time for filing the affidavit expired on the 27th of December, 1946. He has rightly pointed out that the "extended time" mentioned in rule 6 of the High Court Rules 1937 was the period of 15 days instead of 8 days from the date of service which was (as we have said) the 12th December, 1946. We think that Mr. Mogannam's contention is sound and must prevail.

We therefore refuse the application for an extension of time within which to file an affidavit in reply. The position now is that the hearing of the return to this petition must be adjourned to a date to be fixed in the Registry.

On the adjourned return day it will be open to the respondents (or to Crown Counsel on their behalf) to move this Court to be heard in opposition to the petition under the last sentence of Rule 6 of the High Court Rules, 1937. Should Crown Counsel then ask to be heard in opposition to the petition this Court will doubtless listen to any representations which the petitioners' advocate may wish to make.

The first respondent must pay one set of costs to the petitioners as the costs of today in any event, namely fixed (or inclusive) costs of LP. 5.

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THE LAW REPORTS OF PALESTINE

GAZA

Volume 14

1947

FEBRUARY

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate,
and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.

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Civil Appeal No. 77 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal

Before: The Chief Justice and Curry Ag. J.

SIMON AGREST. . . . . *Appellant.*

v

1. ABDEL KADER SHIBEL,
2. AHMAD SHIBEL,
3. MUHAMMAD SHIBEL,
4. RAJAB SHIBEL. . . . . *Respondents.*

1947
3rd February

FitzGerald C. J.
and
Curry Ag. J.

CA 77/46
Agrest
v
Shibel
and others

Contracts — What must be established to infer a contract by conduct.

In dismissing this appeal from the judgment of the District Court of Haifa given in Civil Case No. 57/45 whereby that Court (Judge Sheuss) dismissed a claim for commission in respect of sale of land, the Court of Civil Appeal,

HELD that before the obligations of a contract by conduct can be foisted on to a person, it must be clearly established that the inference to be drawn from the conduct of the person is that he intended to enter into contractual relations, that he knew or must have known that he was incurring contractual liability and that he was prepared to accept the consequences of that contractual liability.

The relevant facts appear from the judgment.

E. D. Goitein for appellant.

Hanna Atalla for respondents.

Judgment: The appellant in this case claims a commission of LP. 369.500 in respect of the sale of land. It appears that he is a landbroker in Haifa. The respondents had land which they wished to sell. It is admitted that in a previous transaction the appellant did act as landbroker for the respondents. This transaction arose out of the sale of land for the sum of LP. 19480 to the Haifa-Acre Bay Company through the medium of Mr. Baruch Ram. For the purposes of this appeal it seems to us immaterial whether Mr. Baruch Ram was acting in a personal capacity or on behalf of the Acre-Haifa Bay Company. Undoubtedly Mr. Baruch Ram knew that the respondents had land to sell and so did the appellant. Mr. Baruch Ram conveyed an invitation through the appellant to respondents to come and see him regarding this land. The appellant did go to the respondents and eventually the respondents did sell the land.

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The appellant was paid his commission by Mr. Baruch Ram. He alleged in this appeal and in the Court below that he was in addition entitled to a commission from the respondents as he was also their broker.

It appears to have been established that there is a custom in this territory whereby a broker, if he acts in the capacity of broker for each party, is entitled to a fee of 2% of the the purchase price from each party. The question therefore arises — Was the appellant acting in the capacity of broker for the respondents? He argues that he was by reason of their acquiescence which was evident from the fact that they accepted the invitation and accompanied the appellant to Mr. Baruch Ram.

Now it is quite true that contractual relations can arise from conduct, but before the obligations of a contract can be foisted on to a person by this means, it must be clearly established that the inference to be drawn from the conduct of the person is that he intended to enter into contractual relations, that he knew or must have known that he was incurring contractual liability and that he was prepared to accept the consequences of that contractual liability. The evidence to this effect, as we have said, must be definite.

Now what were the facts? It seems to us that the appellant did little more than act as the messenger, or perhaps agent, of Mr. Baruch Ram. The mere fact that the invitation from Mr. Baruch Ram conveyed by the appellant was accepted by the respondents could not of course give rise to any contractual liability. The other acts performed by the appellant, that is accompanying the respondents to the residence of Mr. Baruch Ram, or even persuading them, as he said he did, to close the deal with Mr. Baruch Ram, amounted to nothing more than carrying out the duties for which Mr. Baruch Ram employed him and for which he intended to pay him. In any case these incidents fell far short of what would be necessary to impose a contractual liability on the respondents towards the appellant in respect of brokerage. The appeal is therefore dismissed with costs on the lower scale to include LP.10 advocate's attendance fee.

High Court No. 13 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice, Edwards J. and Shaw J.

1947
3rd February

FitzGerald C. J.
Edwards J.
and
Shaw J.

HC 13/47
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v
Commissioner of Prisons, Jerusalem, and another

FRANK GRUNER. . . . . *Petitioner.*

v

1. COMMISSIONER OF PRISONS, JERUSALEM,
2. OFFICER IN CHARGE, CENTRAL PRISON, JERUSALEM. . . . . *Respondents.*

Military Courts — Article 48 of the Palestine Order-in-Council, 1922, inapplicable to death sentences passed by Military Courts.

In refusing to issue an order commanding the respondents to refrain from executing the death sentence passed by the Military Court on Dov Gruner and confirmed by the General Officer Commanding British Troops in Palestine, the High Court,

HELD that Article 48 of the Palestine Order-in-Council, 1922, is inapplicable to the Military Courts which are regulated by the Palestine (Defence) Order-in-Council, 1937, which has no similar provision to the above Article 48. Article 48 referred to above applies only to the Court of Criminal Assize which Part V of the Palestine Order-in-Council, 1922 creates, and for whose procedure it makes provision.

M. Kritzman for petitioner.

Order: There are two grounds which preclude this High Court from accepting the arguments advanced by Mr. Kritzman in support of the grant of this Order. The first is that we are compelled to interpret Article 48 of the Palestine Order-in-Council of 1922 as referring only to the Court of Criminal Assize which this part of the Order-in-Council sets out to create and for whose procedure it makes provision. The Military Courts which derived authority to sentence Dov Gruner to death are regulated by a different Order-in-Council, i.e. the Palestine (Defence) Order-in-Council, 1937, which has no similar provision to Article 48 of the 1922 Order-in-Council.

Turning now to the other arguments advanced by counsel, even if we were able to accept that Article 48 of the 1922 Order-in-Council could be interpreted as applying to all Courts, including the Military Courts functioning in this territory, we would be forced to the conclusion that the procedure visualised by Article 48 was inconsistent with the procedure specifically set out in Defence Regulations for the conduct of trials in Military Courts and the carrying out of death sentences imposed

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by them; this being so, the provisions of Article 6(4) of the Defence Order-in-Council, 1937, would come into operation and suspend, in so far as Military Courts are concerned at all events, the operation of Article 48 of the Palestine Order-in-Council of 1922.

For these reasons the prayer of the petitioner must be rejected.

Civil Appeal No. 195 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Edwards J., Shaw J. and de Comarmond J.

1947
10th February

Edwards J.
Shaw J.
and
de Comarmond J.

CA 195/46
Abu Kana
and others
v
Keren Kayemeth
Leisrael Ltd.

AHMAD SHEHADEH ABU KANA,
and seventy others. . . . . *Appellants.*

v

KEREN KAYEMETH LEISRAEL Ltd. . . *Respondent.*

Immovable property — Awlawiyeh — Company — Those Articles of the Ottoman Land Code dealing with awlawiyeh apply to juristic persons as they equally apply to natural persons — For purposes of Article 45 of the Ottoman Land Code a company cannot be considered as an "inhabitant of another village."

A registered company in Palestine purchased parcels of land in a certain village. Some of the inhabitants of the village claimed in the Land Court of Haifa (Land Case No. 47/45) those parcels by awlawiyeh under Article 45 of the Ottoman Land Code. The Land Court, constituted of the President thereof (Judge Bourke), dismissed the claim. The main grounds on which the Land Court dismissed the claim were (1) that Article 45 of the Ottoman Land Code did not apply to juristic persons, and (2) that for the purpose of Article 45 of the Ottoman Land Code the company coud not be regarded as an inhabitant of another village. The plaintiffs appealed. In dismissing the appeal, the Court of Civil Appeal,

HELD (1) that those articles of the Ottoman Land Code dealing with the right of awlawiyeh apply to juristic persons as they equally apply to natural persons.

(2) that for the purposes of Article 45 of the Ottoman Land Code, a company cannot be regarded as an "inhabitant of another village."

Henry Cattan and Subhi Khadra for appellants.

M. Eliash, J. Feiglin and M. Scharf for respondent.

Edwards J: This is appeal from a judgment of the Land Court of Haifa dated 9th May, 1946, in Land Case 47/45 whereby

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the appellants' claim for awlawiyeh under Article 45 Ottoman Land Code was dismissed. The learned trial Judge found for the appellants on certain grounds and I see no reason for disagreeing with his findings thereon. One reason why the learned trial Judge held that the appellants' claim must fail was because they did not prove that the heirs of one Wadi Bishara Azam did in fact possess by virtue of a title deed. The contention of the appellants' advocate at the Bar before us was that, on a proper construction of Article 45, it was not necessary for his clients to prove that there was in fact a title deed in existence but merely that the land was of the category for which a title deed was usually granted. The learned trial Judge while he realised that it might well be argued that since the Land Settlement Officer was satisfied that a good transfer of title had been effected by way of renunciation given by the heirs of Wadi in favour of the present respondents there was enough material to entitle one to assume that they did in fact own the land by virtue of a title deed. The learned trial Judge went on to say that he was not satisfied that he should assume this in favour of the plaintiffs. He said "if there was a title deed it was surely susceptible of proof. I think that this point must be resolved in favour of the defendant." I have obtained and I attach to this judgment what I believe to be an accurate translation from the Turkish of Article 45 where the relevant words appear in English as follows:

"Lands possessed ..... by a title deed...."

Mr. Cattan has argued that possessing by title deed means merely that the land is miri and must be registered and does not mean that one must actually have a title deed. If the case depended on this point alone I would be inclined to think that Judge Bourke required too much when he required actual proof of the existence of a title deed.

The next important point is that the learned trial Judge was of opinion that a company, although it may be a juristic person, was not a natural person but an artificial one, and he went on to hold that the Court should not lean towards any extension of the interpretation of the words used in Article 45 so as to include a company. The learned trial Judge admitted that the present respondents were the defendants in Civil Appeal 229 of 1940, Vol. 8 P.L.R. 1941 p. 48, in a case under Article 45, but he held that as the point does not appear to have been taken before the Court of first instance in that case, and was not dealt with by this Court on appeal, there is no direct authority on this point. He accordingly held that he was free to decide the point in favour of the present respondents. In

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my view, one reason for the silence of the Courts hitherto may well be that it never occurred to anyone to argue that Article 41 did not apply to companies. We understand that at one time companies under the Ottoman Law were not allowed to own land but that subsequent legislation enabled them to do so. Speaking for myself, I fail to see why a company, which was at one time under a disability, that is the disability of not being capable of owning land, should, after that disability had been removed by legislation, be in a better position with regard to prior purchase than a natural person. If the matter depended on this point I would, with respect, disagree with Judge Bourke. I am, however, in agreement with Judge Bourke when he held that a company could not be regarded as an "inhabitant of another village" for the purposes of Article 45.

The next ground of appeal is that the learned Judge erred in holding that there was insufficient evidence to prove that the present appellants were in need of (dharourat) the land. While it may be easy to say that people who have left a village temporarily in order to work as labourers with employers such as the Iraq Petroleum Company or as constables in the Police Force and so on, may later legitimately declare that they are tired of working as labourers or as policemen and that they properly wish to return to the land and own land, it seems to me that this must always be a matter of fact to be decided on the peculiar circumstances of each case. The learned trial Judge dealt with this matter at page 5 of the typewritten copy of the judgment and I am unable to hold that his finding is one with which an appellate Court should interfere. For these reasons I think that the appeal should be dismissed with costs on the lower scale to include an advocate's attendance fee at the hearing of LP. 25.

Shaw J: I concur.

de Comarmond J: I concur.

Article 45:

"Lands lying within the boundaries of a village and possessed by Tapu-deed, if the person in possession of such land transfers it to an inhabitant of another village, the inhabitants of the village where the lands lie who are in need of the land have the right, within the period of one year, to claim the lands at the equivalent value."

Civil Appeal No. 220 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Edwards J., Shaw J. and de Comarmond J.

SALAH SAID NAHAWI. . . . . *Appellant.*

v

KEREN KAYEMETH LEISRAEL Ltd. . . *Respondent.*

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10th February

Edwards J.
Shaw J.
and
de Comarmond J.

CA 220/46
Nahawi
v
Keren Kayemeth
Leisrael Ltd.

Immovable property — Awlawiyeh — Article 41 of the Ottoman Land Code applies to juristic persons as it equally applies to natural persons.

In allowing this appeal and setting aside the judgment of the Land Court of Haifa given in Land Case No. 28/45, whereby that Court, constituted of the President thereof (Judge Bourke), dismissed a claim to awlawiyeh brought by a natural person against a juristic person (a company) on the ground that Article 41 of the Ottoman Land Code did apply to juristic persons, the Court of Civil Appeal,

HELD that Article 41 of the Ottoman Land Code applies to juristic persons as it equally applies to natural persons.

Followed: CA 195/46, *Supra* p. 30.

Referred to: CA 70/44, 11 P.L.R. 367.
CA 226/44, 12 P.L.R. 10.

Henry Cattan and Subhi Khadra for appellant.

M. Eliash, J. Feiglin and M. Scharf for respondent.

Edwards J: This is an appeal from a judgment of the Land Court of Haifa dated 28th May, 1946, in Land Case 28/45 dismissing the appellant's claim for prior purchase under Article 41 Ottoman Land Code. The learned trial Judge at the beginning of his judgment referred to the words used by Frumkin J. in Civil Appeal 226 of 1944 Annotated Law Reports (1945) at page 33. He also referred to Civil Appeal 70/1944 Vol. 11 P.L.R. 1944 pp. 367 and 369 which dealt with actions for "shuf'a" under the Mejelle. For the sake of convenience I append to this judgment a copy of a translation from the Turkish of Articles 41 and 42 of the Ottoman Land Code made by one whom I believe to be reliable.

The principal matter argued in this appeal is whether Article 41 can be said to apply to a juristic or artificial person such as a company. The learned trial Judge held that it did not. For all the reasons given by me in Civil Appeal 195/46 I am unable to agree with the leaned trial Judge when he held that a company is not an owner of an undivided share within the meaning of Article 41. Civil Appeal 195/46 dealt, of course,

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with a claim under Article 45 while we are now dealing with a claim under Article 41. The learned trial Judge dealt at length with the matter at pages 4 and 5 of the typed copy of his judgment. While there is much that is attractive in his reasoning I am unable to conclude that a company should be in a better position than any other owner of an undivided share in so far as Article 41 is concerned. The other issues were determined by the learned trial Judge in favour of the plaintiff (appellant). I would accordingly allow the appeal, set aside the judgment of the 28th May, 1946, and enter judgment for the plaintiff as follows, namely — order registration in name of the plaintiff of 24843 out of 103822 shares in the entire seven parcels specified in Part 3 of the statement of claim but such registration to be carried out only on plaintiff depositing in Court within two months from today the sum of LP. 10,477.547 in which case the registration standing now in the names of the respondents shall be altered accordingly. I further order that if the plaintiff fails to pay the said amount within two months from today he shall forfeit the right of awlawiyeh.

The respondents must pay appellant's costs here and below, the costs of this appeal to be taxed on the lower scale, to include an advocate's attendance fee at the hearing of LP. 25. We fix the appellant's costs in the Court below at fixed (or inclusive) costs of LP. 40.

Shaw J: I concur.

de Comarmond J: I concur.

Article 41. A person in possession of land in partnership with others cannot transfer his share gratis or in consideration of payment without permission of his khalit (i.e. joint owner of a servitude) or his partner; otherwise that partner shall have the right within the period of five years to acquire that share on payment of its equivalent value (Badl il misl) at the time of the claim from the person who has acquired it. Even if these five years have elapsed when the excuses of minority, unsoundness of mind or absence on a journey exist, the right to claim shall not subsist after the lapse of the said period. But if, at the time of the transfer, the said partner has renounced his right, either by giving his permission or by failing to take the share when offered to him, he cannot afterwards make a claim.

ADDENDUM DATED 19 SHABAN 1291.

If the partner or khalit dies within the said five years those of his heirs having the right of succession shall have the right to acquire the land in the above manner from the transferee and if the transferee dies then the partner and khalit shall have the right to take the land from the transferees' heirs having the right of succession. And if both the partner (or khalit) and transferee die the partners' and khalits'

heirs having the right of succession shall have the right and power to acquire the land in the manner described above from the transferees' heirs having the right of succession.

Article 42. If one of three or more partners desires to transfer his share to another, one partner may not be preferred to the others. If the other partners claim the share they shall have the right to take it in partnership.

If one of the partners transfers his share entirely to one of his partners, the other partners shall each have the right to acquire his proportionate share.

The provisions given in the preceding article apply also to them.

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CA 220/46
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v
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Civil Appeal No. 305 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice, Frumkin J. and Abdulhadi J.

IJMAI'AN SALEM HUMRAN. . . . . *Appellant.*

v

1. SALIM SALEM HUMRAN,
2. HAJ ABED ABU TAHLEH. . . . . *Respondents.*

1947
10th February

FitzGerald C. J.
Frumkin J.
and
Abdulhadi J.

CA 305/46
Humran
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Appeal — Default judgment — Judgment by default by Magistrate's Court — Refusal of application to set aside judgment — Appeal to appellate Court — Point taken that there could be no appeal because of repeal of proviso to sub-section 7 of Section 11 of Magistrates' Courts Jurisdiction Ordinance, 1939 — Whether contention correct — Magistrates' Courts Jurisdiction Ordinance, 1939, Section 11(7) — Rule 163 of the Magistrates' Courts Procedure Rules, 1940, gives a discretion to a Magistrate to set aside an order made by him ex parte or in default of appearance.

In Land Case No. 41/46 of the Magistrate's Court of Beersheba sitting as a Land Court, judgment by default was given against the defendant which declared plaintiff's ownership to the plot of land in suit. An application to set aside that judgment was rejected by the Court on the ground that it was not supported by affidavit. The defendant appealed to the Supreme Court. At the hearing of the appeal, the objection was taken that there could be no appeal because of the repeal of the proviso to subsection (7) of section 11 of the Magistrates' Courts Jurisdiction Ordinance, 1939.

In overruling the objection but in the result dismissing the appeal, the Court of Civil Appeal,

HELD (1) that since the repeal of subsection (7) of section 11 of the Magistrates' Courts Jurisdiction Ordinance, 1939, the effect of which was to deny an appeal from certain forms of judgments with the

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exception of those provided for in the proviso to the subsection in question, the only test as to whether an appeal lay or not is to be found in the answer to the question whether the order appealed against finally determined the issue between the parties. In this present case, the order appealed against having finally determined the issue between the parties, an appeal lay as of right.

(2) that Rule 163 of the Magistrates' Courts Procedure Rules, 1940, gives a discretion to a Magistrate to set aside an order made by him ex parte or in default of appearance.

Approved: CA 48/43, 10 P.L.R. 251.

Pascal Karmi for appellant.

Anwar Nusseibeh for respondents.

Judgment: A preliminary objection was taken that there could be no appeal before this Court because the proviso to sub-section 7 of Section 11 of the Magistrates' Courts Jurisdiction Ordinance had been repealed. In regard to this we would point out that the effect of sub-section 7 was to deny an appeal from certain forms of judgments, and the only effect of the proviso was to modify in other respects the complete prohibition contained in sub-section 7. Sub-section 7 has been repealed and with that repeal goes the proviso. That being so the only test as to whether an appeal lay or not is to be found in the answer to the question whether the order appealed against finally determined the issue between the parties. Being of opinion that it did, we decide that the appeal lies as of right.

Turning now to the merits of the case this involves consideration of the effect of Rule 163 of the Magistrates' Courts Procedure Rules. This rule gives a discretion to a Magistrate to set aside an order made by him ex parte or in default of appearance. The learned Magistrate in this case refused to exercise his discretion because the application was not supported by an affidavit. He refers to C. A. 48/43, which emphasised the desirability of all such applications being supported by an affidavit. With respect we entirely concur in this general principle, and we can well believe that a Magistrate would be most reluctant to exercise the discretion given to him under Rule 163 in the absence of such an affidavit. Turning now to the order complained of, it seems clear to us that the reason for the Magistrate's refusal was that he accepted the general principle enunciated in Civil Appeal 48/43 that all such applications should be supported by an affidavit. We are unable to concede that in so deciding he acted in a manner which was unreasonable or which would justify us in interfering with his order. The appeal must therefore be dismissed. Inclusive costs of LP. 10.

Civil Appeal No. 117 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and de Comarmond J.

ZEEV SUGERMAN. . . . . *Appellant.*

v

ALI KHALIL ABU SWAY,
and others. . . . . *Respondents.*

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12th February

Shaw J.
and
de Comarmond J.

CA 117/46
Sugerman
v
Abu Sway
and others

Immovable property — Awlawiyeh — Right to awlawiyeh by a non-Palestinian Arab in Zone A taken away by the Land Transfers Regulations, 1940 — Ottoman Land Code, Article 41.

In Land Case No. 8/44 of the Land Court of Jerusalem a non-Palestinian Arab claimed by awlawiyeh certain shares in land situate in Zone A in which the transfer of land save to a Palestinian Arab is prohibited by the Land Transfers Regulations, 1940. The Land Court, constituted of the President thereof (Judge Curry), dismissed the claim. The plaintiff appealed.

In dismissing the appeal, the Court of Civil Appeal,

HELD that the right of awlawiyeh by a non-Palestinian Arab in Zone A in which the transfer of land save to a Palestinian Arab is prohibited by the Land Transfers Regulations, 1940, had been taken away as a result of the Regulations in question, since the right claimed cannot be regarded as a consolidation of existing holdings within the meaning of the above Regulations.

M. Eliash for appellant.

Yehya Hammoudeh for respondents.

Judgment: This is an appeal from the judgment dated 19.3.46 of the Land Court, Jerusalem, in Land Case No. 8/44.

The appellant owns mashaa shares in land situated in Zone A where the transfer of land save to a Palestinian Arab is prohibited by the Land Transfers Regulations 1940 (Supplement No. 2 (1940) p. 327). Clause 3 (c) of those Regulations, however, provides that the High Commissioner, if he considers it desirable to do so, may permit the transfer of such land to persons not being Palestinian Arabs if in his opinion such transfer is necessary for the purpose of consolidating existing holdings.

The question to be decided is whether the exercise by the appellant (who is not a Palestinian Arab) of a right of awlawiyeh under Article 41 of the Ottoman Land Law is a consolidation of his existing holdings.

Having considered the submissions of the advocates for the parties we are unable to find that this could be regarded

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as a consolidation, within the meaning of the Land Transfers Regulations.

What the appellant is really seeking is to increase the shares which he holds in the land.

Holding as we do this view in regard to the meaning of the term "consolidation" we feel that the learned Judge below was right in dismissing the action because any right of awlawiyeh that the appellant might have had in this land has been taken away as a result of the Land Transfers Regulations, 1940. In the result the appeal must be dismissed with costs on the lower scale to include an advocate's fee of LP.5 for attendance at the hearing.

Civil Appeal No. 82 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Curry Ag. J.

1947
13th February

Shaw J.
and
Curry Ag. J.

CA 82/46
Abdallah
v
Abdallah
and others

ABDUL HALIM AHMAD ABDALLAH. . . *Appellant.*

v

RUQAIYA AHMAD ABDALLAH
and others. . . . . *Respondents.*

Immovable property — Adverse possession — Prescription — Lengthy periods of exclusive possession may be evidence in support of adverse possession but do not of necessity prove adverse possession — Adverse possession prior to the coming into force of the Land Law (Amendment) Ordinance to be taken into account when adverse possession is relied upon — Period of adverse possession after the coming into force of the above Ordinance should not necessarily extend for the prescriptive period.

In Case No. 1/Ilut, the Land Settlement Officer dismissed a claim to a piece of land by adverse possession by one of the co-heirs. The aggrieved person appealed by leave. His main argument was that his exclusive possession for a period of about forty years without any claim being made by the other co-heirs was sufficient to rebut the presumption of trusteeship.

In dismissing the appeal, the Court of Civil Appeal,

HELD (1) that lengthy periods of exclusive possession by a co-heir of the jointly inherited immovable property may be evidence in support of adverse possession but it does not follow that any lengthy period of exclusive possession of necessity proves adverse possession. In such cases all the surrounding circumstances must be considered and each case must be decided on its particular merits.

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(2) that the Land Law (Amendment) Ordinance does not prevent a co-heir in possession successfully claiming title by adverse possession in respect of a period prior to the coming into force of the Ordinance in question although his adverse possession subsequent to the Ordinance does not exceed the prescriptive period, and where a person has been in exclusive possession amounting to adverse possession for a number of years prior to the Land Law (Amendment) Ordinance, that person's claim, if established by the possession prior to the Ordinance, would not be defeated merely because his period of possession did not also extend for a period of ten years thereafter.

Referred to: CA 220/41, 9 P.L.R. 14.
CA 104/42.
Explained: CA 49/46, 13 P.L.R. 307.

The judgment of the Court was delivered by Curry Ag. J.

Walid Salah for appellant.

E. Georges Elia and Awni Daoudi for 1st respondent.

Fuad Atalla for 2nd and 3rd respondents.

Judgment: This is an appeal from the decision of the Land Settlement Officer in respect of a claim of adverse possession as between co-heirs. The appellant is the son and the respondent the daughter of a common ancestor.

Although the appellant has been in possession of the property for 40 years, the respondent having married and living in a nearby village, the Settlement Officer came to the conclusion that, apart from the fact that the appellant had been the sole administrator of the property, there was no other evidence of adverse possession and he considered that evidence insufficient to rebut the legal presumption of trusteeship by the male heir on behalf of the female heir.

The appellant largely relies on C.A. 220/41, 9 P.L.R. 14, where it was held that exclusive possession for a period of 22 years without any right or claim being asserted was sufficient to rebut the presumption of trusteeship and on C.A. 104/42, Supreme Court Judgments 1942 Vol. 1 p. 483 where undisputed possession for 38 years was held to rebut the presumption.

Whilst undoubtedly lengthy periods of exclusive possession may be evidence in support of adverse possession, it does not follow that any lengthy period of exclusive possession of necessity proves adverse possession. It is necessary to consider all the surrounding circumstances and thus each case must be decided on its particular merits. This Court in C.A. 49/46, 13 P.L.R. 307 expressed the opinion that where brothers take

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possession of land in exclusion of their sisters, very strong evidence is necessary to rebut the presumption that the brother is holding on behalf of his sister. In this case the only evidence of the adverse possession is the sole administration for 40 years. It may well be that it would be embarrassing for a sister well married to claim from her brother part of the yearly produce. It is to be noted that so soon as Land Settlement came the respondent lodged her claim. We feel it is entirely a matter of weighing the evidence.

It may be this is a borderline case but satisfied as we are that the Settlement Officer has correctly applied his mind to the facts we do not feel that we are in a position to say he came to a wrong conclusion.

There is one other matter to which I think we must refer. In C.A. 49/46, 13 P.L.R. 307 this Court expressed the opinion that the Land Law (Amendment) Ordinance did not prevent a co-heir in possession successfully claiming title by adverse possession in respect of period prior to the coming into force of the Ordinance although his adverse possession subsequent to the Ordinance did not exceed the 10 year prescriptive period. Mr. Elia for the respondent appears to have thought that this view was in contradiction to a long line of cases which held that the aforesaid Ordinance was not retroactive. We wish it to be clearly understood that it was not the intention of this Court to express any opinion contrary to those judgments. The opinion that we were there expressing was merely to the effect that, if a person has been in exclusive possession amounting to adverse possession, for a number of years prior to the Land Law (Amendment) Ordinance his claim if established by the possession prior to the Ordinance would not be defeated merely because his period of possession did not also extend for a period of 10 years thereafter.

For the aforesaid reasons this appeal must fail and the decision of the learned Settlement Officer is confirmed. First respondent is entitled to costs on the lower scale to include an advocate's attendance fee of LP.10.

Civil Appeal No. 133 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Curry Ag. J.

1947
13th February

Shaw J.
and
Curry Ag. J.

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BISHARA ODEH. . . . . *Appellant.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

Government Officer — Acting appointment — Colonial Regulations, Regulation 35.

The holder of the post of chief clerk of a District Court was suspended from discharging the duties thereof and a chief clerk of a Land Court was called upon to discharge the duties of the post of chief clerk District Court. An interpreter of the Land Court in the same grade as the chief clerk of the Land Court was required to discharge the duties of the chief clerk of the Land Court in addition to his substantive duties as interpreter. He acted for a period of one year for which he asked for acting pay, but as his request was refused, he brought an action in the District Court of Jerusalem (Civil Case No. 101/44) claiming acting pay. The District Court (Judge Hasna) dismissed the action. The plaintiff appealed. The main ground argued against the appellant was that the post of chief clerk Land Court was not legally vacant.

In allowing the appeal, setting aside the judgment of the District Court and entering judgment for the appellant in the amount claimed, the Court of Civil Appeal,

HELD that the word "vacant" in Regulation 35 of the Colonial Regulations means that there is no one fulfilling the duties of an office and does not mean that the office has to be legally vacant. Since in this particular case the chief clerk of the Land Court was discharging the duties of chief clerk District Court, the office of chief clerk Land Court was vacant and Regulation 35 of the Colonial Regulations was applicable, and the appellant who acted as chief clerk Land Court in addition to his substantive duties as interpreter Land Court was entitled to acting pay.

The judgment of the Court was delivered by Curry Ag. J.

Appellant in person.

Crown Counsel (J. Wicks) for respondent.

Curry Ag. J: The appellant brought an action in the District Court claiming the sum of LP. 130 under Regulation 35(3)(a) of the Colonial Regulations in that he, whilst holding the office of Interpreter, was required in addition to discharge the duties of Chief Clerk of the Land Court. He alleged that the offices did not stand to one another in any immediate relation of superiority or subordination.

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It is not disputed that the appellant was working as Interpreter in the Land Court, Jerusalem, and that as a result of the Chief Clerk of the District Court being suspended the Chief Clerk of the Land Court was transferred to that office, and the appellant was requested to act as Chief Clerk of the Land Court in addition to his duties as Interpreter. It is further agreed that in fact he did so from the 10th June 1929 to the 13th June 1930.

In the trial Court the learned Judge appears to have given judgment against the appellant on the ground that there was an immediate relationship of superiority or subodination in the two offices. This finding, however, appears contrary to the evidence adduced. The only witness was Mr. Denham who was called by the respondent. At the time he was the Superintendent of the Courts. He gave evidence to the following effect —

> "Both the Interpreter and the Chief Clerk are of the same degree and the same salary. They stand in the same relationship to one another in relation of seniority or subordination".

The only other evidence on this point was Exhibit P/2 which is a letter from an Acting Chief Registrar to the Chief Secretary in which he says —

> "The two posts were quite distinct and separate and were not in any immediate relation of superiority or subordination to one another".

With this evidence before him and no other evidence to the contrary, it would appear clearly against the weight of evidence for the trial Court to make the finding that it did.

Before this Court learned Crown Counsel dropped all objections on the ground of jurisdiction, and contented himself with arguing that Regulation 35 did not apply as the office was not legally vacant, and that a mere physical vacation of the office did not suffice. I find myself unable to agree with that interpretation of Regulation 35. The relevant part of the Regulation reads as follows —

> "35. When an office is vacant in a Colony for any reason other than the absence on full pay leave of the holder, the person appointed to act in that office shall be remunerated as follows —"

If the word "vacant" is to be interpreted as "legally vacant" there would appear to be no reason for the specific exception in respect of the holder of office absent on full pay leave, for in that instance clearly the office is not legally vacant. One must therefore conclude that the word "vacant" means that that there is no one fulfilling the duties of that office. In this

case the office became vacant when the holder was instructed to take over the office of Chief Clerk at the District Court.

In the result, therefore, I am of the opinion that the judgment of the District Court must be set aside and judgment entered for appellant in the sum of LP.130 with interest at 6% from date of filing of the action. Costs on the lower scale to include an attendance fee of LP.10 will be paid by the respondent to the appellant.

Shaw J.: I concur.

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Criminal Appeal No. 138 of 1946.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: Shaw J., Frumkin J. and Abdulhadi J.

ATTORNEY GENERAL. . . . . *Appellant.*

v

MUHAMMAD ALI SAKHNINI. . . . . *Respondent.*

1947
17th February

Shaw J.
Frumkin J.
and
Abdulhadi J.

CRA 138/46
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Criminal law — Information — Perjury — Particulars to be contained in an information for perjury.

The absence of mere allegation of materiality in an information charging an accused with perjury is not of great importance sufficient to warrant the discharge of the accused; nor the absence of such allegation is likely to cause prejudice to an accused person. What is more important is that an information for perjury should indicate the materiality of the false evidence.

Explained: CRA 34/37, 4 P.L.R. 210.

Crown Counsel (A. Hooton) for appellant.

Respondent in person.

Judgment: This is an appeal by the Attorney-General against the order dated 7th October, 1946, of the District Court, Haifa, in Criminal Case 158/46, discharging the respondent on the ground that the information was defective.

The charge was one of perjury under Section 117 of the Criminal Code Ordinance, and the learned Judge held that the information was defective because it was not specifically alleged therein that the false testimony was material to a question depending in the judicial proceedings in which the evidence was given. The Court relied on the judgment in C.A. 34/37 (4 P.L.R. 210).

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Rule 4(3) in the Schedule to the Trial Upon Information Ordinance (Cap. 36) provides that the statement of offence shall describe the offence shortly in ordinary language, and without necessarily stating all of the essential ingredients of the offence. Rule 4(5) provides that the forms set out in the appendix to the rules, or forms conforming thereto as nearly as may be, shall be used in cases to which they are applicable. The appendix (see 1939) Laws of Palestine, Vol. 1, p. 134) actually contains a specimen information for use in the case of a charge of perjury. These rules are of later date than the judgment in Criminal Appeal 34/37. It may also be observed that Criminal Appeal 34/37 did not decide that the failure to allege materiality was a fatal defect. The point was dealt with very shortly by saying that "this allegation should, of course, have appeared in the information". The real ratio decidendi was that inadmissible evidence had been admitted.

It is, of course, encumbent upon the prosecution to prove that the false evidence was material, and it does not appear to us that a mere allegation of materiality in the information is of any great importance, or that its absence is likely to cause prejudice to the accused person. What is more important is that the information should indicate the materiality of the false evidence. In the present instance the information did not state what was the charge in respect of which the false evidence had been given. We think that it would have been more satisfactory if it had done so, in order that it might be immediately obvious why the evidence was material. We do not, however, consider that this defect is sufficient to warrant the discharge of the accused person, as we do not think that he has been prejudiced by it, and as the information sufficiently complied with the rules. It is of interest to observe that a form of indictment for perjury is given in the appendix to the rules which follow the Indictments Act, 1915 (see Chitty's Statutes, 6th ed. p. 694), and that form does not indicate that an allegation of materiality is necessary or even that it should be made clear therein why the evidence was material.

In the result we find that the learned Judge erred in discharging the accused. The appeal must be allowed and the case remitted to the Court below for trial.

Criminal Appeal No. 137 of 1946.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Shaw J. and Frumkin J.

1. ELIAS MOUSSA ABBOUD,
2. ALYA ELIAS SALAH. . . . . *Appellants.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

1947
19th February

FitzGerald C. J.
Shaw J.
and
Frumkin J.

CRA 137/46
Abboud
and another
v
Attorney General

Town planning — Instances in which Section 35(7) of the Town Planning Ordinance, 1936, becomes inapplicable owing to death of offender.

In allowing this appeal from the judgment of the District Court of Haifa in its appellate capacity given in an appeal to it (Criminal Appeal No. 58/46) from the judgment of the Acting British Magistrate in Criminal Case No. 1551/45, the Court of Criminal Appeal,

HELD that Section 35(7) of the Town Planning Ordinance, 1936, does not apply to a case where a person against whom an order for demolition has been made dies before the expiry of the period within which he was ordered to effect demolition in case he should be unable to obtain a permit.

The judgment of the Court was delivered by Shaw J.

Jamil Habiby for appellants.

M. Ashoush for respondent.

Judgment: This is an appeal from the judgment dated 13.5.46 of the District Court of Haifa in Criminal Appeal No. 58/46.

Moussa Elias Abboud (now dead) was convicted on 21.3.45 in the Chief Magistrate's Court of Haifa in Criminal Case 1551/45, of an offence under section 35(1)(a) of the Town Planning Ordinance, 1936, as amended by the Town Planning Ordinance, 1941. That case was taken on appeal to the District Court, and on 25.5.45 the District Court (in Criminal Appeal 79/45) ordered Moussa Abboud to demolish one wall, one partition wall, and to remove the gate on the stairs leading to the basement where the said walls are situate in his premises at 124, Jaffa Road, Haifa, unless he succeeded in obtaining a permit from the Town Planning Commission within six months as from 25.5.45. Moussa Abboud did not obtain a permit and he did not demolish the walls or remove the gate. He appealed to the Supreme Court, but died on 27.7.45 before his appeal had been disposed of, and the appeal was accordingly dismissed on 19.9.45[1].

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(1) CRA 128/45, 12 P.L.R. 440.

The Attorney-General thereafter applied under the provisions of Section 35(7) of the Town Planning Ordinance, 1936, as amended by the Town Planning Ordinance, 1941, for an order that the work be carried out by the Local Building and Town Planning Commission, Haifa, and that the costs and incidental expenses be recovered by sale of the materials of the walls and gate in question.

The application was made and heard ex parte by the Acting British Magistrate, Haifa. The Attorney-General's representative contended that although the owner (Moussa Abboud) was known to be dead the competent authority was nevertheless entitled to ask for a demolition order. The Magistrate held that section 35(7) did not apply, and he dismissed the application. He observed that the general principle of law in this country is that when a person dies he is succeeded by his heirs, and that the prosecution had not proved or alleged that Moussa Abboud had left no heirs.

An appeal was made ex parte to the District Court, Haifa, in Criminal Appeal No. 58/46. The District Court allowed the appeal, and in so doing it relied particularly on the words "or that it is impossible or impracticable to serve him with a summons .... or that the offender has divested himself of the ownership of the building or structure since the commission of the offence" which appear in section 35(7).

The point to be decided is whether section 35(7) is applicable in a case such as this, where the person against whom an order for demolition has been made dies before the expiry of the period within which he was ordered to effect demolition in case he should be unable to obtain a permit, and before this appeal could be heard.

Having considered the submissions of Jamil Eff. Habiby, advocate for the appellants, and Mr. Ashoush for the Attorney-General, we consider it to be highly improbable that the legislator, when drafting section 35(7), intended to provide for the very unusual circumstances that have arisen in the present case. Under section 35(1)(i) the District Court, Haifa, had the power to order the demolition to be effected by the Local Commission, but the Court made the demolition order against Moussa Abboud himself whose death, in July 1945, deprived him of the possibility of obtaining a permit within the six months allowed by the District Court.

Mr. Ashoush has conceded that if Moussa Abboud had not died action would not have been taken ex parte. If Moussa Abboud had not died the Attorney-General would presumably

have proceeded under the provisions of section 35(2). We rule therefore that section 35(7) has no application in the present instance. In so ruling we wish to make it clear that our decision is strictly limited to the peculiar facts of the present case. We must not, for instance, be taken to have decided that the provisions of section 35(7) could not have been made use of if Moussa Abboud had left Palestine for an unknown destination.

Mr. Ashoush took the preliminary point that leave to appeal ought not to have been granted. He submitted that the present appellant was not a party to the proceedings. It is not denied that the appellants are heirs of the late Moussa Abboud, and we think that for the purposes of section 35(8) they come within the category of owners aggrieved by the order appealed against. The property is said to have been registered in their names in March, 1946.

In the result the appeal must be allowed.

Criminal Appeal No. 8 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Shaw J. and Frumkin J.

AZIZ ABRAHAM MIZRAHI. . . . . *Appellant.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

Criminal law — Witness — Evidence — Statements — The fact that a witness makes contradictory statements prior to giving his evidence in Court does not necessarily entail the total rejection of that evidence.

In dismissing this appeal from the judgment of the Court of Criminal Assize given in Criminal Assize Case No. 41/46, whereby that Court (Mr. Justice de Comarmond, the President of the District Court, Judge Weldon, and Judge Baradey) convicted the appellant of murder contrary to Section 214 of the Criminal Code Ordinance, 1936, and sentenced him to death, the Court of Criminal Appeal,

HELD that the fact that a witness made contradictory statements prior to giving his evidence in Court would not necessarily entail the total rejection of that evidence.

Henry Cattan, A. Levitsky and J. Ruthberg for appellant.

Crown Counsel (J. Wicks) for respondent.

Judgment: This was a lengthy trial conducted in a painstaking manner and the facts have been marshalled and the issues clearly set out in the judgment of the trial Court. While we are conscious of the danger of over-simplification, it can be said that the whole case resolves itself into the question — Can the evidence of Naji, the principal witness for the Crown, be believed?

The case for the appellant was that Naji's evidence should have been rejected outright for the reason that his first statements were inconsistent with his latter, and with his evidence in Court which confirmed his last statement. It is established beyond doubt that this witness did make different statements. His final statement, and his evidence on oath was to the effect that he was present when the murder was committed and that he saw the accused fire the shot. Now, all the statements of Naji were consistent to this extent, that they did not deviate in regard to the background of the crime and the circumstances surrounding the actual shooting; the only deviation was in regard to the person who fired the shot. In his first statement he said he did not recognise the man; in one oral and one written statement he said he recognised the man as an Arab cake seller, and in his final statement, and in his evidence in Court he said that the man who fired the shot was Aziz, the accused.

He explained that what ultimately decided him to give a true statement, and to give the evidence on oath which he did give in the Court was his conscience. We would remark that the fact that a man made contradictory statements prior to giving his evidence in Court would not necessarily entail the total rejection of that evidence. Provided that the sequence of events as related by the witness are probable in the circumstances in which they happened, the best judge as to the weight to be attached to any particular witness's evidence is of course the Court of trial who have had an opportunity of seeing the witness in the box where even, as Lord Cockburn has remarked, "the flicker of an eyelid may have significance."

In regard to the witness Naji the trial Court stated:

> "It is hardly necessary to mention that we would have great hesitation to rely on Naji's evidence alone in view of his reluctance to tell the Police what he now swears to be the truth."

We consider that that was a wise precaution on the part of the trial Court.

Mr. Cattan's first argument was that this remark was an indication that the trial Court rejected Naji's evidence outright.

We do not so interpret this passage of the judgment. It appears to us that what the trial Court decided to do was to treat Naji's evidence as they would that of an accomplice, that is, without necessarily disbelieving it, they decided not to convict on it unless it were corroborated by other evidence. In the event the trial Court came to the conclusion that it was so corroborated and they convicted.

We now turn to examine the evidence which the trial Court accepted as corroboration. It is in the main that of Shahrour. As to Shahrour's evidence, counsel for the appellant makes two points. He says it should be rejected as unreliable evidence because he did not make his first statement to the Police until a few days after the crime. As to this, we need only say that it would be no ground for excluding his evidence although it might have made the Court cautious It is not unusual, particularly in Palestine, for people to hesitate before they get mixed up in any criminal matter. In any case, the facts do not bear out Mr. Cattan's contention. Shahrour says that on the night of the crime he told the Jewish Supernumerary Police Mamman what he knew about Aziz's connection with it. It is true that in his statement Inspector Gershovsky does not mention that he received his first information of Aziz from Mamman, but he was never cross-examined on this point; and even if Mamman failed to tell Inspector Gershovsky what he had heard from Shahrour, it cannot react against Shahrour. Shahrour had done his duty as a citizen when he had told what he knew to a Police Officer in uniform. If that Police Officer failed to carry out his duty and pass on the information, and there is no evidence that he did fail to do so, it could not, as we have said, be interpreted as detracting from the value of Shahrour's evidence.

We come now to scrutinise, and it is necessary to scrutinise most carefully, the evidence given by Shahrour. He says that at 9.30 on the night of the crime he heard three shots. He was in his house. After the shots he ran out of his house, he saw a man running towards him and he (Shahrour) stopped. He asked the man where the shots came from; the man, he said, was Aziz, the accused; and he recognised him. The accused did not stop to answer his question; he kept on running; he stumbled. The accused recovered and continued running in the direction of his house. What this evidence amounts to is that the witness Shahrour saw Aziz running from the direction of the scene of the crime and immediately after the crime along the road which led to his (Aziz's) house. Now, it was not the direct road from the scene of the crime to

Aziz's house, — it was a roundabout way. It must be emphasised that Aziz lived in the same house as the J.S.Ps and there was evidence that the J.S.Ps also heard the shots and took the direct road to the scene of the crime. If the accused had taken the direct road from the scene of the crime he would of course have collided with the J.S.Ps going to the scene. Konig gave evidence that at the time of the shooting he was standing near his shop and immediately (twenty seconds, he said) he saw a man running down the lane which leads from the scene of the crime to Galilee Road and go along Galilee Road.

Smaja gave evidence to the effect that when he heard the shots he came out on his verandah, he saw a man running from Konig's shop down Galilee Street, and he saw him stumble at the same point at which Shahrour saw him stumble.

The Court came to the conclusion that the man seen by Konig, the man seen by Shahrour and the man seen by Smaja was the same man. We think the Court were perfectly entitled to come to that conclusion. If we believe Shahrour's evidence, then it follows that Aziz ran down the lane in which the pistol was later found, along the Galilee Road to his own house. There was also evidence that some time before the muder Aziz had made enquiries about purchasing a pistol.

The Court accepted this sequence of events as corroboration. The question is — Was that a reasonable finding by the Court? We are of opinion that it was It is quite true, as counsel for the appellant points out, that the fact that a man is running from the scene of the crime is not necessarily evidence of guilt. We agree. But when a *prima facie* case has been made out by the Crown and a man is found running from the scene, the onus is on the man satisfactorily to explain his flight.

The accused's defence was an alibi. He said he had never left his house that night. This of course is completely contradictory of the evidence of Shahrour. The Court came to the conclusion that the evidence which the accused adduced did not establish an alibi, and there is no doubt in our minds that this conclusion was fully justified. Now an alibi if it is established is the best of all defences, but if it fails it rebounds against the accused.

We have then this evidence: that the accused before the crime had made enquiries about purchasing a pistol, that he was identified running from the scene of the crime a moment after the crime was committed, that he ran down the lane in which the pistol was found and then along a roundabout road

to his own house, that he made no attempt to explain his flight to Shahrour, whom he well knew, and that before the Court he attempted to establish an alibi which completely failed. We think that the trial Court were right in coming to the conclusion that this chain of circumstances was corroboration of the evidence of Naji. If it is, then the Court was justified in accepting Naji's evidence.

This being so, the case for the prosecution was established beyond any reasonable doubt and the appeal is dismissed.

Civil Appeal No. 28 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J.

NABIHA ODEH. . . . . *Applicant.*

v

ISMAIL HASSAN KARRAM. . . . . *Respondent.*

Landlord and tenant — Eviction — Execution, Stay of — Stay of execution of judgment of eviction pending determination of appeal.

Normally stay of execution of a judgment ordering the eviction of a tenant, if appealed, should be granted, since if the judgment were executed, it would be difficult to restore the status quo ante in case the tenant succeeded in his appeal. But in such instances the tenant will be ordered to furnish security for the payment of any rent which may be due by him pending the final determination of the appeal.

Fayez Nazzal for applicant.

Anwar Nusseibeh for respondent.

Order: This is an application for a stay of execution made on behalf of the appellant, Miss Nabiha Odeh. The position is rather peculiar. The respondent brought an action before the Magistrate's Court seeking the eviction of Miss Odeh on the ground that he required the premises for his own use and also on the ground that Miss Odeh was making unreasonable profit by sub-letting part of the premises. The Magistrate ordered eviction on both grounds, but he also ordered that the flat, with the exception of the room occupied by the defendant, be vacated on the 1st of Muharram of the next Hejira year, so that the sub-tenants (who were not parties in the case) would

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have time to take such steps as would in their opinion protect their interest. I confess that I have found the wording of that order rather confusing.

On appeal before the District Court the Magistrate's decision was upheld, but the learned Acting Relieving President granted leave to appeal. Subsequently, application for stay of execution was made and was heard by the Relieving President, who refused the stay prayed for on the ground that the applicant, in case she were successful in her appeal, would not suffer irreparable loss, and the learned Judge added that it would be possible to restore the said applicant in the position in which she was before.

After much hesitation I find myself compelled to grant the stay of execution prayed for, because I am not quite satisfied that the status quo ante could be restored. The main consideration which has led me to grant the stay of proceedings is that the learned Judge who heard the appeal in the District Court saw fit to grant leave to appeal. Were I to refuse stay of execution now, it would obviously mean that I am of opinion that leave should not have been granted. This would be most undesirable at this stage, because it would tend to pre-judge the decision of this Court on the appeal. I therefore grant the leave prayed for on condition that the applicant shall, within three days from today, deposit in the Registry of the Supreme Court the sum of LP.100 as security for the payment of any rent which may be due by her pending the final determination of the appeal.

I would add that it would be very desirable in this case that an early hearing be fixed, and I trust that the Chief Registrar will take note of this suggestion.

I do not grant any costs to the applicant.

Civil Appeal No. 15 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Curry Ag. J.

HASSAN MUHAMMAD SHAYEB,
and others. . . . . *Appellants.*

v

NAJIB KASSAB,
and others. . . . . *Respondents.*

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FitzGerald C. J.
and
Curry Ag. J.

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Shayeb
and others
v
Kassab
and others

Statutory tenant — Cultivators (Protection) Ordinance, Section 2 — What constitutes a statutory tenant.

In dismissing this appeal from the judgment of the Land Court of Haifa (Civil Appeal No. 150/44) whereby that Court, constituted of the Acting Relieving President thereof (Acting Judge Ross), dismissed an appeal to it from the decision of a Special Commission appointed under the Cultivators (Protection) Ordinance, the Court of Civil Appeal,

HELD that the essential element necessary to constitute a person, family or tribe, who not being the owner of a holding, a statutory tenant within the meaning of the Cultivators (Protection) Ordinance is cultivation, and it is immaterial whether the owner (landlord) is aware of the fact of cultivation. And a person who originally was a trespasser could become a statutory tenant, although a person who originally a trespasser by force would be excluded on general principles from becoming a statutory tenant.

Followed: CA 29/39, 6 P.L.R. 281.

A. Wittkowsky for appellants.

H.C. Weston Sanders for respondents.

Judgment: This is an appeal from the District Court of Haifa. The main issue is a question of the interpretation of the Cultivators (Protection) Ordinance, Chapter 40, and the Cultivators (Special Commission) Appeal Rules, 1937. It can be conceded that the Ordinance is not a satisfactory legislative measure. The Courts have experienced considerable difficulty in interpreting certain sections, with the result that the decisions of different Courts appear to conflict.

I ask myself the question, what is it that this Ordinance sets out to do. It seems to me that the primary object was to protect cultivators. The intention was not, as in the case of the various Rent Restriction Ordinances, to modify contractual relations which had already existed between the parties concerned. It is a type of measure which the past one hundred years of history have proved to be necessary in agricultural countries.

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It is based on the principle that he who turns the sod of earth for the purpose of producing food shall be protected in his right to continue to turn that sod. I cannot avoid the conclusion that the difficulty that arises in interpreting the Ordinance is due to the loose use, if I may say so, of the term "tenant" which of course in law presupposes the existence of a superior lord. But if we look at what I may call the effective sections of the Ordinance we will discover that the word "tenant" never occurs. In its place we find the term "statutory tenant". Now "statutory tenant" is an artificial creation of the Ordinance; it does not presuppose the existence of an overlord. I now proceed to examine the nature of this statutory creation. It is a person, family or tribe who not being the owner of the land, nevertheless cultivates it. It appears to me that for the purpose of this creation, it is immaterial whether the owner (landlord) is aware of the fact of cultivation. The one essential element necessary to constitute a person a statutory tenant, is cultivation. It follows that I must go so far as to admit that a person who originally was a trespasser could become a statutory tenant, although a person who was originally a trespasser by force would be excluded on general principles. I am reinforced in this opinion in that it appears to be in accordance with the general principles enunciated in Civil Appeal No. 29/39. The only exception to cultivation being the sole test is to be found in the last lines of the definition of "statutory tentant" in Section 2 of the Ordinance, which are to the effect that a person who although cultivating is hired to do so and who received a money wage, does not come within the ambit of the legislative creation "statutory tenant".

Turning now to the facts of this case, it clearly emerges that the appellants were managers or agents of the owner expressly employed as such by the owner and if they cultivated at all, they cultivated in the shoes as it were of the owner and they do not come within the definition of statutory tenant.

The appeal must therefore be dismissed with inclusive costs of LP.15.

Civil Appeal No. 279 of 194

1947
25th

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Abdulhadi J.

1. YOUSEF ELIAS ZAHRAN,
2. EISSA ELIAS ZAHRAN. . . . . *Appellants.*

v

1. SLEIMAN I. SHLAWIT,
2. SHAFIK I. SHLAWIT. . . . . *Respondents.*

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and
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Service of process — Procedure to be followed when effecting service of process in accordance with Rule 35 of the Civil Procedure Rules, 1938 — The words "all due and reasonable diligence" in Rule 37 of the Civil Procedure Rules, 1938, cannot be transposed to Rule 35.

In this appeal from the judgment of the Land Court of Haifa in Land Case No. 5/46, whereby that Court refused to set aside a judgment by default given by it in that case, the Court of Civil Appeal,

HELD that the words "all due and reasonable diligence" in Rule 37 of the Civil Procedure Rules, 1938, cannot be transposed to Rule 35 of the rules in question.

Directions by the Court with regard to the practice to be followed when effecting service of process under Rule 35 of the Civil Procedure Rules, 1938, and the data which the statement of service made by the serving officer should show.

Referred to: CA 382/45, 13 P.L.R. 159.

Elias Koussa for appellants.

George Mu'ammar for respondents.

Judgment: This is an appeal from the refusal of the learned President of the District Court of Haifa to set aside a judgment given by default against the two present appellants. It was held in C.A. 382/1945, 13 P.L.R. 159 that appeal lies against such a refusal.

The two appellants and three other persons were cited as defendants in Land Case No. 5/46 (Haifa). On the 3rd March, 1946, the process-server proceeded to the village where the two appellants reside, and, in accordance with rule 39 of the Civil Procedure Rules, 1938, after effecting service, he recorded the time and manner of such service. This statement of service or "return" shows that he had delivered the documents at the place of residence of each of the persons to be served "to his wife who lives with him and who received the said documents

but refused to sign in the presence of witnesses". The above is a free translation of the "return" made by the process-server, and the return was signed by two witnesses.

The two present appellants (then defendants) did not enter appearance and when the case was called on the 2nd May, 1946, the record bears the entry "No appearance entered, no defence filed". There was no entry on the record to the effect that the Court was satisfied that the process had been duly served, but an affidavit by the process-server was put in at the end of the hearing of the case. The proviso to rule 36 lays down that where a written acknowledgment of service is not obtained by the process-server, the Court may declare the process to have been duly served. The Registrar did, however, on the 29.3.46, order that notices of trial were not to be served on the two present appellants who had not entered appearance and had not filed a defence. We have not been told what was the rule or legal provision, if any, under which the Registrar acted, and the respondents' advocate pointed out that this point had not been mentioned at the hearing of the application to set aside.

Judgment having been given against the two present appellants, they subsequently applied under rule 213 of the Civil Procedure Rules, 1938, to have it set aside. The grounds put forward for setting aside were:-

(a) that the process-server had not recorded that the persons to be served were not to be found; and

(b) that the process-server did not affix the papers on the premises as required by rule 37.

The application to set aside was supported by affidavits sworn by each of the present appellants. One of them, Yousef, swore that he had not received the documents and did not know that they had been handed to his wife. The other appellant, Eissa Elias, swore that the Mukhtar gave him papers written in English which had been brought by the process-server for him and his brother Yousef; that he could not ascertain what the papers were for and did nothing about them and did not even hand the documents over to his brother. No date is mentioned by Eissa and it is not therefore known when the Mukhtar handed him the papers.

The main point in this case is whether a process-server may effect service by virtue of rule 35 on a member of the family of the person to be served, before making an effort to effect personal service. Rule 35 begins with the words "Where any person to be served cannot be found.....", and these words cannot be totally disregarded. In the present case we

have nothing on the return made by the process-server to the effect that he could not find the persons to be served; even in his affidavit sworn on the 3rd May, 1946, which was filed before judgment given by default, the process-server did not state that he had tried to find the parties to be served and had failed.

Mr. Koussa, for the present appellants, submitted to us that service on a member of the family is not good service unless the process-server has used all due and reasonable diligence to find the party to be served. We do not agree, and we consider that the words "all due and reasonable diligence" cannot be transposed from rule 37 to rule 35. Our view is that a process-server may proceed under rule 35 if the person to be served cannot be found at the address given for service, i.e. his place of residence (vide rule 7(1)(d)), and may, subject to the following observations, serve a member of the family of such person who is residing with him and who is apparently more than 18 years old. It is however important that the process-server should ascertain whether the person to be served does in fact reside in the house to which the process-server has repaired, and the information obtained should be included in the statement of service required by rule 39. The statement of service should also mention that the person to be served cannot be found and why it is not practicable to serve him in person as mentioned in rule 32. Where the process-server decides to act under rule 35 he must be careful to mention clearly and describe in his statement of service the member of the family on whom the documents have been served. When all the necessary data have been properly noted by the process-server, the Court is then in a position to decide whether the process was duly served: this is of special importance where the person to whom the documents are handed refuses to acknowledge service (as in the present case).

The learned President was, it seems, of opinion that the appellants did in fact receive the documents destined to them, and we would not be surprised if he were right. Nevertheless, the appellants are entitled to invoke the protection of rules formulated to ensure that a party will be given due notice of a claim brought against him, and it is the duty of the Courts to make sure that such rules are observed. Slavish compliance is not always essential but there must be sufficient compliance to achieve the object in view. We are of opinion that the spirit of the rules was not sufficiently complied with in the present instance and that there was no sufficiently reliable data recorded at the time of service to negative the possibility that the present appellants may have been prejudiced. We are

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therefore of opinion that the application to set aside should have been granted, the more so as the learned Judge who gave judgment by default did not record his view that the service had been duly made (in the absence of an acknowledgment from the person actually served).

With regard to the other point raised by the appellants, namely, that a copy of the process was not affixed on the outer door of the house, we entirely agree with the President that rule 37 does not apply where a member of the family of the person to be served has accepted the documents.

We therefore reverse the decision appealed against and grant without costs the application to set aside the judgment by default of appearance given against Yousef Elias and Eissa Elias Zahran on the 4th May, 1946, in Land Case 5/46 Haifa. The appellants are together allowed LP. 15 inclusive costs to be paid by the two respondents jointly and in solido.

Civil Appeal No. 280 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Abdulhadi J.

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NAHUM ISAAC MERKIN. . . . . *Appellant.*

v

MIRIAM MERKIN. . . . . *Respondent.*

Appeal — Judgment delivered in absence of party — Judgment reduced to form of decree and copy thereof served on that party — Original of decree not signed by members of Court giving judgment — Appeal after lapse of period of appeal — Service of decree sufficient compliance with Rule 321 of the Civil Procedure Rules, 1938, and with Form 32 of Schedule I thereto — Decree to be signed by members of Court giving the judgment.

In Land Case No. 20/43 of the Land Court of Haifa, the Land Court (Judges Shems and Nasr) gave judgment in favour of Miriam Merkin, the plaintiff. The judgment was delivered in absence of the defendant, Nahum Merkin. The judgment was reduced to the form of a decree and a certified copy of the decree with no indication therein that the original thereof had been signed by the members of the Court which gave the judgment was served on the defendant. No notification in Form No. 32 of Schedule I to the Civil Procedure Rules, 1938, was served on the defendant. The defendant filed an appeal after the lapse of thirty days from the date of service of the purported decree. Notice under Rule 333 of the Civil Procedure Rules, 1938, that the appeal was out of time was served on the appellant. At the hearing

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of the appeal and in resisting the objection raised, appellant's advocate submitted that, inasmuch as no notification in Form 32 of Schedule I to the Civil Procedure Rules, 1938, had been served on appellant, the period for filing the appeal fixed by Rule 321 never began to run and that the document served on appellant did not indicate that the original thereof had been signed by the members of the Court which gave the judgment.

In dismissing the appeal, the Court of Civil Appeal,

HELD (1) that the document served on appellant, which purported to be a certified copy of a decree the original of which was not signed by the members of the Court which gave the judgment, amply fulfilled the object of the notification in Form 32 of Schedule I to the Civil Procedure Rules, 1938, required by Rule 321 of the same Rules.

(2) that a decree to the form of which a judgment of a Court is reduced must be signed by the members of the Court which gave the judgment.

In a reference under Rule 330 of the Civil Procedure Rules, 1938, which arose from the refusal of the Chief Registrar to accept for filing an appeal on the ground that the decree accompanying the notice of appeal was not signed by the members of the Court which gave the judgment as provided in Rule 206 of the above Rules, but had the signature of the Registrar of the Court which gave the judgment, Copland, Ag. C.J. ruled that that part of Rule 206 providing for the signing of the decree by the members of the Court whose judgment it gives effect to was *ultra vires* Section 15 of the Registrars Ordinance, 1936, which authorises a Registrar to sign formal judgments and orders of the Court. This ruling is to be found in CA 159/38.

S. Felman for appellant.

Y. Eisenberg for respondent.

Judgment: The respondent has taken the preliminary objection that this appeal was lodged out of time. Notice of the objection was duly given on the 11th October, 1946.

The appeal was lodged on the 4th August, 1946, by the present appellant who was the defendant in the Court below. Judgment in the Court below was delivered on the 21st May, 1946, in defendant's absence. The present respondent alleges that on the 30th June, 1946, a certified copy of the judgment was served on the appellant.

Rule 321A of the Civil Procedure Rules, 1938, provides that where judgment has been delivered in the appellant's absence, the period within which notice of appeal may be lodged is thirty days from the date of service upon the appellant of a notification in the Form No. 32 of Schedule I to the Rules.

Form 32 is a short intimation signed by the Registrar of the Court to the effect that judgment was delivered on a certain date. So far as we know, no such notification was served in the present instance. What was served was a document purporting to be the judgment reduced to the form of a decree,

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and the appellant's advocate does not dispute that service of such a document was in fact effected on the 30th June, 1946.

The learned advocate for the appellant (Mr. Felman) has resisted the preliminary objection on the ground that the notification in Form 32 was not served and that the delay fixed by Rule 321 for lodging the appeal never began to run. With regard to the document served on the 30th June, 1946, Mr. Felman has pointed out that it was a certified copy of a what purported to be a decree but that unlike a proper decree according to Form 12 of Schedule I to the Civil Procedure Rules, 1938, it did not indicate that the original had been signed by the members of the Court who gave the judgment. Undoubtedly, in the present case, a decree of the Haifa Land Court should have been signed by the two Judges who gave the judgment. Mr. Felman's criticism is therefore to a certain extent justified, and we agree that the document served on his client did not clearly show that it was a certified copy of a formal decree.

We do not, however, agree with Mr. Felman's submission that the period for lodging an appeal did not begin on the 30th June, 1946: we consider that the document served on his client on that date amply fulfilled the object of the short notification mentioned in Rule 321. We therefore hold that Rule 321 A has been sufficiently complied with and that, consequently, the appeal was lodged out of time.

We would add that Mr. Felman has mentioned that the appeal would have been lodged in time had there not been a curfew order at Tel-Aviv from the 30th July to the 2nd August, 1946, which made it impossible for him to fulfill the necessary formalities at the Registry of the Supreme Court, Jerusalem. Mr. Felman has sworn an affidavit to the above effect. The question which has to be considered is whether the incidence of the curfew order does save the appellant from the consequences of the belated lodging of the notice of appeal. In this respect we would point out that Rule 324 of the Civil Procedure Rules provides for applications for extension of time to be made to the appellate Court or to a Judge or to the Registrar thereof within 30 days of the date upon which the period fixed for appealing has expired. No such application was made in the present case.

For the above reasons, we are of opinion that the objection must succeed and we therefore dismiss the appeal with costs on the lower scale and we allow LP. 10 attendance fee to the respondent's advocate.

High Court No. 4 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and Curry Ag. J.

EISSA DARWISH KURDI. . . . . *Petitioner.*

v

DEPUTY DISTRICT COMMISSIONER, JAFFA,
and others. . . . . *Respondents.*

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Instances to which term "criminally responsible" in Section 21 of the Criminal Code Ordinance, 1936, is applicable — High Court — Instances in which it will intervene where act complained of done in the purported pursuance of power vested by Ordinance.

In discharging the rule nisi issued by it calling upon the respondents to show cause why the order of the first respondent made under the Crime (Prevention) Ordinance whereby petitioner was required to execute a bond of LP. 200 with one surety for the same amount to be of good behaviour for eleven months subject to certain restrictions and to reside within Safad Sub-District should not be set aside, and why respondents 3 and 4, i.e. the Inspector General of Police and the Superintendent of Police of the Galilee District, should not be ordered to refrain from executing the said order, the High Court,

HELD (1) that Section 21 of the Criminal Code Ordinance, 1936, has no application to instances where a person has been submitted to the restrictions of the Crime (Prevention) Ordinance on substantially the same averments on which he had previously been tried and discharged, since for the purpose of the said Section 21 the term "criminally responsible" means responsible to answer for the acts complained of in the lawfully constituted Courts of the country; the term "criminally responsible" does not apply to administrative or quasi-judicial proceedings.

(2) that the High Court, in petitions made to it against acts done in pursuance of power vested by an Ordinance, will intervene, firstly, to ensure that the person purporting to act under the Ordinance acts strictly within the legal limits set by the Ordinance, and, secondly, if it considers that the manner in which a public officer acted under the Ordinance led to an abuse of power and an infringement of fundamental principles of justice.

Referred to: HC 23/46, 13 P.L.R. 290.

Henry Cattan for petitioner.

Crown Counsel (M. Heenan) for respondents.

Order: This is in fact an appeal from the consequences of an enquiry held under the Crime (Prevention) Ordinance. Now in view of certain arguments adduced we think it desirable to stress that it is not within the functions of this Court sitting

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أحد	٢	٩	١٦	٢٣	٣٠
اثنين	٣	١٠	١٧	٢٤	٣١
ثلاثاء	٤	١١	١٨	٢٥	
أربعاء	٥	١٢	١٩	٢٦	
خميس	٦	١٣	٢٠	٢٧	
جمعة	٧	١٤	٢١	٢٨	

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as High Court either to modify or to extend the provisions of any Ordinance. That power is vested in the legislator, but this Court will intervene to ensure firstly that a person purporting to act under the Ordinance acts strictly within the legal limits set by the Ordinance; and secondly we will intervene if we consider that the manner in which a public officer acted under the Ordinance led to an abuse of power and an infringement of fundamental principles of justice.

Two points arise in this case. The first is whether sufficient evidence was adduced before the Court to enable the District Commissioner to arrive at the conclusion which he did. In this connection Mr. Cattan referred to High Court Case No. 23/46, 13 P.L.R. 290. During the proceedings several witnesses were called to give evidence as to the general reputation of this man and the opinion which they had formed of his general character. We would in this connection refer to section 6(4)(b) of the Ordinance which provides that it shall not be necessary to prove that the person charged was guilty of any particular act. The whole gravamen of the section is that it is sufficient to establish that his known character was such as to lead to the belief that he was of the type who might commit offences which are prejudicial to the public safety. We think that the evidence which was adduced before the Assistant District Commissioner amply warranted him in coming to the conclusion to which he did come.

The second and probably more important point of this appeal was that the man charged had previously been charged under the Ordinance on substantially the same averments. To deal first with the legal implications of submitting a man to the restrictions of the Ordinance after he had previously been tried under it and discharged, we accept the argument of the Crown Counsel that section 21 of the Criminal Code Ordinance has no application to this particular case. For the purpose of section 21 "criminally responsible" means responsible to answer for the acts complained of in the lawfully constituted Courts of the country. It does not apply to administrative or quasi-judicial proceedings such, for instance, as proceedings under Defence Regulation 18(b) in England and the Defence Regulations which provide for the restricting of the liberty of the subject in Palestine. It follows that the mere fact that a man had previously been charged on similar averments under the Crime (Prevention) Ordinance would not per se justify this Court in interfering, but we would intervene if we came to the conclusion that the circumstances of the recharging the person were such as to amount to an infringement of the fundamental principles of justice. This therefore compels us to examine the circumstances under which this man was twice forced to defend himself under the Ordinance. We observe that in the first enquiry, that was the enquiry held in May, 1946, only one witness was called, and the evidence which he gave was of a very sketchy character. In the second enquiry, not only was he charged with a further offence which had happened after the first enquiry, but the evidence adduced in support of his alleged wrong doings prior to the first enquiry, was much more detailed and convincing. In these circumstances we cannot say that charging him a second time amounted to an abuse of the powers conferred by the legislator by this Ordinance. For these reasons the rule must be discharged.

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Criminal Appeal No. 12 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Shaw J. and de Comarmond J.

MUHAMMAD MOUSSA ARRAR. . . . . *Appellant.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

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Criminal law — Evidence — Statement by victim of violence — Statement made some two hours after commission of offence and after victim had seen and conversed with many people — Ruling by trial Court that statement in question inadmissible — Submission that statement admissible as being in favour of accused — Evidence Ordinance, Section 8.

The Court of Criminal Assize sitting at Nablus (Mr. Acting Justice Curry, the Acting Relieving President (Acting Judge Rogers) and Judge Katib) convicted Arrar in Criminal Assize Case No. 1/47 of murder contrary to Section 214 of the Criminal Code Ordinance, 1936, and sentenced him to death. The conviction was based on a statement, which the Court admitted in evidence under Section 8 of the Evidence Ordinance, by the deceased made to his father soon after the incident as to who his assailant was and on the evidence of two eye-witnesses who recognised the assailant. Another statement by the deceased made some two hours after the incident to a Police Corporal and after the victim had seen and conversed with many people, was held inadmissible by the Court on the ground that it could not be considered to have been made "shortly after" the incident. The accused appealed. On appeal, it was submitted that the statement which the trial Court ruled out as inadmissible should have been admitted in evidence, firstly, because it was *per se* admissible under Section 8 of the Evidence Ordinance, and, secondly, even if it were technically inadmissible, it was admissible as being in favour of the accused.

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In dismissing the appeal by majority (Shaw J. dissenting), the Court of Criminal Appeal,

HELD *(per FitzGerald C.J. and de Comarmond J.)* that the statement by the deceased made to the Police Corporal some two hours after the incident and after he had seen and conversed with many people, which the trial Court ruled out as being inadmissible under Section 8 of the Evidence Ordinance on the ground that it could not be considered as having been made "shortly after" the incident, could not be admitted in evidence as being in favour of the accused, since if it is excluded on the ground that it is inadmissible evidence to be adduced before a Court by the prosecution, it must equally be inadmissible if it is placed before the Court by the defence. And if the law enjoins a Court to reject evidence because of some inherent defect in it, that defect is not cured merely because an accused person may consider the evidence favourable to him.

(per Shaw J.) that the statement by the deceased to the Police Corporal made some two hours after the incident and after he had seen and conversed with many people, which the trial Court ruled out as being inadmissible under Section 8 of the Evidence Ordinance, was admissible in evidence either for the purpose of contradicting or modifying what the deceased had previously said (in this case the deceased had made a statement to his father soon after the incident as to who his assailant was) or for the purpose of the cross-examination of other witnesses, as to hold otherwise it would mean that, if the victim did not die and the appellant had been charged with attempted murder, hearsay evidence (i.e. the statement he made to the Police Corporal) is admissible for the purpose of contradicting him, whereas if he is dead the hearsay evidence is not admissible.

Referred to: CRA 80/45,
CRA 203/45, 13 P.L.R. 13.
Rex v. Thompson, (1912) 3 K.B. 19.

Distinguished by Shaw, J: Rex v. Thompson, (1912) 3 K.B. 19.

Henry Cattan and Fawzi Ghussein for appellant.

Crown Counsel (A. Hooton) for respondent.

Judgment: In this case the appellant was convicted of murder by the Court of Criminal Assize sitting at Nablus. The main evidence against him was that of three witnesses who purported to be eye-witnesses of the killing. The evidence of the third witness, Mustafa, was to the effect that the victim, as was his usual custom, left his village early on the morning of the 27th of July, carting manure on a camel to a grove. He was in front leading the camel, and was followed at some distance by his father, his brother, and by a cousin, named Idries. The evidence of the two witnesses Mustafa and Idries was that as they proceeded on their way the deceased had reached the top of a hill when he (the witness) heard a man

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shout "Hands up", and saw a man shoot at deceased. He recognised the assailant as the appellant. He went up to his brother, he saw the accused who was armed with a rifle, and one other man, who was originally charged, run away. His brother Muhammad who had been wounded was removed to hospital. The doctor gave evidence describing the wound. A few days later Muhammad died and the Court found, and in our opinion rightly found, that his death was the result of the wound inflicted on him. This evidence of Mustafa was confirmed in detail by Idries and by the father, with this exception — that the father did not actually see the appellant fire the shot but he rushed up to his son and asked him who shot him. The son replied that it was the accused.

Various points were raised in the appeal. The first was the question as to the possibility of identification, seeing that it was before sunrise. There were slight conflicts as to the amount of visibility. Two witnesses said they had no difficulty in clearly distinguishing the accused, another witness, Daoud, who came on the scene afterwards, said that it was dark and he could not see more than a few metres. This slight deviation, as it can justifiably be so called, might be accounted for by the effect of better eye-sight or other reasons. In any case, it was a question for the trial Court to gauge the credibility of the witnesses, and decide whether identification could have been established. The judges came to the conclusion that visibility was sufficient to enable a person to be identified, and as we are not prepared to say that that was an unreasonable conclusion we see no ground for interfering with it.

Counsel for the appellant also referred to other variations, particularly in regard to the position of the wound. As to these, we need only say that no Court could expect a witness to give an exact photographic picture of what he saw when he came face to face with a crime of violence such as this. Such variations as were disclosed were examined by the trial Court and accounted for to their satisfaction. Again, in so far as the variations of evidence were concerned, we can find no criticism with the reasoning of the trial Court, or their conclusion based on that reasoning.

We now come to the main ground of appeal, which was an issue never raised in the trial Court or even in the written grounds of appeal. The dead man made a statement before he died. It was P/1. This was tendered in evidence by the prosecution under Section 8 of the Evidence Ordinance. The trial Court came to the conclusion that it was not admissible because in the circumstances in which it was made it could

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not have been said to have been made shortly after the act of violence, which was necessary to bring it within the ambit of section 8. The question as to what constitutes "shortly after" must depend on the circumstances of the case. In one case it might amount to a few minutes, in another case it might even be hours. Having directed their minds to the issue, the trial Court came to the conclusion that it could not be considered "shortly after", within the meaning of the section, because, as they stated, it was made some two hours after the incident and after he had seen and conversed with many people. The trial Court were, in our opinion, entitled to come to that conclusion, and having come to it they were entitled to, indeed they were bound to, exclude the statement.

The prisoner at the trial Court never questioned the correctness of this ruling. It is now challenged for the first time. Counsel for the appellant says that that statement was favourable to the appellant and that it should have been admitted in evidence. There are two grounds, he says, on which it should have been admitted. The first is that it was per se admissible under Section 8 of the Ordinance. We have dealt with this ground and we have rejected it.

Mr. Cattan's alternative ground was that even if it was technically inadmissible as coming under the hearsay rule, it was admissible as being in favour of the accused.

The argument at first sight is attractive, but in our opinion it does not stand up to a critical analysis. It is a fundamental principle of English law that hearsay evidence, except in certain specified circumstances, is not admissible in the Courts. There are schools of jurisprudence which criticise this provision of English law, and in fact Moslem law freely admits hearsay evidence. The reason why it is excluded in English Courts is that centuries of experience have led Judges and the Legislature to the conclusion that it is unreliable. We would emphasise that it is not excluded merely because it is considered prejudicial to an accused person. It is excluded because the British Courts are not prepared to base a decision upon it. It seems to us, therefore, that if it is excluded on the ground that it is inadmissible evidence to be adduced before a Court by the prosecution, it must equally be inadmissible if it is placed before the Court by the defence. If the law enjoins the Court to reject evidence because of some inherent defect which goes to the very root of it, — and there is such an inherent defect in hearsay evidence, unless it comes within the exception — that defect is not cured merely because an accused person may consider the evidence favourable to him. We might here

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remark that one statement of the deceased man to his father was rightly admitted because it came within the hearsay exception and therefore was not inherently defective. It seems to us that the issue has been authoritatively decided in the case of Rex v. Thompson, 3 K.B. 1912. In that case the issue was on all fours with the issue here, although of course the facts were not quite the same. In our opinion the fact whether the woman died or not was immaterial. The statement was refused admission solely on the ground that it was hearsay and did not come within the exception rule. In Rex v. Thompson the accused was charged with using an instrument on a woman for the purpose of procuring miscarriage. The woman had made a statement which the defence considered to be of use to the accused, as here, the victim made a statement which the defence now consider might be of service to the appellant.

The statement of the woman in Rex v. Thompson, as the statement of the deceased in this case, came within the hearsay rule, and in consequence it was excluded. The Court of Criminal Appeal upheld the trial Court in refusing to allow it to be used in favour of the accused on the ground that if such evidence was admissible for one side, it must also be admissible for the other. It follows that, if, as we have held, the Court rightly decided that the evidence was inadmissible for the prosecution, it must be inadmissible for the defence.

It follows that this ground of appeal must be rejected.

Two other grounds were advanced in favour of appellant. It was said that the evidence against the second accused was the same as the evidence against the first, and that therefore following the decision in Criminal Appeal No. 80/45, the first accused could not have been convicted and the second acquitted. We think that this contention has been examined and disposed of in Criminal Appeal No. 203/1945. It seems to us that the issue here is similar to the issue considered in that Criminal Appeal. The Court have stated that the evidence against the two was not the same. The evidence against the second accused was distinctly weaker. We agree with that conclusion. It therefore follows that the Court were entitled to differentiate between the two lines of evidence and convict one and acquit the other.

Finally, it was said that the Information was amended before the start of the trial and that there is no authority to do this. This is purely a technical objection. Not only was no objection taken at the time when the Court allowed the amendment, but counsel for the appellant intimated that he

had no objection to the amendment. The amendment did not in any way prejudice the course of the trial or the accused in putting forward his defence, and whatever highly technical substance there may be in the point we will not allow it to be taken now.

For these reasons the appeal must be dismissed.

Shaw J: This is an appeal from the judgment dated 27.1.47 of the Court of Criminal Assize sitting at Nablus in Criminal Assize Case No. 1/47.

The conviction was based mainly on a statement made by the deceased to his father shortly after the shooting, and on the evidence of two other witnesses — P.W. 3 Mustafa (a brother of the deceased), and P.W. 4 Idries (a cousin of the deceased).

The principal submission of Mr. Cattan, who appeared on behalf of the appellant, is that a statement made by the deceased to P.W. 8 Corporal Mustafa Samara was not admitted in evidence. The note which the Court made when it excluded this evidence is at p. 10 of the typewritten record.

This note, together with the Court's ruling, reads as follows:-

> "(Pros. want to put in the Mahmud statement under Section 8 Evidence Ordinance — evidence of a statement of a person upon whom an act of violence is alleged etc ... shortly after) Court holds that it is inadmissible not being a statement made shortly after — made some two hours after the event and after he had seen and conversed with many people".

It may be remarked here that it is not one of the grounds of appeal that evidence was wrongly excluded, but the point has been extensively argued and we assume that Crown Counsel thought it proper (and his conduct commends itself to me) to allow this point to be taken in view of its great importance. I must also observe here that the record does not show that any objection to the exclusion of this statement was taken by the defence, and I must assume that in excluding it the Court could not possibly have apprehended that its exclusion would be considered otherwise than beneficial to the defence. It is also clear that the defence made no attempt to put in the statement for any other purpose later. Indeed it is clear that it could only have been very late in the day that it struck the appellant's counsel that the statement might be used with advantage to the appellant.

So the first question to be considered is whether the appellant's counsel can be allowed to raise, for the first time, in this Court, a point which he never raised at the trial.

The excluded statement is in the file, and we have looked at it and listened to lengthy arguments upon it from both sides. The question is a legal one, and it may be put shortly as follows —

Where a trial Court has excluded a statement made by a deceased person on the ground that it was not made shortly after the act of violence, for the purpose of Section 8 of the Evidence Ordinance (Cap. 84), can the Court of Appeal admit that statement?

Although I take the view that in the circumstances of this case the trial Court might reasonably have admitted the statement as having been made shortly after the act of violence, I am not prepared to say that the Court erred in excluding it — particularly where, as in the present case, neither side pressed for its admission. It is a matter for conjecture whether the Court would or would not have admitted the statement if the defence had indicated its wish that it should be admitted. But if the Court had admitted it I certainly would not have been prepared to say that the Court had wrongly exercised its discretion.

But the question is whether this Court now has the power to admit it. Section 71 of the Criminal Procedure (Trial upon Information) Ordinance (Cap. 36) empowers the Court of Appeal to hear any witnesses whom it may see fit to call or require the production of any document, and I have no doubt that this power is wide enough to enable the Court to admit this statement provided that it is shown to be admissible in law.

The question to be decided then is whether this statement is admissible in law. It is, of course, hearsay evidence, since it is a statement which the deceased made to Corporal Samara. All evidence which is admitted under the provisions of Section 8 of the Evidence Ordinance is hearsay. If this statement was not made shortly after the act of violence was committed it cannot be admitted under Section 8 of the Evidence Ordinance, and the question arises whether it can be admitted under any other rule of law.

The use which Mr. Cattan wishes to make of the statement is briefly this — he submits that, although the deceased stated to Corporal Samara that he had been shot by the appellant, that statement might raise a doubt in the mind of a juror as to whether the witnesses Mustafa and Idries were actually present at the time of the shooting, or at least raise a doubt as to whether the shooting amounted to premeditated murder. It is stressed that in this statement the deceased speaks of an

altercation taking place before the shot was fired, and the submission is that the appellant had not necessarily gone to the place with the intention of killing the deceased and that the killing was, at the worst, manslaughter.

If the deceased had survived, and if the appellant had been charged with the offence of attempted murder, the statement which he made to Corporal Samara could subsequently have been used for purposes of cross-examination of the deceased; but if it had been intended to contradict him by the writing, it would have been necessary to call attention to those parts of the writing which were to be used for contradicting him.

Section 5 of the Criminal Procedure Act, 1865, contains the following proviso —

> "Provided always that it shall be competent for the judge at any time during the trial to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit".

I of course realise that this Act is not in force in Palestine. But it seems to me to be reasonable to take it as a guide to the Court in the absence of any local law on the subject. I consider it to be against natural justice that the appellant, by reason of the deceased's death, should be deprived of the possibility of showing that he made a statement which was either untrue or which left out facts favourable to the appellant.

My attention has been drawn to the case of Rex v. Thompson (1912, 3 K.B. 19) where on a charge of procuring abortion the defendant's counsel, cross-examining a witness for the prosecution, proposed to ask the witness about statements made by the woman (since dead) some time before her miscarriage, that she intended to operate upon herself and, shortly after the miscarriage, that she had operated upon herself. The questions were not allowed to be put, as the statements, being mere hearsay, were not admissible in evidence for the defence.

It seems to me that that case is clearly distinguishable from this. The accused in that case was not charged with causing the death of the woman, and it was not a question of proving that she had subsequently made a statement which differed in essential particulars from the statement which had been admitted as evidence against the accused. It was a question of admitting an original statement which was quite clearly hearsay. In English and Empire Digest, Vol. 15, p. 807 the following appears in para. 8740 —

> "May be admitted if not objected to. —
>
> On a trial for murder it was proved that deceased, who lived a few hours after the wound was inflicted, made a statement, at the conclusion of which he exclaimed, "Oh, God! I am going fast: I am too far gone to say any more"; but he did not appear to have previously said anything about his condition, & there was no evidence, one way or other, to show that he was aware of it:- Held: the statement was inadmissible as a dying declaration.
>
> The objection to the statement having been subsequently withdrawn by prisoner's counsel:
>
> Held: it might be read in evidence, although not evidence if objected to. — R. v. Nicolas (1852), 6 Cox, C. C. 120."

And at page 313 of Phipson on Evidence (8th edition) in a chapter on "Dying Declarations in Cases of Homicide" the following appears —

> "And his credibility may, perhaps, be impeached in the same manner as that of a witness (R. v. Macarthy, cited Russ. Cr. (8th ed.), 1931).

I regret that I have not been able to refer to the report of this case, as this brief quotation is not at all enlightening as to the facts.

If the deceased had survived and had been called as a witness it may be that he would have been able to explain his subsequent statement. On the other hand he might have denied that he made it. And in any event the Court would have ultimately have had to decide whether to believe his original or his subsequent statement. I am unable to see any reason why the circumstance that the person is dead should render his subsequent statement inadmissible either for the purpose of contradicting or modifying what he had previously said or for purpose of the cross-examination of other witnesses. Otherwise this would mean that, if alive, hearsay evidence is admissible for the purpose of contradicting him whereas if he is dead it is not admissible. That seems to me to be neither logical nor just. Nor can I find any justification for it in law.

It should be observed that section 8 of the Evidence Ordinance is peculiar to Palestine. There is no similar law in England. The following passage which appears at p. 85 of Evidence in Criminal Cases (2nd edition) by W. Shaw, shows the position as it exists in English law —

> "On an indictment for murder, a statement made by the deceased almost immediately after her throat had been cut, on coming out of the house where it had been done, and in which the prisoner was lying with his throat cut and speechless, was held not admissible as part of the res gestae.
>
> 'Anything uttered by the deceased at the time the act was being done would be admissible, but here it was something stated by her when it was all over, whatever it was, and after the act was completed'. Per Cockburn, C.J., in R. v. Bedingfield (1879), 14 Cox 341."

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In view of this difference one cannot expect to find any English case in which the facts are on all fours with the facts in the present case.

I find, therefore, that the statement is admissible. It may be that its admission would not benefit the appellant. But I do not feel that I can guess at the effect it would have had on the minds of the trial Judges if it had been admitted. What perhaps appears to be a comparatively slight piece of evidence might affect the verdict by raising a reasonable doubt in the minds of the Judges.

It would be possible for this Court to call Corporal Samara before it, and to consider the effect of the statement after it had been properly proved, but I do not consider that such a course would be satisfactory. This piece of evidence should be considered by a trial Court together with all the rest of the relevant evidence, and the defence should have the opportunity, if they wish it, of using it for the purpose of cross-examining the prosecution witnesses.

Mr. Cattan has suggested that there should be a re-trial, and, although I greatly regret the necessity, I consider that in this case it is the only way in which justice can be done to both sides. I would allow the appeal on this ground alone, and would remit the case to the Assize Court, Nablus, for retrial.

On all other points I agree with the judgment which my learned brother the Chief Justice has delivered.

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THE LAW REPORTS OF PALESTINE



Volume 14

1947

MARCH

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate, and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.

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High Court No. 112 of 1946.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and Frumkin J.

McKESSON & ROBBINS INCORPORATED. *Appellant.*

v

ADMINISTRATOR GENERAL,
AS REGISTRAR OF TRADE MARKS. . *Respondent.*

1947
3rd March

FitzGerald C. J.
and
Frumkin J.

HC 112/46
McKesson & Robbins Incorporated
v
Administrator General

Trade marks — Application for registration of a trade mark registered in U.S.A. — Trade mark in question a combination of two surnames — Refusal of registration on ground that trade mark sought to be registered is lacking in distinctiveness and has not been used as a trade mark — Whether Registrar of Trade Marks correct in his refusal — Trade Marks Ordinance, 1938, Section 7 — International Convention for the Protection of Industrial Property of 1925, Article 6.

The firm "McKesson & Robbins, Incorporated", a company registered in the U.S.A., made two applications for the registration of two trade marks. The one concerned the registration as a trade mark of the term "McKesson's" which was accepted and registered accordingly. The other concerned the registration as a trade mark of the term "McKesson & Robbins" already registered as a trade mark in the U.S.A., the registration of which was refused on the grounds (1) that the term "McKesson & Robbins", which consisted of an ordinary combination of two surnames, was lacking in distinctiveness in that it consisted of an ordinary combination of two surnames, and the Trade Marks Ordinance, 1938, very clearly precluded from registration as trade marks all surnames unless they were represented in a special and particular manner or unless they had acquired distinctiveness throughout user within the meaning of Section 7(3), and (2) that the applicants had not shown that the combination of the surnames "McKesson & Robbins" had been used by them as a trade mark, inasmuch as the wrapper and the leaflet which were attached to a sworn declaration made by the firm's agent in Palestine went to show that the firm considered the word "McKesson's" as its trade mark and not the term "McKesson & Robbins" which it considered merely as the firm name. As to the question that because the term "McKesson & Robbins" was registered as a trade mark in the U.S.A. and therefore the applicants were entitled to registration in Palestine by virtue of Article 6 of the International Convention for the Protection of Industrial Property of 1925, the text whereof, in French, reads as follows: "Toute marque de fabrique ou de commerce régulièrement enregistrée dans le pays d'origine sera admise au dépôt et protégée telle quelle dans les autres pays de l'Union", the Registrar held that by virtue of the proviso to that article, which sets out the marks outside the general undertaking contained in the article in question, amongst which marks which have no distinctive character are included, the position was not altered by the fact that the applicant-firm succeeded in obtaining registration as a trade mark of the term "McKesson & Robbins" in the U.S.A. The applicants appealed to the Supreme Court sitting as a High Court of Justice under Section 11 of the Trade Marks Ordinance, 1938.

In dismissing the appeal, the High Court,

HELD (1) that the term "McKesson & Robbins" did lack the distinctiveness which justified the Registrar of Trade Marks in refusing the registration of the term as a trade mark, inasmuch as the labels and packages produced by the applicant-firm show that "McKesson's" is used to give a distinctive quality, and "McKesson & Robbins" is inserted on the labels and packages solely to indicate the address and name of the manufacturing company.

(2) that the fact that the term "McKesson & Robbins" had been registered as a trade mark in the U.S.A. did not preclude the Registrar of Trade Marks from refusing registration in Palestine, since by the proviso to Article 6 of the International Convention for the Protection of Industrial Property of 1925, although the said article 6 entitles a person who has a registration of a trade mark in the country of origin to claim registration in any of the subscribing countries, marks which have no distinctive character are excluded from the privilege enjoyed by article 6.

Approved: Richards v. Butcher, (1891) 2 Ch. p. 532.

E. Katzenstein for appellant.

J. Gavison for respondent.

Judgment: This is an appeal under Section 11 of the Trade Marks Ordinance against the refusal of the Registrar to register a trade mark. The appellants made two applications to the Registrar, one was for registration as a trade mark of the term "McKesson's". This was application 7129. It was accepted, and registered accordingly. The second application was made on the same day and was for the registration of the term "McKesson & Robbins". This second application was refused on the ground that it was lacking in distinctiveness in that it consisted of an ordinary combination of two surnames. A certificate, duly authenticated, was produced from the Department of Commerce of the United States Patent Office, testifying that the name "McKesson & Robbins" was registered in the United States as a trade mark on January 6, 1931, under registration No. 2791/46.

It appears to us that two questions arise. One is a question of fact and the other a question of law. The question of fact is whether the term McKesson & Robbins does lack the distinctiveness which would justify the Registrar in refusing the registration, and the question of law is, whether the fact that the term is registered as a trade mark in the United States, the Registrar in Palestine is barred from refusing registration here.

Dealing first with the question of fact: we have been referred to the case of Richards v. Butcher which, although

an old case, is still authoritative. There it was stated that user as a trade mark means not what a person who uses has in his own mind about it, nor what he has registered in a foreign country, but what the public would understand when the so-called trade mark is impressed upon the goods or upon some wrapper or case containing the goods to be the trade mark. The Registrar had before him, and we have before us in this Court, several paper labels and packages in which the products of McKesson & Robbins are contained. They all have this element in common that the term "McKesson's" in large letters with underneath the words "Standard of Quality" is clearly impressed in a prominent position. In addition both the labels also have the writing "McKesson & Robbins Incorporated, New York, Bridgeport and Montreal".

Now the first question that forces itself is why use the name "McKesson" twice. We think that the impression which must be left on the mind of any person looking at those labels or packages is that "McKesson's" is used to give a distinctive quality, and "McKesson & Robbins" is inserted solely to indicate the address and name of the manufacturing company. It is also to be observed that in the case of the packets which were produced the name "McKesson & Robbins" and their address is inserted on the front of the packages, but where the firm desired to invite attention to their products other than those contained in the package, they do so on the side of the package, and they describe all those other products as "McKesson's". It seems to us, therefore, that on the pure question of fact the Registrar was right in concluding that the real trade mark of this firm was "McKesson's".

Turning now to the question of law. It is, as we have said, clear that the term "McKesson & Robbins" has been registered as a trade mark in the United States since 1931. It is true that Article 6 of the International Convention entitles a person who has a registration in the country of origin to claim registration in any of the subscribing countries, but the proviso to the Article excludes from this privilege marks which have no distinctive character.

As we have decided that the term "McKesson & Robbins" lacks distinctiveness, it follows that registration in the United States would not preclude the Registrar from refusing registration here.

The appeal must therefore be dismissed, with inclusive costs of LP.10.

High Court No. 24 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice, Shaw J. and de Comarmond J.

1947
5th March

FitzGerald C. J.
Shaw J.
and
de Comarmond J.

HC 24/47
Funt
v
Chief Secretary
and others

ITZHAK FUNT, a member of the Executive of the JEWISH COMMUNITY COUNCIL OF JERUSALEM. . . . . *Petitioner.*

v

CHIEF SECRETARY, GOVERNMENT OF PALESTINE, and others. . . . . *Respondents.*

Immigration — High Court — Illegal entry of persons to Palestine — Order of deportation against each and everyone of those persons — Persons awaiting deportation detained on board ships — Allegation that order of deportation bad since it involved an illegality on the high seas inasmuch as the persons awaiting deportation would be detained as prisoners on prison ships — Whether High Court will intervene to prevent the illegality from being perpetrated if the charge is substantiated — No formal enquiry on the High Commissioner's part is necessary to decide whether each and every person in respect of whom an order of deportation was made for illegal entry into Palestine is a danger to the security of Palestine — The terms "the public safety", "the defence of Palestine" and "the maintenance of public order", in Regulation 108 of the Defence (Emergency) Regulations, 1945, to be read disjunctively — Defence (Emergency) Regulations, 1945, Regulations 108 and 112.

On the 28th February, 1947, an order of deportation was made by the High Commissioner under Regulation 112 of the Defence (Emergency) Regulations, 1945, in respect of each and everyone of the persons who entered Palestine on board the ship ULVA also known as the "HAIM ARLOSOROFF". Thereupon Itzhak Funt, a member of the Executive of the Jewish Community Council of Jerusalem, made an application in the nature of habeas corpus, which was granted, for an order directed to the respondents calling upon them to show cause why those 1350 persons should not be allowed to remain in Palestine, or alternatively why the respondents should not be restrained from keeping those persons detained in Palestine and/or on the high seas and/or in the Crown Colony of Cyprus and/or from deporting them to Cyprus or from Palestine.

In discharging the rule nisi, the High Court,

HELD (1) that the fact that an order of the Executive might lead to a subsequent illegality would not make that order bad *per se*, but if the order, though on the face of it a valid order, would lead to some subsequent act to be done which would itself be illegal, the High Court would intervene to prevent the illegality from being perpetrated.

(2) that when making an order of deportation under Regulation 112 of the Defence (Emergency) Regulations, in respect of any number of persons who entered Palestine illegally, no formal enquiry on the part of the High Commissioner is necessary to decide whether each and every person in respect of whom the order was made was a danger to the security of Palestine; all that is required is that the High Commissioner should satisfy himself as to the danger to the security of Palestine.

(3) that the terms "the public safety", "the defence of Palestine" and "the maintenance of public order" in Regulation 108 of the Defence (Emergency) Regulations, 1945, must be read disjunctively.

Approved: HC 89/45, 12 P.L.R. 556.
HC 107/46, 13 P.L.R. 594.
Rex v. Inspector of Leman Street Police Station, ex parte Venicoff (1920) 3 K.B. 72

E.D. Goitein and A. Spear for petitioner.

Attorney General (L. Gibson, K. C.) and Solicitor General (M.J. Hogan) for respondents.

1947
5th March

FitzGerald C. J.
Shaw J.
and
de Comarmond J.

HC 24/47
Funt
v
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and others

Order: This is a return to an Order Nisi. Most of the submissions made this morning have already been examined and a decision, which of course is binding on this Court, recorded in High Court Case No. 107/46. This is the same Court that granted the Order Nisi and we would not have done so had we not been persuaded that a new point which was not covered by the decision in High Court 107/46 arose in this petition. This of course does not preclude either side from again advancing substantially the same arguments as were adduced in 107/46, nor does it exonerate us from the duty of considering them. But this time, fortified by the decision in the previous High Court case, we can dispose of them briefly.

Mr. Goitein has taken the preliminary point that the persons who filed the affidavits in reply were not the persons named as respondents by the petitioner, and in this connection he referred to Rule 6 of the High Court Rules. This petition involves a complaint against the Executive Government of Palestine, and from the fact that the petitioner found it necessary to name nine respondents it is obvious that he himself was not clear as to which Department of Government was responsible for the acts of which he complains. This Court has pointed out in High Court Case 89 of 1945 that with the delegation of powers incidental to all organised Governments of the present day, the person who in law may be technically responsible for an act of Government is not always the person who is able to give the best information as to the motives that impelled the Government to the act. Here the Government is represented by the Attorney-General, and it can be presumed that all the affidavits filed were filed on behalf of the Executive Government of Palestine who are the real respondents in this case.

1947
5th March

FitzGerald C. J.
Shaw J.
and
de Comarmond J.

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were imprisoned. He swore an affidavit as to the conditions on board this ship. If his evidence as to conditions on board this ship is accepted, it would be impossible for us to say that those passengers were prisoners. That they were living under very austere conditions can be admitted, and that their liberty of movement was severely restricted is also true, but that is a long distance from such a denial of liberty as would constitute illegal detention. Lieut. Commander Hall has stated that the Empire Comfort, another of the ships complained about, was similar in every way to the Empire Lifeguard.

Lieut. Commander Stanley Galloway filed an affidavit as to conditions on board the Ocean Vigour. This ship was used during the war for transporting members of His Majesty's Forces. The only difference, he says, in regard to the transport of soldiers during the war and the transport of those immigrants, is that protective screens, of expanding metal, had been erected in order to ensure the security of the vessel so that the crew could work without interference. The captain considered that the erection of those protective screens was necessary. It must be emphasised that the primary responsibility imposed both by law and tradition on any master of a ship is to ensure the security of the vessel and passengers. The fact that a master was of the opinion that this could only be achieved by screening off the passengers would not be a ground of holding that people behind those screens were held in illegal detention. It is no part of the duty of this Court to assess the resentment of the persons who were forced aboard these ships, or to speculate on the manner in which that resentment might assert itself, but it obviously was a primary consideration for the master of the ship.

Having read the affidavit of those naval officers, and having seen them under cross-examination in the box, we cannot say that the masters of the ships the Ocean Vigour, the Empire Lifeguard and the Empire Comfort, which were the ships in which it was complained that the persons were about to be imprisoned, were not justified in imposing the restrictions they did.

Mr. Goitein has further invited attention to the statement of Commander Hall that if anyone tried to get off the ship in the sense that if he tried to jump overboard he would be stopped by force. That, he says, was a restriction of freedom of movement. As to this, we need only say that jumping overboard a ship on the high seas is in itself an offence, and the Commander of the ship would in law be bound to take measures to prevent it.

1947
5th March

FitzGerald C. J.
Shaw J.
and
de Comarmond J.

HC 24/47
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v
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and others

It is admitted that there are twenty-five armed British soldiers as guards on board the ship. It emerges, however, that those guards were under the general orders of the masters of the ships, and Commander Hall emphasised that if the passengers conformed with the ship's routine the guards were not there to interfere with them. There is nothing illegal in having guards on board a ship if the captain considers that guards are necessary to ensure the safety of the ship and the passengers. It cannot therefore be said that the presence of the guards make the passengers prisoners.

All the officers who made the affidavits in support of these facts were called for cross-examination and they were not shaken in the witness box.

In the light of their evidence it would be impossible to say that the restrictions imposed on the passengers, however harsh they may be, are more than the masters of the ships are entitled to impose in the discharge of the responsibility that rests upon them by virtue of their command.

For these reasons the rule must be discharged.

High Court No. 27 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and Hubbard Ag. J.

RAPHAEL TOURGEMAN. . . . . *Petitioner.*

v

CHEIF SECRETARY,
GOVERNMENT OF PALESTINE,
and others. . . . . *Respondents.*

1947
12th March

FitzGerald C. J.
and
Hubbard Ag. J.

HC 27/47
Tourgeman
v
Chief Secretary,
Government
of Palestine,
and others

Statutory martial law — Executive — High Court — Civil Courts — Imposition of statutory martial law by virtue of Defence (Emergency) Regulations made under the Palestine (Defence) Order-in-Council, 1937 — Such Defence (Emergency) Regulations ordered the closing of the Civil Courts — Whether the Defence (Emergency) Regulations ordering the closing of the Civil Courts intra vires — When will the High Court interfere with acts of the Executive — Palestine (Defence) Order-in-Council, 1937, not inconsistent with the Foreign Jurisdiction Act — Palestine (Defence) Order-in-Council, 1937, Article 6(2)(d) — Defence (Emergency) Regulations, 1945, Regulation 151.

1947
12th March

FitzGerald C. J.
and
Hubbard Ag. J.

HC 27/47
Tourgeman
v
Chief Secretary,
Government
of Palestine,
and others

An application for the issue of an order nisi calling upon the Chief Secretary to the Government of Palestine and eight other officials to show cause why certain Government Offices in Tel-Aviv, and in particular the Civil Courts, all of which were closed as a result of the imposition of statutory martial law, should not be reopened to the public was made to the High Court. The ground relied upon that the closing of the Courts was contrary to the fundumental priciples of justice and the High Commissioner could not do it unless he had specific legal sanction for doing it was that the Palestine (Defence) Order-in-Council, 1937, under which the High Commissioner passed Defence (Emergency) Regulations making provision for the closing of the Courts, was inconsistent with the Foreign Jurisdiction Act in that it conferred powers which were repugnant to the Magna Carta, to the Bill of Rights and to the Statutes of Northampton, and must therefore be declared ultra vires, and that the imposition of statutory martial law in time of peace was illegal.

In refusing the application, the High Court,

HELD (1) that the Defence (Emergency) Regulation 151 by virtue of which the High Commissioner ordered the closing of the Civil Courts in Tel-Aviv was *intra vires* the powers of the High Commissioner conferred upon him by the Palestine (Defence) Order-in-Council, 1937, Article 2 of which defines law as including any Order of His Majesty in Council, and Article 6(2)(d) of which empowers the High Commissioner to amend any law, suspend the operation of any law, or apply any law with or without any modification and by virtue of which Article 6 the High Commissioner suspended the laws namely the Palestine Order-in-Council, 1922, and the Courts Ordinance, 1940, by virtue of which the Courts function.

(2) that the Palestine (Defence) Order-in-Council, 1937, is not *ultra vires* the Foreign Jurisdiction Act, nor is it repugnant to the Magna Carta, to the Bill of Rights and to the Statutes of Northampton, inasmuch as there is nothing in the Magna Carta, or the Bill of Rights or the Statutes of Northampton to curb the power of the legislature to limit or restrict the rights of the subject.

(3) that the duty of the High Court, when dealing with acts of the Executive complained of, is to decide whether there is legal authority for the acts complained of, not to speculate as to whether the acts were desirable or necessary, and where an authority is vested in a person giving him powers to do what he considers necessary, the High Court will not go behind his order to enquire whether in fact the measures he has taken were necessary; the question as to the necessity of those measures is left by the legislature to the discretion of the person vested with the authority and the High Court would only interfere if *mala fides* was established.

Approved: Chester v. Batson, 122 L.T. 684.

I. Hake for petitioner.

Order: This in effect is a petition for an order calling upon the Government to vindicate their legal authority to impose on Tel-Aviv and on parts of Jerusalem what is known as statutory martial law.

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It raises, as Mr. Hake has emphasised, a question of great importance to many persons in Palestine. It is of equal importance that the inhabitants should be aware that the High Court still functions, and that it will enquire into the legal authority of the Executive to do any act complained of. It is for this reason that we take the unusual course of giving reasons for rejecting this petition.

Once again we would emphasise that this Court will not usurp the functions of the Executive. Our duty is to decide whether there is legal authority for acts of the Executive, not to speculate as to whether the acts were desirable or necessary.

Mr. Hake has argued that the closing of the Courts, which is the principal act complained of, was so contrary to the fundamental principles of justice that it could not be done unless the High Commissioner were cloaked with specific legal sanction for so doing, and he quoted in support of his arguments the case of Chester v. Batson, Law Times, Vol. 122. The principle enunciated in that case was that an executive authority, in that instance the Minister of Munitions, could not deprive the King's subjects of a right of access to the Courts unless he was specifically authorised by a statute of the Realm to do so. The Minister had inferred his right to make the prohibition from a general power vested in him to take any action to prevent the successful prosecution of the war being endangered. With respect, we entirely accept the principle, but applying it to this case we cannot escape the conclusion that the High Commissioner is specifically empowered by the legislature. The Courts which have been closed function by virtue of legislative enactments which are the Palestine Order-in-Council and the Courts Ordinance, 1940.

Article 6 of the Palestine Order-in-Council, 1937, authorises the High Commissioner to make such regulations as appear to him in his unfettered discretion necessary for securing public safety, etc. And Article 6(2)(d) in the most specific terms empowers him to amend any law, suspend the operation of any law, or apply any law with or without modification. Article 2 defines law as including any order of His Majesty in Council. It cannot, therefore, be open to doubt that the High Commissioner was empowered to suspend the operation of the law which created the Courts in Tel-Aviv. It follows that Defence Regulation 151 was clearly *intra vires* his powers.

Mr. Hake then went on to argue that even if the Order-in-Council purported to give those powers, the Order-in-Council itself must be declared ultra vires as it would be inconsistent with s. 12(1) of the Foreign Jurisdiction Act, in that the powers

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conferred by the Order-in-Council were repugnant to Magna Carta, to the Bill of Rights and to the Statutes of Northampton. We are unable to discover any repugnancy. There is nothing in Magna Carta, or the Bill of Rights or the Statutes of Northampton to curb the power of the legislature to limit or restrict the rights of the subject. What those foundation Bills of British Rights do enjoin is that the Crown or the Executive, as it might now be termed, cannot restrict the rights of the subject unless it has been granted by Parliament or the legislature, which takes the place of Parliament, legal authority so to do.

The next point raised by Mr. Hake arises out of the wording of the regulation and the term "statutory martial law". He again quoted the Bill of Rights and various cases in support of his contention that the issue of a commission of martial law in time of peace is illegal. It is unnecessary for us to enquire into the substance of Mr. Hake's argument on this issue, because whatever these regulations may be called by way of short title or for the purpose of convenience or perhaps for impressing the seriousness of the situation on the inhabitants, they are in fact and in law Defence Regulations made under the authority of the Order-in-Council, and the only function in this Court is to enquire into whether they are intra vires the Order-in-Council. In regard to Regulation 151 which closed the Courts, we have already held that it is intra vires. In regard to the other inconveniences which the regulations impose on the inhabitants of Tel-Aviv, Mr. Hake argues that they are unreasonable and contrary to the principles of justice in that they hit at innocent people. Now, as we have already emphasised in several of these cases, where an authority is vested in a person, as it is in the High Commissioner under Article 6 of the 1937 Order-in-Council, giving him powers to do what he considers necessary for the public safety or the defence of Palestine, this Court will not go behind his order to enquire whether in fact the measures he has taken were necessary for the public safety and defence of Palestine. The question as to the necessity of those measures is left by the legislature to the discretion of the High Commissioner and we would only interfere if mala fides was established; in this case mala fides has not even been alleged.

Accepting this appreciation of the law and the facts, the legal authority of the High Commissioner to take the action that he has taken has been so clearly established that it would be unreasonable for this Court to call upon the respondents to show cause.

The prayer of the petitioner must be rejected.

Civil Appeal No. 126 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Curry Ag. J.

ITZHAK TRACHTENGOTT. . . . . *Appellant.*

v

1. W. SOMMERFELD,
   Liquidator of Amiel Bros. Ltd., in liquidation
2. OFFICIAL RECEIVER,
3. ELIEZER AMIEL,
4. LEVY AMIEL. . . . . *Respondents.*

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Liquidation — Scale of fees on which private liquidators to be remunerated for the services rendered by them.

There appears to be no good reason why private liquidators should be paid considerably higher fees for services rendered by them, and the scale of fees fixed for Official Receivers affords a useful yardstick when assessing the remuneration to be paid to a private liquidator. The usual practice is to pay a private liquidator by way of fees for the distribution of the amounts he realised half the rate he is being paid for realisation.

The judgment of the Court was delivered by Curry Ag. J.

M.S. Levison and Edward Z. Felman for appellant.

A. Wittkowski and W. Sommerfeld for first respondent.

J. Gavison for second respondent.

Curry Ag. J: The first respondent is the Liquidator of the firm Amiel Bros. and the appeal arises from an order made upon his application for remuneration as Liquidator under Rule 135 of the Companies (Winding-up) Rules, 1936. The Liquidator applied for remuneration on the basis of 6% of the assests realised and 6% on the amount distributed. The total remuneration on that basis would amount to a sum of LP. 6,000 approximately. This application was supported by the Official Receiver and an order was made by the learned President in those terms.

There was considerable argument as to whether or not the scale of fees laid down for Official Receivers should be followed in the case of private liquidators or whether private liquidators should be paid considerably higher fees. Whilst I would not go so far as to say that the scale fixed for Official Receivers should be strictly followed in the case of private liquidators, I see no good reason why the latter should be paid

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considerably higher fees and I would merely say that I consider the scale fixed for Official Receivers affords a useful yardstick. Clearly, however, each case must be considered on its merits, and it must be the endeavour of the Court to see that the liquidator is fairly remunerated for the work he has done. In this particular case were the liquidation fee to be assessed on the scale fixed for Official Receivers he would receive a total amount of LP.2,100 approximately. From the facts of the case as found by the learned Judge there can be no doubt that the liquidator has been involved in an exceptional amount of work and he has also been involved in considerable litigation which he, being an advocate, has personally conducted.

The learned Judge has fixed his remuneration at 6% of the amount realised — a sum amounting to LP.3,500 approximately, such sum to include remuneration for his professional services. Under the Official Receiver's Rules he would have been entitled to a sum of LP.1,400 approximately. Now the Judge has given very cogent reasons for fixing the scale on realisation at 6%, and although this rate may appear in the circumstances somewhat generous for work done over a period of two years only, nevertheless, it is a matter within the discretion of the Judge and I am not prepared to say that it was so generous as to be unreasonable.

Turning to the remuneration awarded for the distribution of the assets, here again the learned Judge has fixed the fee at 6% — a sum of LP.3000 approximately instead of a sum of about LP.700 payable under the Official Receiver's Rules. The Judge gives as his reason for the special fee the fact that there are some 42 appeals pending by workmen. It appears, however, that these claims by workmen involve a sum of less than LP.10,000, practically all the balance being due to the two contributors. In such circumstances to pay the Liquidator such a sum appears to me unreasonable, and I am of the opinion that if the Liquidator is paid for distribution at half the rate he is being paid for realisation — thereby following the usual practice — he will be adequately remunerated.

In the result, therefore, the appeal is allowed and the order of the Judge amended by the substitution of 3% instead of 6% on the amount distributed. The appellant is entitled to court fees plus advocate's attendance fee fixed at LP.10 to be paid out of the estate.

Shaw J: I concur.

High Court No. 18 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and Hubbard Ag. J.

DINAH KAZAK. . . . . *Petitioner.*

v

DISTRICT COMMISSIONER,
HAIFA DISTRICT. . . . . *Respondent.*

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High Court — Mala fides — Instances in which High Court will intervene even though an alternative remedy exists — High Court will look on the whole background of the act complained of when mala fides is attributed to the officer whose act is complained of.

In discharging the rule nisi issued by it calling upon the respondent to show cause why his notice of requisition of the petitioner's one-room flat should not be cancelled, the High Court,

HELD (1) that in order successfully to reject a petition to the High Court in respect of an act complained of on the ground of alternative remedy, the Court must be satisfied that the remedy suggested is not a remote one and the Court must be convinced that there is a normal legal procedure capable of dealing directly with and deciding the real issue in the case. The High Court will not allow itself to be used as a short cut for obtaining legal redress, but, on the other hand, if a citizen, living under the protection of the Crown, alleges some misuse of power, the Court will not refuse to entertain the petition solely because the consequences which flow from the alleged abuse of power might eventually be nullified by a legal action.

(2) that where mala fides is attributed to an officer in the exercise of a discretion vested in him, the High Court, when considering the charge of mala fides, has to look on the whole background of the act complained of to determine whether there was mala fides or not.

A. Wittkowski by delegation from *J. Salomon* for petitioner.

Solicitor General (M. J. Hogan) for respondent.

Order: This is a return to an order nisi. The petitioner's complaint concerns a notice, purporting to be made under Regulation 114 of the Defence (Emergency) Regulations, 1945, notifying her that the District Commissioner considered it necessary in the interests of public safety and the maintenance of public order to take and retain until further notice possession of her one-room flat situate at House Carmi, Succot Street, off Pine Road, Haifa. The petition raises questions both of law and of fact.

The Solicitor General who appeared for respondents took the objection that as the petitioner had an alternative remedy

this Court would not grant a writ of relief. There are, of course, numerous decisions to the effect that we will rarely intervene if an alternative remedy is open to petitioner. The alternative remedy here, the Solicitor General argues, is to be found in section 3 of the Crown Actions Ordinance which enables a person who follows the procedure set out in that Ordinance to maintain a claim against the Government for the restitution of immovable property. Now we would emphasise that in order successfully to reject the petition on the grounds of alternative remedy the Court must be satisfied that the remedy suggested is not a remote one. We must be convinced that there is a normal legal procedure capable of dealing directly with and deciding the real issue in the case. We ask ourselves the question, What is the complaint of the petitioner? It is that she has been the victim of an arbitrary act on the part of a public official, an act which she says has no justification in law and which is an abuse of power. It is true that if the petitioner would be prepared to embark on the procedure dictated and endure the delays involved in bringing an action under section 3 of the Crown Actions Ordinance and if she were to succeed, one of the consequences of the alleged abuse of power, that is the ousting her from her property, would be nullified; but to insist on such a method of righting the wrong, if it be established that there was a wrong, done to her would in our opinion be placing too onerous a burden on a citizen preferring a complaint of oppression against the Crown. This High Court will not allow itself to be used as a short cut for obtaining legal redress, but on the other hand, if a citizen living under the protection of the Crown alleges some misuse of power we will not refuse to entertain the petition solely because the consequences which flow from the alleged abuse of power might eventually be nullified by a legal action on a question of title.

Turning now to the merits of the case. The Solicitor General sought to controvert the sequence of events as they are set out in the petition, but it seems to us that the evidence of Mr. Law, the Distrist Commissioner, and of Isidor Cherah substantially confirm the facts as they have been stated by Mr. Salomon, advocate for the petitioner. Those facts are that on the 4th of February a number of notices were served under Defence Regulation 114 on occupiers of houses in a certain area of French Carmel. With two exceptions all the notices were served on Jews. The two exceptions covered two Arab houses which there are good grounds for stating were requisitioned not as part of this general scheme, but because they were particularly required for specific military purposes. The petitioner is a Jewess of British Nationality. The District Commissioner stated that he did not consider her to be in any way dangerous to public security, nor did he consider that any individual evacuated by virtue of these notices was a danger.

Mr. Salomon touched on the argument that service of these notices constituted discrimination against one community on the ground of race or religion. Later he indicated that he did not rely on this, and we do not propose to deal with it. His main argument was that in considering the question of public security and maintenance of public order the District Commissioner misapplied his mind in that he took into consideration extraneous matter, such as the fact that the person being evacuated was a Jewess. It has been authoritatively established both by previous cases in this Court and decisions in the English Courts, that where an authority is given power, as the District Commissioner is under the Defence Regulations, to do an act which he considers necessary in the interest of public security, the High Court will not go behind his order to enquire whether the act was necessary for public security unless it can be proved that he acted with mala fides, capriciously or without reason. Mr. Salomon argues that the District Commissioner did act without reason because, he urges, if the District Commissioner did not consider that the petitioner was personally a danger to public security, why then was an order made against her and not against Arab occupiers? We turn to the answer of the District Commissioner. He admitted that the fact that the houses were occupied by Jews was one of the facts which came into consideration. Here are his answers:-

> "It was not an accident. The fact that the houses were occupied by Jews was a fact which came into consideration. It was not a consideration against them. My consideration was security and for that reason I required the houses. It was one of the factors in deciding which house to take".

Now, ignoring for the moment the later charge of male fides, this version of what was in the District Commissioner's mind is not very far from what Mr. Salomon alleges was in his mind, but we are unable to follow Mr. Salomon in the inference he draws from this state of mind. The fact that Miss Kazak was a perfectly loyal law-abiding citizen, as she undoubtedly was, would not make it unreasonable on the District Commissioner's part to requisition her house on grounds of public security. Apart altogether from the petitioner's personal character, there might be many sound security reasons, reasons which even the District Commissioner could not be compelled to disclose in a return to this writ, why her house should be requisitioned in preference to other houses. Faced with this contention Mr. Salomon was forced to argue that the District

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Commissioner acted with mala fides. We think he would wish to stress that what he intended was mala fides in law, not in the moral sense. Indeed the impression left on our minds is that this charge would not have been made at all had the District Commissioner been more ready to concede facts which, as we have said, are inescapable and which did not impugn either the legality or bona fides of the notice. The mala fides, he said, consisted in what he can only infer from the circumstances as a concealed object of the District Commissioner, which was to expel all the Jews, solely because they were Jews, from that area of Haifa. Now mala fides is a serious charge to make against a public officer and it is the duty of this Court no less to the officer than to the petitioner to investigate it. This in our opinion demands an appreciation of the whole background of the issue of those notices. Mr. Salomon, very understandably, would like to confine the investigation to the happenings at Haifa, but he has made this serious charge of mala fides, and it cannot be probed to its depths without taking into consideration a fact which is public knowledge to every inhabitant of this country, and which is most relevant to the issue of mala fides. That fact is that at this particular period there was a country-wide operation conducted by the security authorities in pursuance of which the principal towns were divided into zones, admission to and egress from which was regulated by permit. These evacuations in Haifa formed part of the general operation, and the District Commissioner was merely a cog in the machine conducting those operations. It is also public knowledge that the scheme involved the evacuation of large numbers of exclusively Arab families from certain areas of Jaffa, the evacuation of Britishers, including Judges of this Court, from certain areas in Jerusalem, and the evacuation of Jews from this area of Haifa. There must also be taken into account the fact which was established in the course of the hearing of this petition, that 145 Arab families from the same area have been served with notices or are about to be served with notices of requisition. Examining the Haifa notices, which included the notice of which the petitioner complains, against this background it seems to us that the suggestion that the District Commissioner acted with mala fides is quite untenable.

It follows that the rule nisi must be discharged.

Civil Appeal No. 168 of 1945.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Curry Ag. J.

ATTORNEY GENERAL. . . . . *Appellant.*

v

KEREN KAYEMETH LEISRAEL Ltd. and others. . . . . *Respondents.*

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Appeal, Leave to — Chief Justice — Land Settlement Officer — Unconditional grant by Chief Justice of leave to appeal from decision of Land Settlement Officer — Appeal must be heard by Court of Appeal, but the Court, after entering fully on the merits, is not precluded from reaching conclusion that appeal is not entertainable.

Where the Chief Justice grants unconditional leave to appeal from a decision of a Land Settlement Officer, the Court of Appeal must hear the appeal, but the grant of such unconditional leave does not preclude the Court of Appeal, after entering fully on the merits of the appeal, from reaching the conclusion that it has no jurisdiction to entertain it.

Distinguished: CA 172/40, 7 P.L.R. 547.
CA 99/41, 8 P.L.R. 269.
CA 17/44, 11 P.L.R. 255.
CA 2/46.

Crown Counsel (J. Wicks) for appellant.

M. Eliash for first respondent.

Henry Cattan and Subhi Khara for rest of respondents.

Ruling: Mr. Eliash has raised a preliminary objection to the hearing of this appeal on the ground that no appeal lies against the refusal of the Settlement Officer to exercise his discretion under section 33(4) of the Land Settlement Ordinance.

Mr. Wicks submitted in reply that leave to appeal had been granted by the Chief Justice and that Mr. Eliash could not appeal against the order granting leave.

Several cases have been cited to us.

C.A. 17/44, 11 P.L.R. 255 is not an authority which is of any help in the present instance because no leave was in fact obtained by the appellants.

Mr. Eliash for the respondent has drawn our attention to C.A. 2/46 A.L.R. 1946 p. 619 from which it appears that the Chief Justice granted leave to appeal in a settlement case leaving the Court of Appeal "to decide the issue". It seems

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from this report, if correct, that the Chief Justice granted leave, leaving it to the Court of Appeal to decide whether the appeal concerned a decision regarding right to land, i.e. whether the matter was appealable. In that case, therefore, there was what we term conditional leave to appeal.

In our opinion where the Chief Justice grants unconditional leave to appeal the appeal must be heard.

C.A. 172/40, 7 P.L.R. 547 was also a Land Settlement Case. When application for leave to appeal was made it was objected that the application had been made too late. The question depended on the interpretation of section 63 of the Land Settlement Ordinance and leave was granted by the Chief Justice "without prejudice, however, to the objection". It seems to us that the learned Chief Justice thought it desirable that the Court of Appeal should interpret section 63 of the Land Settlement Ordinance and decide whether the word "refusal" in the said section meant "date of refusal" or "date of notification of refusal". In other words, what we term "conditional leave" was given, whereas in the present case unconditional leave to appeal was granted.

Another case quoted to us is C.A. 99/41, 8 P.L.R. 269. In that case the point at issue was whether the Civil Procedure Rules, 1938, applied to succession matters. It was held that they did not apply and that, under the Succession Ordinance there was no provision for appeals.

We are of opinion that in the present case the preliminary objection must fail because leave to appeal was granted unconditionally.

This does not mean that after entering fully on the merits of the appeal we would be precluded from reaching the conclusion that we have no juridiction to entertain it.

Civil Appeal No. 359 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Frumkin J.

JOSEPHPRAFF & Co. Ltd. . . . . *Appellants.*

v

JACOB KATZ & Co. Ltd. . . . . *Respondents.*

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Shaw J.
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CA 359/46
Josephpraff &
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v
Jacob Katz &
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Power of attorney — Advocate and client — Application to Court by advocate not holding a valid power of attorney from a company — Ratification later on of power of attorney by company — Objection to power of attorney — Duty of Court in such instances — Advocates Ordinance, 1938, Section 21 — Civil Procedure Rules, 1938, Rule 24.

Where an advocate makes an application to Court on behalf of a company from which he has no valid power of attorney but which power of attorney the company ratifies later on, the Court before which objection to the validity of the power of attorney is raised should decide whether the ratification is good or not, and in case the Court comes to the conclusion that the ratification is good, the ratification should relate back to the time when the application was made to the Court.

Referred to: Ancona v. Marks, 126 Revised Reports, p. 646.

A. Gross for appellants.

A. Werner for respondents.

Judgment: This is an appeal from the judgment dated 17.9.46 of the District Court of Haifa in Civil Case 89/46, ordering the appellants to pay the sum of L.P. 2739.740 mils together with interest at 9% from 20.5.46, and costs.

Dr. Gross, who has appeared for the appellants, has explained to us that the appellant Company has a board of directors which consists of two groups, each of which holds 50% of the share capital, and any transaction has to be concurred in by both groups.

The statement of claim was endorsed "Summary Procedure", as laid down in Rule 241 of the Civil Procedure Rules, 1938, and a summons was issued requiring the appellant Company (who were the defendants to the action) to obtain leave to appear and defend the action within ten days.

An application for leave to appear and defend was filed but, owing to a difference of opinion between the two groups, Dr. Gross's power of attorney was only signed by a member of one group. That power of attorney was given at the end of May 1946.

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In June 1946 Dr. Gross appeared in Court, and of course he then held a power of attorney which was signed by a member of one group only.

An objection was taken that there was no proper power of attorney, and the case was adjourned.

On 21.7.46 a purported ratification of the power of attorney was given, and on 23.7.46 Dr. Gross again appeared before the Court. There was a hearing, and the case was then adjourned till after the vacation.

On 17.9.46 there was a further hearing, and judgment was given on the same day.

We are not at present dealing with the question whether the purported ratification was or was not valid. All that we are setting out to decide is whether the ratification, if it was valid, was given too late to be effective.

It must be observed that when the objection was first made, in June 1946, it was not immediately upheld, and Dr. Gross has conceded that if the objection had then been upheld he might not have come to this Court.

The position that we have to deal with is that the objection was upheld on 17.9.46 when Dr. Gross had a power of attorney (which may or may not be valid) on the ground that the purported ratification was too late.

Rule 242 of the Civil Procedure Rules does not itself fix the time within which the application for leave to appear and defend must be obtained, but the form of summons (Form No. 18 of Schedule I) contains the words "within ten days". Rule 242 lays down that that form shall be used "with such variation as the circumstances may require", and we therefore think that the time allowed is capable of being enlarged under the provisions of Rule 361, even though the period originally fixed may have expired.

Section 21 of the Advocates Ordinance No. 32/1938 provides that —

> "No advocate and no person permitted to practise before the Moslem Religious Courts shall appear before any Civil Court or any Moslem Religious Court, as the case may be, or any Execution Officer, unless he is the holder of a power of attorney authorising him to appear in such proceedings.
>
> Provided that in proceedings before the Supreme Court sitting as a Court of Admiralty the Court may, if it deems fit, allow an advocate to appear notwithstanding that he is not the holder of such power of attorney."

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And Rule 24 of the Civil Procedure Rules provides that —

> "Any application to or appearance or act in any Court required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by an advocate duly appointed to act on his behalf: Provided that any such appearance shall, if the Court or Judge so directs, be made by the party in person.
>
> Where corporations are concerned a duly authorised officer of the corporation may do on behalf of the corporation all things which the corporation itself could do under these rules if it were an individual."

There is, we think, no doubt that Dr. Gross was precluded, by the terms of Rule 24, from filing the application for leave to appear and defend, but that application was, in fact, accepted and put before the Court. It is also clear that Dr. Gross could not, on the strength of an invalid power of attorney, even apply for an extension of time. He could only do so on the strength of a valid power of attorney, which he might or might not have been able to get before the ten days had expired. The circumstances were unusual and difficult, and although we must give effect to the law if it is clear that it provides for no way out of the difficulty we think that it would be unfortunate if no relief could be given in a case like the present.

We have been referred to the English case of Ancona v. Marks, Vol. 126 Revised Reports, p. 646. The following passage appears in the judgment of Pollock C.B. at page 649 —

> "We are all of opinion that the rule ought to be discharged. There is no doubt that the plaintiff, at the time the action was brought, did not know that his name was used, but the question is whether, the securities having been delivered to Greville and Tucker (who on a previous occasion had the plaintiff's permission to use his name) for the purpose of the action being brought on them in the plaintiff's name, and the action having been so brought, and the plaintiff having subsequently ratified the proceedings, he is entitled to retain the verdict. I think he is. In my opinion it makes no difference whether the ratification is before action, or after."

So it is clear that in England a plaintiff can ratify proceedings which had been started without his knowledge. Of course the position in England differs from the position in this country since in England an advocate need not have a power of attorney.

We think that the proper course for us to follow is to consider the position as it was on 23.7.46 when Dr. Gross held what purported to be a ratification of the power of attorney which had been given by Mr. Cohen. The Court then had before it an application which had been accepted by the Court office, and it had before it an advocate who held what purported to be a good power of attorney.

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We think that in these circumstances the Court should have held that the ratification (if good) related back to the time when the application for leave to appear and defend was filed.

We accordingly allow this appeal, and remit the case to the lower Court for deciding whether the ratification was or was not valid, and for further hearing on the merits if that point is decided in the appellant's favour.

The costs of this appeal will follow the event. These costs will be on the lower scale with LP.10 advocate's attendance fees.

High Court No. 31 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: de Comarmond J. and Curry Ag. J.

NOAH WEINBERG. . . . . *Petitioner.*

v

MILITARY COMMANDER, JERUSALEM. . *Respondent.*

1947
18th March

de Comarmond J.
and
Curry Ag. J.

HC 31/47
Weinberg
v
Military Commander, Jerusalem

Curfew — Whether a curfew order infringes Article 83 of the Palestine Order-in-Council, 1922.

In refusing this application for the issue of an order nisi calling upon the Military Commander of Jerusalem to show cause why the curfew order by which part of Jerusalem came under curfew should not be annulled or amended so that petitioner and other Jews residing in Beit Israel Quarter may be enabled to pray and attend in the evenings the service at the synagogue, the High Court,

HELD that the curfew order, in the imposition of which there was nothing illegal, could not be considered as infringing Article 83 of the Palestine Order-in-Council, 1922.

Joseph Weinberg (petitioner's father) for petitioner.

Order: The petitioner's complaint on behalf of his son is that the latter cannot attend the synagogue during curfew hours. Curfew has been imposed for the maintenance of public order, and we can find nothing illegal in the imposition of curfew. Such a measure inevitably causes inconvenience in many respects but by no stretch of imagination could it be considered that a curfew order infringes article 83 of the Order-in-Council of 1922.

The pitition is dismissed.

Civil Appeal No. 183 of 1945.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice, Edwards J. and de Comarmond J.

HANAH MENAHEM MESSA. . . . . *Appellant.*

v

1. MOSES BENIN MENAHEM MESSA,
2. MAURICE BENIN. . . . . *Respondents.*

1947
19th March

FitzGerald C. J.
Edwards J.
and
de Comarmond J.

CA 183/45
Messa
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Personal status — Succession — Order declaring the succession to deceased person — Time within which to challenge such order — Succession Rules, Rule 25(1).

On 26th January, 1935, an order was made by the District Court of Jaffa in Estate Case No. 45/32, whereby Moses Benin Menahem Messa was declared the sole heir to all the property, movable and immovable, of one Benin Menahem Messa who at the time of his death left three wives, two daughters and his son Moses. The Court applied the personal law of the deceased, i.e. the Jewish law under which law the Court stated the son was entitled to the whole estate. In December, 1944, Hanah Benin Menahem Messa, a daughter of the deceased, applied for an alteration of the above order. The District Court, constituted of the Acting Relieving President thereof (Acting Judge Rogers), dismissed the application on the 4th May, 1945. Hanah appealed. The sole question was whether after this long period Hanah could apply for alteration of the order declaring the succession to the deceased and it was submitted that under Rule 25(1) of the Succession Rules she could do so.

In dismissing the appeal by majority (de Comarmond J. dissenting), the Court of Civil Appeal,

HELD that an application for an alteration of an order declaring the succession to a deceased person made under Rule 25(1) of the Succession Rules must be made before the order declaring the succession has been carried into effect and the case file closed in so far as the Courts are concerned. Accordingly a person cannot under Rule 25(1) of the Succession Rules come to Court years after the settlement of property has been effected and vested interests have been created and demand the setting aside of the settlement and a declaration that interests enjoyed for years under the authority of a judgment should be declared null and void; Rule 25(1) does not create a right to reopen the whole case de novo.

E.D. Goitein and A. Wittkowski for appellant.

M. Eliash for respondents.

FitzGerald C.J: This case presents some unique features. Twelve years ago, in 1935, the President of the District Court at Jaffa sitting in a matter of Probate, delivered a considered judgment which dealt with complex questions of the law of

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succession. In the event he declared the respondent (Moses Benin Menahem Messa) the sole heir to all the property, movable and immovable, of one Benin Menahem Messa, a member of the Jewish faith and a British subject, domiciled at Aden.

The question came before the Jaffa Court again ten years later, the presiding Judge this time being an Acting Relieving President, Judge Rogers. His judgment, as I interpret it, purported in fact to review the judgment of Judge Copland; in other words, he treated himself as a Court of Appeal from it. He agreed with Judge Copland and he refused to alter the declaration of succession.

It is against Judge Copland's declaration, and Judge Rogers' confirmation of it, that an appeal is now made in this Court, — twelve years, be it remarked, after the delivery of Judge Copland's judgment.

This appeal is possible, says Mr. Goitein, under Rule 25(1) of the Succession Rules. If his interpretation of Rule 25(1) is correct, it would mean that there is nothing to prevent a person, except of course the ordinary prescriptive law, from coming to Court years after the settlement of property has been effected and vested interests have been created, and demanding the setting aside of the settlement and a declaration that interests enjoyed for years under the authority of a judgment should be declared null and void. I am unable to believe that Rule 25(1) of the Succession Rules ever contemplated any such state of affairs. The Rule reads:

> "After an order declaring the succession to a deceased person has been made, any person may apply for an alteration of the order."

I interpret this as meaning before the order has been carried into effect and the case file closed, in so far as the Courts are concerned. It does not, in my opinion, create a right to re-open the whole case de novo.

I ask myself the question — What does Rule 25(1) of the Succession Rules purport to do? It seems to me that it purports to grant nothing more than an extension of the legal right given by Rules 20 to 24, that is, a legal right to make an application for a declaration of succession. In my opinion the right can only exist so long as the question of succession can be said to be "lis pendens", so long as the property, as it were, is in the melting pot awaiting division between the heirs. The right must cease some time, or there would be no finality in succession. In my view the right ceases when practical effect has been given to an order of succession declared by a

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Court, that is, when the property the subject-matter of succession, has been finally handed over to the person whom the Court declared a successor.

I therefore agree with Edwards J. that the learned Relieving President, Judge Rogers, should have dismissed the application out of hand, and should not have dealt with the merits.

Edwards J: (Written on 4.2.47) On 26th January, 1935, the then President of the District Court of Jaffa (Judge Copland as he then was) declared one Moses Benin Menahem Messa to be the sole heir to certain property movable and immovable of the deceased Benin Menahem Messa, and declared Moses to be entitled to be registered as sole owner in the Land Registry. In 1945, that is to say more than ten years after Judge Copland had made his order, Hanah Menahem Messa, a daughter of the testator, applied to the District Court of Jaffa under Rule 25(1) of the Succession Rules for an alteration of the order of 26th January, 1935. The learned Acting Relieving President (Judge Rogers) dealt with the application on its merits and came to the same conclusion as Judge Copland had done, and on 4th May, 1945, dismissed the application for an alteration of the order of 26th January, 1935.

The question that at once occurs to one's mind is whether, after a lapse of over ten years after an order has been made declaring the succession to a deceased person, a person claiming to have an interest in the estate can apply under Rule 25(1). The words in Rule 25(1) are, "after an order has been made". Does this mean "at any time after an order has been made"? It cannot be suggested that Judge Rogers purported to act as an appellate Court from Judge Copland. There is no suggestion in the present case that new facts had come to light after Judge Copland had made his order. The only suggestion that can be made in favour of the present appellant is that in January, 1935, and possibly for some time afterwards, she was ignorant of the terms of the order that Judge Copland had made. Even assuming that she was thus ignorant, is it reasonable to interpret Rule 25(1) in such a way as to enable a person more than ten years later to try to upset arrangements made consequent on the order of 26th January, 1935? In my view, the answer must be in the negative. Even supposing the present appellant had not been properly cited as a party to the application which resulted in the order of 26th January, 1935, one would have expected her to make due inquiries at the Registry of the District Court of Jaffa at any time after January, 1935, to see what was happening to the estate.

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In my view, it would be an abuse of process to enable a person to make use of Rule 25(1) over ten years after an order declaring succession has been made. I consider that the learned Relieving President (Judge Rogers) should have dismissed the application out of hand, and should not have dealt with the merits.

In the result I would dismiss this appeal.

de Comarmond J: The appellant, Hanah Menahem Messa, filed a petition in the District Court, Jaffa, in December, 1944, praying for the alteration of an order made by the same Court on the 26th January, 1935, in the matter of the succession of Benin Menahem Messa, her father.

The petition was dismissed on the 4th May, 1945, by the learned R/President, Judge Rogers, and the present appeal was then lodged.

When the appeal was heard, Mr. Eliash for the respondents pointed out that Hanah's petition was made under Rule 25(1) of the Succession Rules, which reads as follows: "After an order declaring succession to a deceased person has been made, any person claiming to have an interest in the estate of the deceased may apply for the alteration of the order." Mr. Eliash submitted that in 1944 Hanah could not apply under Rule 25(1) for a variation of an order made in January, 1935.

Curiously enough, this point was not raised before the learned Relieving President, although in my opinion it is of importance in the circumstances of this case.

My learned brothers have reached the conclusion that Mr. Eliash's contention is correct and have upheld it. For my part I do not feel satisfied that there are enough data to enable me to reach a similar conclusion.

Mr. Goitein, for the appellant (who was the applicant in the Court below), has drawn attention to certain features of the earlier litigation which, according to his submission, shows that his client was not a party to the proceedings which resulted in the order made by Judge Copland in January, 1935. Mr. Goitein told us that the appellant's stepmother, Miriam, had been the first person to apply in 1932 for the appointment of an administrator, and that she (the appellant) signified her agreement to that application. Subsequently, however, Miriam withdrew or abandoned her application, and according to Mr. Goitein his client then lost touch with the matter.

It would seem that, although Miriam had abandoned her application for the appointment of an administrator, the proceedings were in some way kept going by or on behalf of deceased's son (Moses) and ultimately, in 1935, an order was made to the effect that the said son was the sole heir to all the property left by the deceased.

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I consider that it would be advisable to scrutinize the proceedings which led up to the making of the order in 1935, so as to find out what part, if any, the present appellant played in them. It would also appear necessary to find out whether the rescission or variation of the order made in 1935 could possibly have any practical effect with regard to the property left by the deceased.

Were this appeal to be dismissed on the ground that the learned Relieving President's decision is correct, it would not matter whether or not appellant's application was made in time. But if, as seems advisable and necessary, the first question to be decided is whether in the circumstances of this case the appellant was entitled to rely on Rule 25(1), I am of opinion that all the facts should be investigated on the lines indicated above.

I therefore consider that the better course in this case would be to remit it back to the Court below.

Civil Appeal No. 214 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J., Frumkin J. and Abdulhadi J.

MAMOUR AWQAF, JAFFA. . . . . *Appellant.*

v

1. HAJ ALI KASSAS.
2. ABDUL SALAM ARAFAT NAHHAS. . . *Respondents.*

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25th March

de Comarmond J.
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CA 214/46
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Third party opposition — Action for eviction for non-payment of rent — Plaintiff's title not questioned although in defence it was averred that the leased property was taken on lease from plaintiff in his capacity as mutawalli of waqf — Judgment entered for plaintiff — Second action in same court by another person for setting aside of previous judgment — Plaintiff in this second action relied on Rule 285 of the Magistrates' Courts Procedure Rules, 1940, and Articles 53 and 54 of the Ottoman Magistrates law — Judgment given setting aside previous judgment — District Court, on appeal, set aside judgment of Magistrate on ground that Articles 53 and 54 of the Ottoman Magistrates Law were no more in force and that the words "competent Court" in Rule 285 of the Magistrates' Courts Procedure Rules, 1940, meant the Court competent to deal with the right which the third party claimed — Whether District Court

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correct in its view — Ottoman Magistrates Law, Article 53 and 54 — Magistrates' Courts Procedure Rules, 1940, Rule 285 — Magistrates' Courts Jurisdiction Ordinance, 1939, Section 4.

Civil Case No. 1240/42 of the Magistrate's Court of Jaffa was brought by Kassas for the eviction of Nahhas from certain leased property for non-payment of the rent. The defendant averred in his statement of defence that he had taken the property on lease from the plaintiff in his capacity as mutawalli of a certain waqf. At the hearing of the action defendant admitted his failure to pay the rent and judgment for his eviction was given. Civil Case No. 1558/42 was brought before the same Magistrate's Court by the Mamour Awqaf of Jaffa against both the plaintiff and the defendant to Civil Case No. 1240/42 whereby the Mamour Awqaf sought to have the judgment in Civil Case No. 1240/42 set aside on the ground that it was prejudicial to the waqf. The Mamour Awqaf relied in his action on Rule 285 of the Magistrates' Courts Procedure Rules, 1940, and at the hearing he further relied on Articles 53 and 54 of the Ottoman Magistrates Law. The Magistrate gave judgment setting aside the previous one obtained by Kassas against Nahhas. Kassas appealed to the District Court of Jaffa (Civil Appeal No. 89/44) and that Court, constituted of the President thereof (Judge Hubbard), allowed the appeal and set aside the judgment given in Civil Case No. 1558/42 and restored the judgment given in Civil Case No. 1240/42, the view it took was that the words "competent Court" in Rule 285 of the Magistrates' Courts Procedure Rules, 1940, meant the Court competent to deal with the right which such person claimed, which in this present case was the Land Court, and that Articles 53 and 54 of the Ottoman Magistrates Law were clearly inconsistent with Rule 285 of the Magistrates' Courts Procedure Rules, 1940, and were therefore repealed by Section 28(2) of the Magistrates' Courts Jurisdiction Ordinance, 1939. The Mamour Awqaf appealed by leave.

In allowing the appeal, setting aside the judgment of the District Court and restoring the judgment of the Magistrate, the Court of Civil Appeal,

HELD (1) that Rule 285 of the Magistrates' Court Procedure Rules, 1940, coupled with Section 28(2) of the Magistrates' Courts Jurisdiction Ordinance, 1939, made it clear that Articles 53 and 54 of the Ottoman Magistrates Law were no longer in force so far as principal third party opposition was concerned.

(2) that the words "competent Court" in Rule 285 of the Magistrates' Courts Procedure Rules, 1940, cannot be interpreted as referring exclusively to the Magistrate's Court which gave the judgment against which an opposition is lodged. Accordingly, having regard to the fact that the action brought by the appellant (the Mamour Awqaf) was merely to set aside the judgment of eviction, and to the fact that the action could not succeed unless the Magistrate was satisfied that the waqf had at least a colourable title to the property which was the subject matter of the judgment of eviction and which the appellant sought to have set aside, and to the fact that there was no dispute that the value of the property did not exceed LP. 250, the question of setting aside the judgment of eviction was within the Magistrate's jurisdiction by virtue of Section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1939, and the District Court was not right in holding that the appellant (the Mamour Awqaf) should have gone to the Land Court.

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Explained: CA 191/41.

Referred to: CA 270/42.
CA 84/46, 13 P.L.R. 576.

Fayez Nazzal for appellant.

No appearance by respondents.

de Comarmond J: This is an appeal, by leave, from a decision given by the District Court of Jaffa in its appellate capacity. The sequence of litigation is as follows: In Civil Case 1240/42 between El Haj Ali el Kassas and Abdul Salam Arafat Nahhas, the Jaffa Magistrate's Court ordered, on the 16th September, 1942, the eviction of the latter from a certain property; then the Mamour Awqaf of Jaffa, in his capacity as acting Mutawalli, relying on Rule 285 of the Magistrates' Court Procedure Rules, 1940, entered an action (No. 1558/42) before the same Magistrate's Court seeking to set aside the judgment in Case 1240/42 on the ground that it was prejudicial to the Waqf el Zakari el Jabali. Judgment in Case 1558/42 was given in plaintiff's favour on the 8th May, 1944. On appeal to the District Court, the learned President set aside the Magistrate's judgment of 8th May, 1944, and restored the judgment of the 16th September, 1942, and the learned President subsequently granted leave to appeal to the Supreme Court. At the hearing before us the respondents left default.

It is necessary to set out briefly a few facts before examining the decision now under appeal.

In the first case before the Magistrate's Court of Jaffa, i.e. Civil Case 1240/42, the present first respondent, El Haj Ali el Kassas, was the plaintiff, and Abdul Salam Nahhas, who is the present second respondent, was the defendant. The plaintiff claimed the eviction of the defendant for non-payment of rent. The defendant averred in his statement of defence that when he had taken the property on lease from Kassas, the latter was acting in his capacity of Mutawalli of the Zakari el Jabali Waqf, and that Kassas, having been subsequently discharged from his functions, had no right to bring the action. At the hearing, however, the defendant merely admitted his failure to pay rent, and did not further question the plaintiff's right to sue. The plaintiff therefore obtained judgment on the 16th September, 1942.

Case No. 1558/42 was then entered by the present appellant, in his capacity of acting Mutawalli of the aforesaid Waqf, against the two parties in Case 1240/42. This second action was in the nature of a principal third party opposition, and its object was to set aside the judgment of the 16th September, 1942,

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which obviously implied that Haj Ali el Kassas was the owner of the property.

The procedure of principal third party opposition, which is set out in Articles 53 and 54 of the Ottoman Magistrates' Law, was designed to enable a person who had not been a party to an action to have the judgment set aside or modified if he established that it was prejudicial to his rights.

Fayez Eff. Nazzal, who appeared before us for the appellant, submitted that Articles 53 and 54 had never been expressly repealed and were still in force. On this point the learned President has stated his view that Rule 285 of the Magistrates' Courts Procedure Rules 1940, must be construed as repealing the aforementioned two Articles of the Ottoman Magistrates' Law.

Fayez Eff. Nazzal was eager to maintain the authority of Articles 53 and 54 of the Ottoman Law, because the last mentioned Article provides that a principal third party opposition is made to the Magistrate who rendered the judgment against which opposition is made, whereas the learned President held that under Rule 285 of the Magistrates' Courts Procedure Rules, 1940, the action in the nature of an opposition must be entered before the Court which is competent to try the issue raised by the opposer.

Rule 285 of the Magistrates' Court Procedure Rules reads as follows:

> "Where, under the law heretofore in force, any person would be entitled to claim or to enforce any right by way of a third party opposition to an order of any court, such person shall be entitled to claim or to enforce such right by action in the competent court."

I am of opinion that Rule 285, coupled with Section 28(2) of the Magistrstes' Courts Jurisdiction Ordinance, make it clear that Articles 53 and 54 of the Ottoman Magistrates' Law are no longer in force so far as principal third party opposition is concerned.

I am also of opinion that the words "competent Court" occurring at the end of Rule 285 cannot in that context be interpreted as referring exclusively to the Magistrate's Court which gave the judgment against which an opposition is lodged. It may be that when Rule 285 was drafted, sufficient attention was not paid to the object and meaning of third party opposition, but effect must be given to the rule as it stands.

I should perhaps mention that Fayez Eff. Nazzal called our attention to Civil Appeal 191/41 (1941) Supreme Court Judgments, Vol. II, page 536, where it was stated that a party who applies by way of third party opposition under Rule 285

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had to rely on Article 53 of the Ottoman Magistrates' Law. My view is that that statement does not mean more than that the said Article 53 supplies the background which helps to explain Rule 285. Neither does Civil Appeal 270/42 (1943) Annotated Law Reports 88, help the appellant's contention. Another case quoted by Fayez Eff. is Civil Appeal 84/46, which however is against him because it approves the principle that under Rule 362 of the Civil Procedure Rules, 1938, (which is the exact equivalent of the aforementioned Rule 285) an action was properly entered before the Land Court of Nablus by a person who "opposed" a judgment of the District Court in a civil case and sought to establish his ownership of a certain piece of land.

It now remains to examine whether the learned President was right in holding that the present appellant should have gone to the Land Court, because his "opposition" was based on the averment that the land from which the second respondent had been evicted belonged to the Waqf and not to the first respondent, whereas the latter resisted this averment of ownership and claimed that he was the owner.

I am of opinion that the learned President failed to give due importance to the fact that the action brought by the present appellant (in his representative capacity) was merely to set aside the judgment of eviction. Admittedly, the said action could not succeed unless the Magistrate were satisfied that the Waqf had at least a colourable title to the land; but I consider that such a question is within the Magistrate's jurisdiction by virtue of Section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1939, where the value of the land does not exceed LP. 250. As rightly pointed out by Fayez Eff., the parties agreed that the value was below LP. 250 (see page 9 of typed record in Civil Case 1558/42, which relates to the hearing of 21.10.43).

I am therefore of opinion that, in the present instance, the action could be entertained and decided by the Magistrate, and I therefore allow the appeal, reverse the decision of the District Court, and restore the decision given by the Magistrate in Civil Case No. 1558/42 of the Jaffa Magistrate's Court.

The appellant will have the costs in this Court and in the Court below. Costs of this appeal to be on the lower scale together with LP. 5 advocate's attendance fee, the said costs to be paid by the present first respondent.

Frumkin J: I concur.

Abdulhadi J: I concur.

Privy Council Leave Application No. 4 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Frumkin J.

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and
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Salzberger
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Salzberger

ERNESTINE SALZBERGER. . . . . *Applicant.*

v

MACCABI SALZBERGER. . . . . *Respondent.*

Privy Council — Application for leave to appeal to the Privy Council the judgment of the Supreme Court — Supreme Court judgment upheld judgment of District Court referring to Special Tribunal question of whether the probate of a will made in civil form by a Palestinian and a member of the Jewish Community is one of personal status within exclusive jurisdiction of the Rabbinical Court — Grant of leave to appeal under Article 3(b) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924.

An application for the probate of a will made in civil form by a Palestinian and a member of the Jewish Community was made to the District Court of Jerusalem. The application was opposed on the ground that the District Court had no jurisdiction to confirm the will since the deceased was a Palestinian and a member of the Jewish Community. The question therefore arose whether or not the case was one of personal status within the exclusive jurisdiction of the Rabbinical Court, and the District Court referred the matter to the Special Tribunal. The applicant appealed the order of the District Court (Civil Appeal No. 335/46). The Supreme Court, for the reasons given by it in Civil Appeal 70/46, 14 P.L.R. 9, in which the same matter arose, upheld the view of the District Court. The appellant applied for leave to appeal the judgment of the Supreme Court to the Privy Council. The application was resisted by the respondent on two grounds, the first was that the judgment was not final, and the second was that the discretion under Article 3(b) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, should not be exercised.

In granting the application for leave to appeal, the Court of Civil Appeal,

HELD that inasmuch as the point involved, namely whether a District Court has jurisdiction to confirm a will made in civil form by a Palestinian and a member of the Jewish Community or whether the confirmation of such a will is within the exclusive jurisdiction of the Rabbinical Court, is of great importance to the Jewish Community as a whole, the matter was one it was fit and proper to be submitted to His Majesty in Council for a decision.

S.T. Cohen for applicant.

M. Scharf for respondent.

Order: This application for leave to appeal to the Privy Council is resisted by the respondent.

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The applicant avers that the amount in dispute exceeds £500 and, in the alternative, that the question involved being one of great general or public importance or otherwise, it ought to be submitted to H.M. in Council for decision.

Mr. Scharf, for the respondent, has submitted that there is no appeal as of right because there is no indication that the legatee (i.e. the applicant) would ever receive an amount exceeding £500. Mr. Scharf's point is that the applicant should have established the value of the estate and shown that the will would have practical effect.

Mr. Scharf's other objection is that the judgment is not a final one and that, therefore, no appeal as of right lies.

This second objection is justified and I do not consider that an appeal lies as of right. It is, therefore, unnecessary to consider the question of value.

Mr. Scharf also submitted that discretion under Art. 3(b) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, should not be exercised because the decision is merely one given in pursuance of Art. 55 of the Palestine Order-in-Council of 1922 referring the matter to the Special Tribunal.

I am not prepared to accept Mr. Scharf's last-mentioned submission. Mr. Cohen, for the applicant, has called attention to the judgment in C.A. 70/46 quoted by the learned Judges who decided C.A. 335/46. C.A. 70/46 itself reviews two previous decisions, namely C.A. 106/40 and C.A. 131/42 and it would be idle to deny that the point is complicated and is of great importance to the Jewish community as a whole. Put shortly, Mr. Cohen's submission is that when a will in civil form has been made by a Palestinian member of the Jewish community the civil court has jurisdiction and there is no need or justification for a reference to the Special Tribunal.

Being given that under Art. 3(b) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, discretion may be exercised even where the judgment is an interlocutory one, I have reached the conclusion that it is fit and proper to grant leave to appeal upon conditions which will be laid down after hearing the parties.

Civil Appeal No. 113 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Curry Ag. J. and Hubbard Ag. J.

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and
Hubbard Ag. J.

CA 113/46
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v
Sharif

ABDUL HAFEZ ABU AWAD SHAHIN. . . *Appellant.*

v

AHMAD MUHAMMAD SHARIF. . . . . *Respondent.*

Contract — Contract of sale of land — Clause in contract enabling purchaser to assign contract without consent of vendor — Assignment of contract — Contract null and void by reason of provisions of Section 11 of the Land Transfer Ordinance — Whether assignee entitled to recover from vendor the purchase money paid under the contract.

Jidawi purchased from Shahin three pieces of land. The contract between the parties contained provision enabling the purchaser to assign all his rights and obligations thereunder without the consent of the vendor. Jidawi assigned the contract to Sharif. Shahin apparently refused to effect the transfer to Sharif and the latter commenced proceedings in the District Court of Jerusalem (Civil Case No. 78/44) claiming the return of the purchase price he paid to his assignor. The District Court (Judge Hasna) gave judgment for Sharif. Shahin, the vendor, appealed. On appeal, the point was taken that the contract was an out and out sale and therefore void, which point was not raised before the trial Court, and if the contract were void, the argument proceeded, the assignor transferred nothing to the assignee.

In allowing the appeal, the Court of Civil Appeal,

HELD that the contract entered into between Jidawi and Shahin, as purchaser and vendor respectively, was a contract of sale and not an agreement for sale, and therefore null and void by reason of the provisions of Section 11 of the Land Transfer Ordinance, and as the contract was void, the assignor transferred nothing to the assignee and the assignee could not recover the purchase money he paid to his assignor from the vendor, because the right to recover the purchase money is not given to the assignor by the contract but is a statutory right given by Section 11 of the Land Transfer Ordinance which right had not been transferred by the assignment.

Followed: CA 104/45, 12 P.L.R. 382.

E. D. Goitein for appellant.

Theodore Mogannam for respondent.

Judgment: The Plaintiff (Respondent) sued the Defendant (Appellant) in the District Court for the sum of LP.200 allegedly paid under an agreement of the 4th of November, 1935, whereby it was alleged the Defendant undertook to sell to one Mohammad Jidawi Arafi 3 pieces of land for the price of LP.200. The document bears an endorsement whereby Mohammad Jidawi Arafi transferred all his rights under the

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agreement to the Plaintiff. The action was fought in the trial court upon the issue as to whether or not the document of sale had in fact been signed by the defendant, the present appellant. The trial Court held that the appellant had signed the document and gave judgment in favour of the plaintiff. On appeal the first point taken by Mr. Goitein on behalf of the appellant is that the document is an out and out sale and not an agreement to sell, and therefore void, as the necessary consent of the Director of Lands had not been obtained to the disposition. Although this point was not raised in the Court below or in the written grounds of appeal, we hold, following the judgment in C.A. 104/45, 12 P.L.R. p. 382, that the question as to the validity of a contract is a point the Court ought to take of its own motion even if not raised by the parties. It is often not easy to determine whether a document is in fact a contract for sale or an agreement for sale. This document contains some clauses which might leave a doubt in one's mind. However, we think that the reference in clause 1 to the vendor having sold finally and the fact that nothing remains to the vendor in the whole of the lands; the reference in clause 11 to the undertaking by the purchaser to accept the land sold at any time, and again in clause 18 the admission of the vendor that he has no right after the signature of the agreement to sell the said lands and finally the fact that the whole of the purchase money was paid on the signing of the document, indicate clearly that the contract was one of sale and not an agreement for sale. We perhaps should mention that the purchaser drew up the document and that the vendor is entirely illiterate, and therefore if there is any doubt in the construction of the document the vendor should be given the benefit thereof.

Although every disposition to which the consent required by section 4 of the Land Transfer Ordinance has not been obtained is null and void, nevertheless section 11 provides that any person who has paid money in respect of such a disposition may recover that money by action in Court.

It is clear, therefore, that the purchaser would have a right of action for the recovery of the money paid by him to the vendor. The point that arises, however, is whether the Respondent who is the assignee from the purchaser also has that right. Clause 21 of the contract provides that the purchaser has the right to assign the agreement without reference to the vendor. There is an endorsement on the document to the effect that by virtue of clause 21 the purchaser has assigned the contract and all the contents thereof to the Respondent. It is clear that the contract being void the assignor transfers

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nothing to the assignee. Whilst it is true an assignee stands in the shoes of an assignor, the assignor's right to recover the purchase money is not given to him by the contract but it is a statutory right which has not been transferred by the assignment. For these reasons this appeal must succeed. In view of the fact that this point was not raised before the trial Court and the appellant has therefore caused unnecessary litigation, appellant is entitled to costs in the Court below but each side will bear its own costs in respect of this appeal.

Civil Appeal No. 278 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice, Frumkin J. and Abdulhadi J.

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FitzGerald C. J.
Frumkin J.
and
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AHMAD MUHAMMAD SHAYEB. . . . . *Appellant.*

v

HUSEIN ISMAIL SAKAJI. . . . . *Respondent.*

Immovable property — Statutory tenant — Execution — Effect of a decision declaring certain person a statutory tenant of certain shares in lands held in common — Execution of judgment ordering dispossession of a statutory tenant of certain shares held in joint ownership in which no cultivation rights exist — Cultivators (Protection) Ordinance — Ottoman Magistrates Law, Article 26.

Sakaji held as a tenant certain lands owned in common by several individuals. One of the co-owners wished to evict Sakaji from the lands in his possession. Thereupon Sakaji applied to be declared a statutory tenant, and the Special Commission found him to be statutory tenant. The other co-owners were not parties to the proceedings between Sakaji and that co-owner before the Special Commission. Those other co-owners sold their shares to Shayeb. The latter asked Sakaji to hand over possession of the shares he purchased but Sakaji refused so to do. Thereafter Shayeb commenced proceedings in the Magistrate's Court of Beisan (Civil Case No. 747/44) for the recovery of possession of his shares. The Magistrate ordered the recovery of possession, and as to the decision of the Special Commission, the Magistrate took the view that that decision did not bar him from ordering recovery of possession since the decision could not have dealt with the shares in claim as neither the plaintiff nor his predecessors in title were parties to the proceedings before the Special Commission. Sakaji appealed to the District Court of Haifa, (Civil Appeal No. 87/46) and that Court (Judge Baradey) allowed the appeal and dismissed the action, the view it took was that a decision declaring a person statutory tenant as against a co-owner must cover the whole holding and cannot be confined to the shares of that co-owner to the exclusion of the shares of the rest of the co-owners. Shayeb appealed to the Supreme Court by leave.

In allowing the appeal, setting aside the judgment of the District Court and confirming the judgment of the Magistrate, the Court of Civil Appeal,

HELD (1) that the decision of the Special Commission declaring Sakaji statutory tenant within the meaning of the Cultivators (Protection) Ordinance of the shares of certain of the co-owners of the land in respect of which cultivation rights were claimed by him could not be taken as declaring him statutory tenant of the shares of the rest of the co-owners who were not parties to the proceedings before the Special Commission.

(2) that a judgment against a statutory tenant of certain shares in lands owned in common ordering his dispossession of the shares in respect of which no cultivation rights exist is capable of execution against that statutory tenant, inasmuch as the judgment in question enables the person in whose favour it was given to enjoy possession of masha' shares jointly with the other co-owners or with their statutory tenant or tenants.

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Muhammad Tewfiq Yehya for appellant.

Kamal Dajani for respondent.

Judgment: This is an appeal from the judgment of the District Court of Haifa, dated 21st July, 1946, which, sitting in its appellate capacity, set aside the judgment of the Magistrate's Court of Haifa and dismissed the appellant's action filed by him against the respondent with a claim for dispossession of the latter from his masha' shares in the lands, the subject-matter of the claim.

The facts of this case are shortly as follows. The appellant filed an action in the Magistrate's Court of Haifa against the respondent asking for the dispossession of the respondent from certain shares in the lands set out in his statement of claim. At the hearing the respondent produced to the Magistrate's Court a decision, dated 13th April, 1938, given by a Special Commission appointed to determine claims of persons who alleged to be statutory tenants, and relying on this decision he stated in evidence that he was a statutory tenant of the land. In his judgment the Magistrate held that the decision of the Special Commission does not bar him from ordering dispossession, since the decision relates to lands bought by other persons; and in the result the Court dispossessed him from the shares of the appellant in the lands in issue.

The defendant (the present respondent), having been dispossessed, appealed against the judgment of the Magistrate's Court to the District Court, Haifa. As a result of the pleadings before it, the District Court, on 21.7.46, set aside the judgment of the Magistrate's Court and dismissed the action of the plaintiff (the present appellant). In its judgment the Court said that "the decision declaring any person to be a statutory tenant of a

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holding owned in common covers the whole land and is not confined exclusively to certain masha' shares owned by a co-owner."

The counsel for plaintiff appealed to this Court against the judgment of the District Court of Haifa in its appellate capacity and raised before us several points, most important of which — a point the consideration of which is sufficient for the purposes of this appeal — was that the District Court of Haifa, in its appellate capacity, erred in holding that the respondent is a statutory tenant of the shares claimed, and in basing itself on the decision of the Special Commission dated 13.4.38, because the decision of the Special Commission was the result of a dispute which took place between the respondent and other persons in whose presence the decision was made and in respect of lands owned by those persons, the decision does not cover the shares of his client who was not a party to the litigation before the Commission.

We agree with the counsel for the appellant on this point. We find that the District Court erred in its decision with regard thereto, since the decision of the Special Commission is not clear as to whether it covers the shares of the appellant and it is also unreasonable that it should cover these shares inasmuch as the persons who owned the shares of the appellant at the date of the decision of the Special Commission and who later sold to him their shares were not a party to the dispute before it. We cannot assume that the Special Commission would decide that the respondent is a statutory tenant of the shares of the appellant without a dispute arising between the respondent and the vendors of the appellant on this subject and without calling the latter (the vendors of the appellant) to appear before it for the purpose of defending themselves and adducing their evidence in regard to the dispute. Our finding on this point is in harmony with the finding of fact arrived at by the Magistrate's Court that the decision of the Special Commission relates to land purchased by other persons.

We do not agree with the contention of the respondent relating to the non-possibility of executing the judgment of dispossession from common shares, for this judgment amounts to enabling the appellant to enjoy possession of masha' shares jointly with the other co-owners or with their statutory tenants; and this is in conformity with the provisions of Article 26 of the Ottoman Magistrates Law.

For these reasons the appeal is allowed, the judgment of the District Court is set aside and that of the Magistrate's Court confirmed. The appellant will have his costs at LP. 15 inclusive.

High Court No. 102 of 1946.

In the Supreme Court sitting as a High Court of Justice.
Before: Curry Ag. J., Frumkin J. and Abdulhadi J.

AHARON YOHANNANOFF. . . . . *Petitioner.*

v

COMMISSIONER FOR MIGRATION AND STATISTICS. . . . . *Respondent.*

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HC 102/46
Yohannanoff
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Commissioner for Migration and Statistics

Palestinian citizenship — Minor — Status of a minor habitually resident in Palestine upon the 1st August, 1925, is governed by that of his father — Palestinian Citizenship Order-in-Council, 1925, Articles 1 and 6.

For the purpose of Palestinian citizenship, the status of a minor, i.e. a person under 18 years calculated according of the Gregorian Calendar, who was habitually resident in Palestine upon the 1st day of August, 1925, is governed by that of his father, and such minor, although he had acquired Turkish nationality during the Turkish régime, does not become Palestinian citizen by virtue of Article 1(1) of the Palestinian Citizenship Order-in-Council, 1925, unless his father was a Turkish subject, because by Article 6 of the Palestinian Citizenship Order-in Council, 1925, the status of a child who has not attained the age of majority is governed by that of his father. Accordingly any Turkish subject who was not 18 years of age on the 1st day of August, 1925, the years calculated according to the Gregorian Calendar, although he was habitually resident in Palestine upon the 1st day of August, 1925, does not become Palestinian citizen by virtue of Article 1(1) of the Palestinian Citizenship Order-in-Council, 1925, unless the father of such person was a Turkish subject.

Approved: HC 58/37.

The relevant facts appear from the order of the Court.

M. Eliash for petitioner.

Crown Counsel (J. Wicks) for respondent.

Curry, Ag. J: The petitioner in this matter was born in Jerusalem in 1911. His father was a Russian subject and his mother who was born in Palestine was Russian by marriage. Apparently in 1914 the petitioner's father went to Egypt as a result of an order banning Russian subjects from this country. In July 1915 petitioner and his mother were granted Ottoman nationality by the Turkish Government. On the first of August, 1925, petitioner was a person habitually resident in Palestine and on the 29th of June, 1927, his father obtained from the Palestinian Government a certificate of naturalisation. That certificate contained the name of the petitioner as one of his children. On the 20th of November, 1934, petitioner obtained

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from the British Consul in Algiers a Palestinian passport as one naturalised in Palestine under Article 7 of the Palestinian Citizenship Order-in-Council, 1925. On the 20th of August, 1945, petitioner applied to the Commissioner for Migration for a new Palestinian passport as a Palestinian citizen by virtue of Article 1(1) of the Palestinian Citizenship Order-in-Council, 1925. The Commissioner refused the application. The petitioner now applies for an order commanding the Commissioner for Migration to cancel his decision and to issue a Palestinian passport describing him as a Palestinian citizen under Article 1(1) of the aforesaid Order-in-Council in lieu of the passport issued to him in 1934 as a person naturalised in Palestine. Article 1 of the Palestinian Citizenship Order reads as follows:-

> "Turkish subjects habitually resident in the territory of Palestine upon the first day of August, 1925, shall become Palestinian citizens".

Now it is clear that petitioner's father was not a Turkish subject and therefore the father could not become a Palestinian citizen. Article 6 of the Order reads as follows:-

> "For the purpose of Parts I and II of this Order the status of a married woman will be governed by that of her husband and the status of children who have not attained the age of majority by that of their parents".

Article 6 was subsequently amended to provide that the status of a child who had not attained the age of majority was to be governed by that of his father.

The question to be decided by this Court is whether in view of Article 6 the status of the petitioner until attaining the age of majority was Russian, being governed by that of his father, or was Turkish as a result of the "Nefus" issued by the Turkish Government.

It seems to me perfectly clear that by the Palestinian Citizenship Order His Majesty has ordered that so far as this Government is concerned the status of a minor shall be governed by that of its father — no option is given in the matter nor does it recognise any possibility of other nationality for the minor and therefore so far as the said Order is concerned a minor can have no other nationality than that of its father. All acts by other States purporting to grant a minor a nationality different from that of its parents can have no effect in matters arising out of this Order.

In my opinion Article 1 must be read together with Article 6 to the effect that only Turkish subjects habitually resident in Palestine upon the 1st of August, 1925, shall become Palestinian citizens and no minor can be deemed to be a Turkish subject unless his father was one. In this I am supported by H.C. 58/37.

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Apart from this aspect of the case the petitioner in 1934 after he had come of age applied for a passport and was granted one as a person naturalised in Palestine. It would, therefore, appear to me that he cannot now deny that he is in fact a naturalised Palestinian.

The order nisi is accordingly discharged.

Frumkin J.: I agree that the order be discharged on the last ground, namly that the petitioner after becoming of age has accepted a passport as a naturalised subject and cannot after twelve years plead ignorance of the law as to the difference between a passport based on naturalisation and one issued to a Palestinian citizen.

Abdulhadi J.: I concur.

Civil Appeal No. 37 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J., de Comarmond J. and Curry Ag. J.

AMINEH NAMIKA SULTAN,
on behalf of the late
PRINCE MUHAMMAD SALIM. . . . . *Appellant.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

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CA 37/46
Sultan
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Attorney General

Immovable property — Land Settlement proceedings — Yoklama registration — Act of State — Lands registered in Turkish registers in name of Sultan Abdul Hamid II claimed at settlement by Government — Registered owner's heirs not making a claim to those lands — Claim by Government based on two Iradehs and on Article 60 of the Treaty of Lausanne — Order of registration in favour of Government — Action by heir of Sultan under Section 66 of the Land (Settlement of Title) Ordinance in Land Court for rectification of new land register — Whether plaintiff-heir can invoke Section 66 — Yoklama registration sufficient proof of title until overridden or rendered void — Treaty of Lausanne, Article 60.

In Case No. 4/32/Muharraqa, the ownership of all the lands lying within the boundaries of the village of Muharraqa and which were still registered in the name of the late Sultan Abdul Hamid II in the Tabu Register was claimed by villagers. The Supreme Moslem Council, as third party, claimed the lands to be waqf. The Government of Palestine claimed the lands in dispute as well. The Land Settlement Officer found that neither the plaintiffs

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(the villagers) nor the waqf had proved their claims which he dismissed and ordered the registration of the lands in dispute in the name of the High Commissioner in trust for the Government of Palestine. Later Price Muhammad Salim, one of the heirs of the late Sultan Abdul Hamid II, commenced proceedings in the Land Court of Jaffa (Land Case No. 35/35) claiming that he was entitled to a share in the lands which formed the subject matter of the decision in Settlement Case No. 4/32/Muharraqa and asked for the cancellation of the registration of the lands in the name of the High Commissioner in trust for the Government of Palestine and for a declaration that the lands in question formed part of the estate of the late Sultan Abdul Hamid II, and for a consequent registration of the said lands in the names of the Sultan's heirs according to their respective shares. He relied in his action on Section 59 of the Land Settlement Ordinance (corresponding to Section 66 of the Land (Settlement of Title) Ordinance). Prince Muhammad Salim died during the proceedings and the action was continued in the name of his heirs. The President of the Land Court gave judgment in favour of the plaintiffs while the other member of the Court gave judgment dismissing the action, but the two judges decided that as the burden of proof that the registration in the new register was correct was on the Government, which it failed to discharge, the plaintiffs must succeed in their claim. The Government appealed to the Supreme Court (Civil Appeal 237/37). The Court of Appeal allowed the appeal and remitted the case for a new trial and stated that it would be advisable that the Land Court should consist of a President or Relieving President and two Judges of the District Court (see judgment of the Court of Appeal reported in 6 P.L.R. 8). The heirs of the late Prince Muhammad Salim appealed to the Privy Council (Privy Council Appeal No. 21/40). The Judicial Committee of the Privy Council advised His Majesty that the appeal be dismissed and held that the only possible remedy appeared to be the new trial ordered by the Supreme Court (see judgment of the Privy Council reported in 8 P.L.R. 181). The trial of the case was changed from Jaffa to Jerusalem and the case was given Land Case No. 44/45. The Government relied in its claim to the lands in question on two Iradehs, the first of 1908 A.D. issued by the Sultan Abdul Hamid II himself in September of that year, shortly before his dethronement in April, 1909, whereby it was and is alleged that he transferred his ownership of all his properties administered by the Civil List, including the lands in dispute, to the Ottoman State, and the second of 1909, issued by Sultan Abdul Hamid's successor which provided for the taking over by the Ottoman State of various scheduled properties which had been "converted into and annexed to the imperial estates in the name of the ex-Sultan since the date of 1293," and on Article 60 of the Treaty of Lausanne which was incorporated in the statute law of Palestine by the Treaty of Peace (Turkey) Ordinance (Cap. 146), and under which the Ottoman State transferred to its successor states such properties as had been transferred to it from the Civil List by the 1908 and the 1909 Iradehs. The Land Court, constituted of the President thereof (Judge Windham), dismissed the action. The plaintiff appealed.

In dismissing the appeal, the Court of Civil Appeal,

HELD (1) As to Section 66 of the Land (Settlement of Title) Ordinance:

(a) *(Per Shaw J.)* that since the registration in the new register in the name of the High Commissioner in trust for the Government of Palestine of the lands which formed the subject matter of Case No. 4/32/Muharraqa and which were until settlement operations still registered in the name of the late Sultan Abdul

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Hamid II in the Turkish register of lands was effected as a result of the Land Settlement Officer's decision in the above case, the plaintiff-appellant could not call to her aid the provisions of Section 66 of the Land (Settlement of Title) Ordinance to have the registration in the new registers cancelled and her action was therefor misconceived.

(b) *(Per de Comarmond J.)* that Section 66 of the Land (Settlement of Title) Ordinance gives a right of action not only where it is alleged that the omission is due to the old registration having been overlooked, but also where such scant alteration has been given to it as to amount to a denial of justice. Section 66 was intended to afford a last opportunity in proper cases for overcoming the finality of settlement proceedings. Accordingly a registered owner in the old register who did not make a claim at settlement, say, because of his absenee from the country, and whose registration is not included in the new register, may bring an action under Section 66 of the Land (Settlement of Title) Ordinance to vindicate his rights, but such action would not succeed if it be shown that, in fact, the Land Settlement Officer did direct his mind to the original registration.

(c) *(per Curry Ag. J.)* that whenever in land settlement proceedings a Land Settlement Officer decides against a party who has a right recorded in the old register and in favour of some other party, the right originally registered is omitted from the new register and the party with the right recorded in the old register could not claim rectification under Section 66 of the Land (Settlement of Title) Ordinance; such party's remedy lies in Section 63 of the above Ordinance.

(2) that a Yoklama registration is sufficient proof of title to land, unless there is conflicting permanent or "daimi" registration or unless it can be shown that it has been overridden or rendered void.

(3) that since the Treaty of Lausanne is an act of State and therefore beyond the ambit of municipal law and no Court in Palestine can question its provisions, and having regard to the fact that Article 60 of the said Treaty recited that the successor states should acquire the properties of which transfer from the Civil List to the State was laid down by two Iradehs, and having regard to the term "subrogated" appearing in Article 60 of the Treaty of Lausanne which means that the Government of Palestine stands in the shoes of the Ottoman State only for the purpose of enabling a subject to determine in the Courts of Palestine whether any particular property did pass under either of the two Iradehs, the term in question does not import any agreement to respect private rights, Article 60 of the Treaty of Lausanne precluded the Courts of Palestine from holding that no property was transferred by the two Iradehs referred to in that article and the article in question further precluded the Courts from holding that either of the two Iradehs was invalid. Accordingly the property in suit was transferred to the Government of Palestine by virtue of Article 60 of the Treaty of Lausanne, the provisions of which, it being an act of State, cannot be challenged in the Courts of Palestine, without any reservation except in regard to waqfs, if any.

Approved: CA 141/37, 4 P.L.R. 310.
Salaman v. Secretary of State for India, (1906) 1 K.B. at p. 626.
Rustomjee v. The Queen, 2 Q.B.D. 69.
Cook v. Sprigg, (1899) A.C. 572.

Explained: Princess Olga Paley v. Weisz (1926) 1 K.B. 718.
CA 139/40 7 P.L.R. 376.

Referred to: CA 306/44.
CA 311/44.
CA 318/44.

A. Weinshall and D.I. Murr for appellant.

Attorney General (L.B. Gibson, K.C.), Professor N. Bentwich and Administrator General (H. Kantrovitch) for respondent.

Shaw J: This is an appeal from the judgment dated 17.1.46 of the Land Court of Jerusalem in Land Case No. 44/45.

The facts have been fully stated in the judgment of the trial Court, and it is unnecessary to recapitulate them at any length. The appellant (original plaintiff) brought the action on behalf of the estate of the late Prince Mohammad Selim, himself one of the heirs of the late Sultan Abdul Hamid II of Turkey, to recover lands said to have been the private property of the late Sultan, and to have the Land Register at Gaza rectified by inserting the names of the late Sultan's heirs in respect of their shares, in place of the High Commissioner in trust for the Government of Palestine. As it appears from Exh. 14 (at p. 96 of the shorthand note of the trial Court) the property in question was registered in the Land Register at Gaza in the name of the late Sultan from about the year 1886. The respondent's case is that after the deposition of the late Sultan in 1909 the Ottoman Government, by one or both of two decrees (Iradehs), took the property in this land, and that following the Treaty of Peace made in Lausanne in 1923 the Government of Palestine acquired the land. The two Iradehs on which the respondent relies are Exh. 6 (p. 75) of 27.8.1324 (1908 A.D.), and Exh. 9 (p. 81) of 20 Nissan 1325 (1909 A.D.). It may be observed here that the 1908 Iradeh was made before Sultan Abdul Hamid had been deposed and the 1909 Iradeh was made after that event.

The most important provisions of law for the purposes of this appeal are sections 43 and 66 of the Land (Settlement of

Title) Ordinance (Cap. 80) Laws of Palestine, which read as follows:-

S. 43. Save as provided in this Ordinance, the registration of land in the new register shall invalidate any right conflicting with such registration.

S. 66. After the completion of the settlement, rectification of the register may be ordered by the land court, subject to the law as to limitation of actions, either by annulling the registration, or in such other manner, as the court thinks fit, where the Court is satisfied that the registration of any person in respect of any right to land has been obtained by fraud or that a right recorded in the existing registers has been omitted or incorrectly set out in the register.

Provided that where a person has since the settlement acquired land in good faith and for value from a registered owner, the court shall not order a rectification of the register.

In dealing with this appeal it is necessary for us to remember that s. 4 (1) of the Land Courts Ordinance (Cap. 75) provides that —

> No appeal shall lie from the judgment of a land court to the Court of Appeal, save on a question of law.

The Attorney General, in whose favour the judgment of the trial court was given did not, and could not, cross-appeal. But he submitted that the judgment could be supported on certain grounds in regard to which the trial court had found against him.

In the first place he submitted that in this case no suit for the rectification of a register lay under s. 66 of the Land (Settlement of Title) Ordinance. His argument is that the words "omitted or incorrectly set out" in s. 66 are not intended to add to the right of appeal in respect of which provision is made under s. 63 of the Ordinance. He submits that the omission or incorrectness must be of the nature of an oversight. He has stressed that the Ordinance was designed to give land owners certainty as to their rights, and he draws attention to the fact that provisions exist for giving notice to possible claimants, and for the investigation and settlement of all claims that may be preferred. He points out that an application for leave to appeal from the decision of the Settlement Officer is limited as to time.

Dr. Weinshall for the appellants has argued that the trial court was precluded from at all dealing with the question whether s. 66 could be invoked in a case like this because the point was, he submits, raised before the Privy Council in P.C.A. No. 21 of 1940 and, at any rate by implication, decided in his favour. He relies particularly on certain remarks which passed

between Lord Thankerton and the Attorney General of England. These remarks appear at p. 137 of the shorthand note of the trial court and they read as follows:-

"Lord Thankerton: It is not enough for him (the plaintiff) to say, that in fact there was an omission of his rights; he must prove that it was wrongly omitted or without just cause.

A.G.: Yes.

Lord Thankerton: It does not matter whether he appeared originally or what happened?

A.G.: Not a bit.

Lord Thankerton: How do you in fact construe s. 66, because that is the sheet anchor of Mr. Miller?

A.G.: I am taking the words as omitted without just cause; it would be wrongly omitted.

Lord Thankerton: It must be that. It would be too narrow to say mere errors and omissions especially having regard to s. 68, which makes provision for clerical errors.

A.G.: A thing is not omitted unless it is wrongly omitted".

At page 2 of the Privy Council judgment the following appears:

"The grounds of the judgment therefore which emerge as being those with which alone this Board are empowered to deal on the terms of the order giving leave to appeal are —

(1) is Rule 2 of the Land Courts Rules, 1921, still operative?

(2) was the onus of proof rightly placed upon the defendant?

Their Lordships will be careful to decide nothing more".

It is quite clear that their Lordships of the Privy Council did not decide whether s. 66 could be invoked and this question was still at large when the case came again for hearing before the trial court.

Prior to 1930, the rectification of the register could only be obtained on the ground of fraud, but in that year the words "or that a right recorded in the existing registers has been omitted or incorrectly set out in the register" were added by Ordinance No. 18 of 1930. The Attorney General has referred to certain observations which were made by Dr. Weinshall at p. 375 of the shorthand note of the trial court. Dr. Weinshall said —

"The clear object of this modification of the law was to give remedy to the person who might have suffered from a mistake in proceedings before the Settlement Officer. Obviously it cannot be deemed to apply to parties who actually appeared before the Settlement Officer and made their claim and argued their case before him, because in that

event if there is some mistake their proper remedy is an appeal against the judgment and if they do so and if the judgment becomes final, certainly they have no further remedy."

The Attorney General has, however, pointed out that s. 66 contains no implication that the remedy is limited to persons who did not make a claim at settlement, and he asks the pertinent question — Why should a person who did not take the trouble to make a claim be in a better position than one who did? He also submits that it is obvious that, so far as fraud is concerned, the remedy is open to a party whether or not he has claimed at settlement.

The Attorney General has traced the history of the Land (Settlement of Title) Ordinance. The first Ordinance, called the Land Settlement Ordinance, was No. 9 of 1928. S. 56 (corresponding to the present s. 63) gave a right of appeal by leave. There followed certain sections also on the question of appeals, and then came s. 59 (corresponding to the present s. 66) giving the right of rectification. This was followed by s. 61 (corresponding to the present s. 68) which dealt with the correction of errors. The Attorney General argues that the legislature, when they amended Ordinance No. 18 of 1930, had in mind the appeal provisions of 1928 and he submits, therefore, that if they had wished to give a further right of appeal the natural course would have been to do so by amending the section dealing with appeals and not the section which deals with rectification. He submits that from the fact that until 1930 rectification was only permitted in cases of fraud, it is clear that s. 59 (now s. 66) was not at all a general appeal section, and he observes that it was the same Ordinance (No. 18 of 1930) that amended both the section dealing with appeals and that dealing with rectification. Finally, he draws attention to the fact that Ordinance No. 18 of 1930 amended s. 61 (now s. 68), which deals with the correction of errors and introduces words almost identical with those introduced into s. 59 (now s. 66).

The Attorney general submits that if the Settlement Officer has considered the matter, and has done so on some evidence, it cannot be said that the omission was made without just cause, and he further argues that the Settlement Officer did have some evidence and did consider the Sultan's registration. He has, in this connection, referred to the judgment of the trial Court (p. 496, para. 6) where the trial judge found as a fact that the Settlement Officer had considered, even if inadequately, the question of the Government's alleged claim of title via the Iradeh of 1908 and the Treaty of Lausanne.

The final conclusion of the trial judge was expressed by him in the following terms:-

> "But it seems to me that, whatever the merits of the learned Attorney General's argument may be when applied to the case of a claimant who was a party to the proceedings before the Settlement Officer and who therefore had an opportunity of appealing against his decision under section 63 (upon which point I do not feel it necessary to express any view), it cannot be acceded to in the case of a person such as the present plaintiff, who was not a party to the settlement proceedings. Such a person, I consider, must be enabled to avail himself of section 66 where the Settlement Officer, through a mistake of fact or law (which would include a decision based on inadequate evidence), has omitted from the new register a right recorded in his name in the existing (i.e. old) register".

In C.A. 141/37 (4 P.L.R. 310), however, it was held that —

> "The provision that a right recorded in the existing registers has been omitted or incorrectly set out in the register contained in the latter part of the first paragraph of section 66 of the Land (Settlement of Title) Ordinance has no application when the right recorded in the existing registers has been varied by the Settlement Officers or the Courts on appeal from a Settlement Officer under the provisions of the Land (Settlement of Title) Ordinance".

That case appears fully to support the submission that in the present case the appellant could not call to his aid the provisions of s. 66 Having considered the arguments on each side I find that the action was misconceived, and for this reason alone the appeal must fail.

Before going on to consider the further points raised both by the appellant and by the respondent I would here say that I agree with the learned trial judge when he says (see para. 7 of his judgment, pp. 497 and 498 of the shorthand note) —

> "The correctness or incorrectness of the entry at present on the register must, therefore, be decided upon in the light of all the evidence now brought before this Court. This interpretation would moreover seem to be in accordance with the view of their Lordships of the Privy Council as expressed in their remitting judgment, where they state that the onus is on the party seeking rectification to show that the entry which is *prima facie* right "ought not to be there". Their Lordships, it will be noted, use the present tense, and say "ought not to be there" and do not say "ought not to have been placed there". And this ruling of the Privy Council further makes it clear to my mind that in the present case the burden lies on the plaintiff not only of showing that the decision of the Settlement Officer was wrong, but also of going on to show that in the light of all the evidence adduced in this case the entry of the defendant's name on the register ought not to be there. Dr. Weinshall has argued that once he has established that the plaintiff's name was wrongfully omitted by the Settlement Officer from the register, the burden shifts to the defendants to prove that the chain of title by which they claim is a good one. But I do not think the words of the Privy Council will bear this construction. The presumption still remains in favour of the defendants being rightly on the register, so that it is for the plaintiff to prove that the defendants' chain of title, which is fully disclosed in the written pleadings, is a bad one".

Before dealing with the grounds of appeal I shall refer to certain further submissions by the Attorney General. One of these was argued by Mr. Kantrovitch and, briefly stated, it is that the registration upon which the appellant was relying was of the yoklama kind, and not a daftar khani registration as held by the trial court. Mr. Kantrovitch said that although he would not go so far as to argue that this yoklama title was entirely invalid, it did not come within the protection of Article 3 of the Provisional Law Regulating the Right to Dispose of Immovable Property. That article appears at p. 169 of the Ottoman Land Laws by R.C. Tute and it reads as follows —

> *Article 3.* Formal tittle deeds are valid and executory. The Civil and Sharia Courts shall give judgment on these deeds and their registration (without?) further proof. A formal title deed shall not be annulled except by a judgment of a Court based on lawful reasons provided that errors, which contradict unambiguous entries and official documents, may be corrected by the Registry Office on an order given by the Administrative Council after informing the parties interested.

Mr. Kantrovitch put in two new exhibits (Nos. 30 and 31), Dr. Weinshall not objecting, with the object of showing that the Court of Cassation at Constantinople, of which court these are judgments of the years 1913 and 1915 respectively, did not place much, if any, reliance upon yoklama registrations. Mr. Kantrovitch has also advanced the proposition that possession even for a period less than that necessary to give a prescriptive title will defeat a yoklama registration.

The learned trial judge dealt with this matter in para. 9 of his judgment. Dr. Weinshall has referred us to C.As 306, 311, 318 of 1944 (1946 A.L.R. 211) in which the following para. appears in the judgment (at p. 219) —

> "Naim Bey has conceded that at the time when these Yoklama registrations were effected that was the only kind of official registration obtainable. I find no reason for not accepting these Yoklama registrations as a valid form of registration and, in any event, appellants have since obtained formal kushans (Exhs. 1 and 2) without material change".

At p. 312 of the Land Law of Palestine by Goadby and Doukhan there is a statement to the effect that —

> "Evidence in writing sufficient to support an adverse title would include entries in the Yoklama records..."

Having considered the point I can seen no reason for disagreement with the learned trial judge whose final conclusion was expressed in para. 9 of the judgment in the following terms:-

"And I accordingly hold that this court ought to consider the registration as sufficient proof of the plaintiff's title to the lands in dispute, there being no conflicting permanent or "daimi" registration, unless it can be shown that it has been overridden or rendered void by any one or more of the three instruments relied on by the defence, namely the Iradeh of 1908, the Iradeh of 1909, and Article 60 of the Treaty of Lausanne".

Another submission made by the Attorney General is that the trial court erred in holding that the 1908 Iradeh did not cover the property in suit. The point is dealt with in paras. 11 to 14 of the judgment. It is really a question of fact, and it is impossible for me to say that there was no evidence upon which the learned trial judge could find that the 1908 Iradeh did not cover the property. I cannot therefore disturb that finding.

The Attorney General has submitted that the 1909 Iradeh was valid. This point was dealt with by the trial judge in paras. 18 and 19 of his judgment. His conclusion on the point is stated at the beginning of para. 20 where he says —

"Upon all the evidence I find that, if we were to stop at this point, the Iradeh might well have been considered unconstitutional and invalid, on both the grounds raised by the plaintiff, namely by offending Articles 6, 21 and 24 of the Constitution, or at least one of those Articles, and by reason of its not having been submitted to Parliament".

The arguments which I have heared have confirmed me in the view that the 1909 Iradeh was, for the reasons stated by the trial judge, invalid as an Iradeh. The question whether it became an act of State by subsequent validation or ratification I shall consider later.

With regard to the meaning of the term "Civil List" the trial judge stated, in para. 16 —

"Furthermore we have been told by the defence witnesses Kleiko and Bseiso, and I accept their evidence on this point, that the Civil List, which administered these properties, existed to administer the private properties of the Sultan".

Here again it is a question of fact since "Civil List" is not a legal term, and although I incline to the belief that the property included in the Civil List comprised the Sultan's properties (some of which were ab antiquo properties), properties of other members of the Sultan's family, and private property of the Sultan himself, I am unable to disturb the finding of the trial judge which is expressed in the following terms in para. 16 of his judgment —

"The evidence on the point, both oral and documentary, is very inconclusive, but upon a careful consideration I think the property must be considered to have been held by the Sultan in his private capacity".

I now come to the grounds of appeal, and I shall deal first with the question whether the schedule produced and alleged to be attached to the 1909 Iradeh (Exh. 9 p. 81) was properly found by the trial court to be in fact the true and original schedule to this Iradeh. The facts have been fully set out in para. 10 of the judgment, and again I must say that it is a question of fact and that I am unable to find that there was no evidence upon which the trial court could come to the conclusion that the schedule (at p. 82) was the true and original schedule to the Iradeh.

With regard to the meaning of the term "amlak" there are two questions. First, there is the question whether the term *could* include miri property, and then there is the question whether, in this particular instance, the term *did* include miri property. Dr. Weinshall contends that "amlak" can only refer to mulk property, and it is quite true that "amlak" is the plural of "mulk". The land in dispute in this case is admittedly of the miri category. That is to say, it is land the legal ownership of which is vested in the State. Article 3 of the Ottoman Land Laws (at p. 7 of R.C. Tute's book) describes "miri" in the following terms:-

State land, the legal ownership of which is vested in the Treasury, comprises arable fields, meadows, summer and winter pasture grounds, woodland and the like, the enjoyment of which is granted by the Government.

And at p. 17 of the Land Law of Palestine by Goadby and Doukhan the following appears —

"The term Miri Land is here used to mean land over which a heritable right of possession (tessaruf) is granted by the State to a private person, though the Raqabe (ownership) remains in the State".

The meaning of the term "amlak" is discussed by the trial judge in para. 15 of his judgment. It has been pointed out by Dr. Weinshall that the Government witness (Mr. Bseiso) gave, in re-examination on 13. 12. 45, see pp. 312 and 322 of the shorthand note, evidence more favourable to the respondent's case than the evidence which he had given two days earlier (see pp. 295 and 296). Dr. Weinshall has further submitted that where there is a question of confiscation the more restrictive meaning of the term should be adopted. In Craies on Statute Law (3rd Edt.) the following appears at p. 105 —

Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes:-

. . . . .

(2) Conferring or taking away legal rights whether public or private....

Dr. Weinshall has submitted that this Court is not bound by the decision of the trial Court, and in this connection he has referred us to C.A. 139/40 (7 P.L.R. 376) where the Court, in its judgment (at p. 378), said —

> "The appellant has argued that the District Court on the appeal could not alter findings of fact made by the Chief Magistrate. The construction of a document, as I pointed out, is a question of law. The District Court was, therefore, quite entitled to its view as to the correct construction".

Having considered the arguments advanced by Dr. Weinshall I find that there are no grounds upon which we can upset the conclusion of the learned Judge that the term "amlak" as used in the Schedule to the 1909 Iradeh, does include "miri" land.

The next point to be considered is whether the Court erred in holding that the constitutional defects of the 1909 Iradeh had been cured by the subsequent attitude of the Ottoman State. The question is whether the 1909 Iradeh had been subsequently validated or ratified in such a way as to make it an act of State or otherwise incapable of being questioned in any court.

The trial judge held, in para. 23 of his judgment, that the 1909 Iradeh was not in itself an act of State. I agree with this finding, and I have only to consider the question of subsequent validation or ratification. This question has been very fully discussed by the trial judge in paras. 20 to 27 of his judgment, and his final conclusion is expressed in para. 27, where he says:-

> ".... on the evidence which I have just specifically considered it is in my view abundantly clear that the Ottoman State did adopt and act upon the transfers effected by the Iradeh of 1909, and thereby made them an act of State and as such binding on this Court. I need only add that if the transfer of the properties to the Ottoman State by the Iradehs was or became a valid transfer, as I have held it did, then the properties would automatically vest in the Ottoman State, and the registration of these properties in the name of the ex-Sultan Abdul Hamid would thereby become of no effect, without the necessity for the formal cancellation of the entry on the register. Mr. Bseiso in evidence appeared to be about to give an answer to this effect, when the question was dropped; but to my mind the point is clear. The act of State must prevail".

At the beginning of para. 27 the trial Judge speaks of "the somewhat negative evidence that while the legality of Iradehs generally may be questioned in the Courts, the legality of these particular Iradehs of 1908 and 1909 has never been challenged in the Turkish Courts". Dr. Weinshall has submitted, in the first place, that the fact that the legality of the Iradehs

has not previously been questioned in the Courts does not prevent a party from doing so now and he has referred to the fact that in the discussions which led up to the Treaty of Lausanne the Turkish delegates spoke of litigation brought by the heirs for the restitution of the properties which, in their opinion, the Turkish Government had illegally confiscated (see pp. 107 and 108 of the shorthand note).

The respondent had filed a judgment dated 7. 12. 44 (Exh. 23, p. 112), of the Court of Cassation, which upheld a decision that properties acquired by a Sultan during the term of his reign were not private properties but were imperial properties which vested in the Treasury. The property in suit in that case was "immovable property together with its appurtenances known as the mension of Ghazi Uthman Pasha, and situated at Bashik-Tash", and it has been pointed out that the schedule to the 1909 Iradeh (see p. 82) contains the item — "Real property situated at Bashlik-Tash".

In order to counter the effect of this judgment the appellant has filed two further Exhibits (T/1 and T/2). In Exhibit T/1 the United Chambers of the Court of Cassation were considering the effect of Article 8 of the Law of 1924, (which the respondent has now put in as Exh. 29), and they decided that this Article did not apply to the private property of the Sultan which was registered in his name and which had not been transferred to the Treasury in his lifetime. The following appears at p. 3 of Exh. T/1 —

> "In consequence the properties being the object of these cases and entered in the Land Registry in the name of the deceased have become the properties of the heirs by death of Abdul Hamid which took place in 1331 (1917) (sic) and it is not possible to maintain that these properties still belonged to the deceased Sultan after his death, having changed owners in the very minute the death took place".

Following that ruling the other case (Exh. T/2) was brought in respect of the property which was the subject matter of Exh. 23, with the result that that judgment (Exh. 23) was quashed. Prof. Bentwich has, however, observed that Exh. T/2 did not deal with the Iradehs or with Article 10 of the Law of 1924 (Exh. 29). He also submits that it is not clear whether the property referred to in Exh. 23 is one of the properties included in the Schedules to the Iradehs.

We have heard a great deal of argument on the question of validation, and on the question of ratification (or adoption) of the Iradeh of 1909, and several cases have been referred to. Having considered these arguments I am unable to agree with the learned trial judge that the 1909 Iradeh was adopted by

virtue of the Budget and Finance Laws in such a way as to make it an act of State. Nor do I find that this Iradeh was validated in such a way as to make it an act of State. Neither the Budget Laws nor the Finance Laws were passed with the express purpose of depriving Sultan Abdul Hamid of his private property and if they had been passed with that purpose in view they would have been invalid as offending against the Constitution. I am unable to regard the Budget Laws or the Finance Laws as being acts of State. The Budget Laws, by treating the income of the property comprised in the schedule to the 1909 Iradeh as revenues of the State, did not alter the fact that the 1909 Iradeh was itself invalid. Acceptance of moneys which came from that invalid source could not, in my judgment, validate the Iradeh. The constitution could not be by-passed in this way. Halsbury, Vol. 26, p. 246, para. 556, contains the following definition of the expression "Act of State":-

> "The expression "act of State" is here used to denote an executive or administrative exercise of sovereign power by an independent state or potentate, or by its or his duly authorised agents or officers. The expression is not a term of art and is used in different senses by different authorities".

And foot-note (a) to this paragraph reads as follows:-

> "The term, taken in its largest sense, might perhaps include legislative and judicial acts, such as an Act of Parliament or a judgment of the superior courts. The term act of State is applicable to any act done by the State in the execution of its Sovereign power".

There appears to me to be no doubt that the Turkish Courts could have entertained a claim by the heirs in respect of this property. If the Turkish Courts could have entertained such a claim then the Courts of Palestine, within whose jurisdiction the property is situated, can entertain it, unless their jurisdiction is ousted for any valid reason.

This brings me to the final and very important ground of appeal and that is whether the wording of Article 60 of the Treaty of Lausanne precludes the Court from holding that the Iradeh of 1909 was invalid, and/or from holding that no property passed to the Ottoman State and consequently to the successor state in virtue of this Iradeh. Bound up with this is the question as to the meaning of the term "subrogation" in Article 60 of the Treaty, and the question whether this article precludes the validity and/or the legal effect of the 1909 Iradeh and/or of the transfers purported to be effected thereunder from being questioned in the Courts.

I agree with the finding of the trial judge (in para. 10 of his judgment) that the two Iradehs and their schedules have

been properly proved, and I also agree with his finding (in para. 28) that the Iradehs of 1908 and 1909, referred to in Article 60 of the Treaty, are those which are the subject matter of this case.

The Treaty of Lausanne is part of the law of Palestine. The Treaty of Peace (Turkey) Ordinance (Cap. 146) appears at p. 1497, Vol.2, Laws of Palestine, and s. 2 provides that —

> Articles of the Treaty and the parts of the articles of the Treaty set out in Part 1 of the Second Schedule to this Ordinance shall have full force and effect as law in Palestine...

Article 60 of the 2nd Schedule reads as follows:-

> "The States in favour of which territory was or is detached from the Ottoman Empire after the Balkan wars or by the present Treaty shall acquire, without payment, all the property and possessions of the Ottoman Empire situated therein.
>
> It is understood that the property and possessions of which the transfer from the Civil List to the State was laid down by the Iradehs of the 26th August, 1324 (8th September, 1908) and the 20th April, 1325 (2nd May, 1909) and also those which, on the 30th October, 1918, were administered by the Civil List for the benefit of a public service, are included among the property and possessions referred to in the preceding paragraph, the aforesaid States being subrogated to the Ottoman Empire in regard to the property and possessions in question. The wakfs created on such property shall be maintained.
>
> . . . . . .
>
> The provisions of this Article will not modify the juridical nature of the property and possessions registered in the name of the Civil List or administed by it, which are not referred to in the second and third paragraphs above".

The Treaty is undoubtedly an act of State, and no Court in Palestine can question its provisions. The chief point to be decided is what is meant by the term "subrogated". Does this term, as used in this Article, mean that the successor States have undertaken to be liable for all claims that might have been brought against the Turkish State, in respect of the properties referred to in the Iradehs of 1908 and 1909?

The first point to be decided is whether the meaning of the term is clear as it stands. If it is clear in its context, we must not, for the purpose of construing it, refer to the discussions which led up to the final text of the Treaty.

I find, in the first place, that there is no indication in Article 60 that the properties were being taken over subject to private claims, and I think it cannot be doubted that if there had been any such intention, it would have been clearly expressed. I am supported in this view by the fact that there is

specific provision that "the wakfs created on such property shall be maintained". Had there been any intention to give effect to private claims there would have been similar specific provision to this effect. I am further supported by the final paragraph of Article 60 which preserves the juridical nature of the property and possessions registered in the name of the Civil List or administered by it, which are not referred to in the second and third paragraphs of Article 60, for example property which is not referred to in the Iradehs of 1908 and 1909. It follows therefore that there is no stipulation that the juridical nature of the properties covered by those two Iradehs shall not be modified.

In my view the term "subrogation", as used here, does not import any agreement to respect private rights. I agree with the learned trial judge (as expressed in para. 29 of his judgment) that the Article, having recited that the successor States should acquire the properties of which transfers from the Civil List to the State was laid down by the two Iradehs, precludes the Court from holding that no property was transferred by them, and thus precludes the Court from holding that either of the two Iradehs was invalid. I also agree with his finding that the term "subrogation" means that the Government of Palestine stands in the shoes of the Ottoman State only for the purpose of enabling a subject to determine in the Courts of this country whether any particular property did pass under either of the two Iradehs. But even if I do take into account the minutes of the discussions (see Exhs. 22, 22A and 22B) leading up to the drafting of Article 60 in its present form, I can see nothing in them to support a finding that there was any agreement to give effect to private claims. On the contrary, there are certain passages which show the opposite intention. For example, in Exh. 22 (at p. 105) we find the following —

> "The property and possessions of the Civil List not referred to by the said Iradehs will be considered as private property".

The implication is that the properties referred to in those Iradehs were not to be considered as private property. The remarks of Mr. Bompard, and of Sir Alan Block, at p. 108, are of interest as showing the view of delegates other than Turkish. There are also the remarks of Sir Horace' Rumbold and Mr. Bompard (at p. 109).

In the result I find that the property in suit was transferred to the Government of Palestine by virtue of Article 60 of the Treaty of Lausanne without any reservation except in

regard to wakfs, if any, and that the provisions of the Treaty cannot be challenged in the Courts of Palestine.

The appeal must be dismissed with costs on the higher scale to include a hearing fee of LP. 80.

de Comarmond J: The Attorney General was defendant in the Court below and the claim having been dismissed, it was not possible for him to cross-appeal. When the appeal was heard, the learned Attorney General submitted, inter alia, that the Court below should have dismissed the case on the ground that there had been no omission within the meaning of section 66 of the Land (Settlement of Title) Ordinance, Cap. 80 of the Revised Laws. This point was dealt with by the learned judge in the Court below in paragraphs 4 and 6 of his judgment. One of the learned Attorney General's submissions on this point was that an omission within the meaning of section 66 must be in the nature of an oversight. I think that the interpretation suggested by the learned Attorney General is too narrow. I am of opinion that section 66 gives a right of action not only where it is alleged that the omission is due to the old registration having been overlooked, but also where such scant attention has been given to it as to amount to a denial of justice.

It is true that numerous provisions of the Ordinance ensure publicity, give rights of recourse to an appellate court, and provide other safeguards, but it seems to me that section 66 was intended to afford a last opportunity in proper cases for overcoming the finality of settlement proceedings. Originally section 66 afforded such an opportunity only in cases of fraud. In 1930, section 59 of the 1928 Ordinance was amended by section 18 of Ordinance 18 of 1930, and the words "or that a right recorded in the existing Registers has been omitted or incorrectly set out in the Register" were inserted therein, and it seems to me that the reason for the amendment was that the legislator considered that the position of a registered owner deserved special attention. What I have in mind is that the legislator in 1930 must have realised that settlement proceedings may for example take place during the absence from the country of a registered owner and may result in his rights not receiving due consideration. In such a case it would be fair to allow a person who was registered in the old register to vindicate his rights. I hasten to add that, in my opinion, an action brought by such a person would not succeed if it is shown that, in fact, the Settlement Officer did direct his mind to the original registration. In this connection I which to draw attention to section 27(4) of Cap. 80 which empowers the Settlement Officer to take into consideration the rights of a person who has not

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presented a claim. I do not overlook the argument that the view I take leads to the result that in some cases a person may use or attempt to use section 66 to bring what is virtually a second appeal, but the obvious answer is that it is open to the defendant to point out that justice has already been done and that the action must fail; in fact, the defendant would probably use rule 21A of the Civil Procedure Rules, 1938, as amended in 1945, and ask that the case be forthwith dismissed, or the Court might under rule 21 strike out the statement of claim on the ground that it is vexatious or frivolous. In the present case, the defendant-respondent pointed out in paragraph 4 of his statement of defence that the Settlement Officer had been placed in presence of the entries in the Turkish Land Register and the defendant denied that there had been an omission within the meaning of s. 66. I consider that the defence on this point was fully justified and that the Court below should have dismissed the claim on the ground that there could be no question of "wrong omission" where it was obvious that the Settlement Officer had applied his mind to the existence and value of the old registration. I will go further and say that I do not agree with the learned trial judge when he says that the Settlment Officer erred in arriving at the conclusion that the Muharraqa lands were to be registered in the High Commissioner's name in trust for the Government of Palestine. In fact, I would have been surprised if the Settlement Officer had reached a different conclusion: he had before him a claim by the Government based on the Iradeh of 1908 and on Article 60 of the Treaty of Lausanne. It is true that the Settlement Officer did not see the Schedule to the 1908 Iradeh (Exhibit 6) and therefore could not from the Iradeh alone find out which were the properties transferred; but on the other hand, Article 60 of the Treaty of Lausanne coupled with the 1908 Iradeh did create a strong presumption in favour of Government and this, taken together with the evidence heard during the settlement proceedings, afforded sufficient data to justify the decision arrived at. I would call attention in this connection to the fact that the witness Muhammad Khalil Mushaweiri, who represented the Village Settlement Committee, stated that people knew that the raqaba of the land, whether miri or jiftlik, belonged to the Government. I am, therefore, not at all ready to endorse the view that, in the circumstances, the Settlement Officer should have decided to have the Muharraqa lands registered in the name of Abdul Hamid or of his heirs. I have already drawn attention to s. 27(4) of Cap. 80, and in my opinion it cannot be doubted that the Settlement Officer did direct his mind to the existence of the old registration and decided, after consideration, to register the Muharraqa lands in the name of Government.

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My learned brother Shaw J. has dealt with the various grounds of appeal and I concur in the views expressed by him. I would, however, like to offer a few remarks regarding the question of act of State.

I am not satisfied that the so-called Budget Laws (Exhibit 11) afford a sufficient basis for the application of the doctrine of act of State. The learned trial judge dealt with this matter in paragraphs 21 to 26 of his judgment. I would refer specially to paragraph 23 in which mention is made of the "adoption" by the Ottoman State of the transfers of property purported to be effected by the Iradeh of 1909. It seems to me that the Budget Laws lack the certainty and finality which, in my view, are necessary ingredients of an act of State. Furthermore, I cannot find in these Budget Laws that exercise of sovereign power which verges on arbitrariness and which places an act of State beyond the ambit of municipal law. I would perhaps convey my meaning more clearly by quoting the following passage from Lord Kingsdown's judgmennt in Secretary of State in Council of India v. Kamachee Boye Sahaba which is referred to in the judgment of Vaughan Williams L.J. in Salaman v. Secretary of State for India (1906) 1 K.B. at page 626 —

> "Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? Or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor. If it were the latter, the defence set up, of course, has no foundation".

I will also quote the following passage from the judgment of Fletcher-Moulton L.J. in the same case at p. 640 —

> "The true view of an act of State appears to me to be that it is a catastrophic change, constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected..."

The learned trial judge relied to a great extent on the case of Princess Olga Paley v. Weisz (1929) 1 K.B. 718 in which the principle of "adoption" was recognised with regard to acts of confiscation done by the Russian revolutionaries in 1918 and subsequently adopted by the Soviet Republic. I would point out that the Russian Government did unequivocally validate and adopt the acts of confiscation, whereas in the present case it is not clear that such an irrevocable step was

signified by the Turkish Government. The importance of the Budget Laws in the present case is that they appropriated revenue produced by certain properties referred to in the Iradehs of 1908 and 1909 and thus supply one more link in the chain connecting the Muharraqa lands with the properties transferred by the Lausanne Treaty.

Dr. Weinshall for the appellant has argued that the reference to subrogation in the second paragraph of Article 60 of the Treaty of Lausanne means that the property and possessions therein mentioned were transferred subject to any legal claims which might have been made against the Ottoman State by persons claiming to be legally entitled thereto. The conclusion I have reached on this point is the same as the one expressed by my brother Shaw and I would add that a study of the French text convinces me that the mention of subrogation was only intended to refer to the existence of wakfs which had to be respected. I would add that I was impressed by the learned Attorney General's argument that it was difficult to conceive that a victorious State would have accepted to take properties subject to claims which had been or might be made by private citizens of the conquered State. In this connection it is of interest to recall the principles enunciated in Rustomjee v. The Queen, 2 Q.B.D. 69 and Cook v. Sprigg (1899) A.C. 572. The former case is of special interest both as to facts and law. Rustomjee was the creditor of a firm of Chinese merchants and was expelled from China with other British subjects. When a treaty of peace was signed between Her Majesty Queen Victoria and the Emperor of China the latter agreed to pay to the British Government the sum of three millions of dollars on account of debts due to British subjects by Chinese merchants who had become insolvent. Rustomjee claimed by petition of right the amount originally owed to him by the said Chinese merchants. One of the grounds on which the claim was rejected was that the making of peace is an act of the prerogative of the Crown and (to quote from the judgment): "The Queen might or not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid her; she acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and as in the making of the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts".

To conclude, I agree that this appeal should be dismissed with costs as stated in my learned brother's judgment (Shaw J.).

Curry Ag. J: I entirely agree with the conclusions arrived at by my learned brother Shaw J. and I feel there is very little indeed which I would desire to add thereto. There are a few brief comments, however, which I would like to make upon certain issues in this case.

I do not think there can be any doubt that when Section 66 of the Land (Settlement of Title) Ordinance empowers the Land Court to order rectification of the register, where the Court is satisfied that a right recorded in the existing registers has been omitted or incorrectly set out in the register, the word "omitted" must be very strictly interpreted. Whenever in Land Settlement proceedings the Settlement Officer gives judgment against the party who has a right recorded in the existing register and in favour of some other party, of course the right originally registered is omitted from the new register, but in my opinion it would be absurd to suggest that the party with the right recorded in the existing register could claim rectification under this section. He has his remedy under s. 63, which deals specifically with appeals. This section was in my opinion enacted to allow rectification where the Settlement Officer had by oversight omitted to register the right in the new register. Its purpose is to provide for cases which could not be brought within the ambit of clerical errors referred to in Section 68, e.g. cases where the Settlement Officer had forgotten to consider the registration of the existing right. If, however, the Settlement Officer does consider the right in the existing register, then his decision not to record it in the new register cannot possibly be called an omission.

Turning next to the question whether the Iradehs were adopted or validated by the Finance Acts in such a manner as to make them acts of State, it appears to me that there has been some confusion of thought as to what is an act of State. The learned Attorney General relied largely on the case of Olga Paley v. Weisz, L.J.R., 1929, Vol.9, p. 465. Very briefly, in that case certain properties of the Princess were seized by the Russian revolutionaries and subsequently sold to a Russian who came to England. The Princess brought an action to recover those properties. It was held that the action failed, as the adoption by the Government of Russia of the act of the revolutionaries in seizing the plaintiff's goods was an act of State, into the validity of which the Court could not enquire.

Thus in that case one starts, not with an invalid Municipal law of Russia, but a seizure by revolutionaries by virtue of their sovereign power. Subsequently, that taking by force by the revolutionaries was adopted by the Russian Government

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by a decree of 1923 and it was held that in view of the fact that the seizure of the property had been adopted by the Russian Government that seizure became an act of State.

How different are the facts in our case. The Finance Laws, merely by appropriating the revenue, cannot be said to be validating the seizure of the property. They were merely legislative financial acts enacted within the framework of the Constitution, and therefore could not be interpreted as acts of State, nor could they be said to be adopting an act of sovereign power, for the Iradehs took the property under colour of legal title, which can be questioned and not by arbitrary power. In the Olga Paley case the Russian State itself claimed that it had a good title to the property. In our case Turkey makes no such claim, and in fact there was evidence that the Courts of Turkey would require evidence as to the validity of the Iradehs. When we consider the Treaty of Lausanne, which specifically mentions the Iradeh of 1909, we of course come to what is undoubtedly an act of State.

I find myself quite unable to accept the argument of Dr. Weinshall that the word "subrogation" in that Treaty means that the British Government was placed in the shoes of the Ottoman Empire, and therefore subject to any claims by third parties. It is impossible to conceive that a victorious State would enter into a treaty transferring property on such terms.

I agree that this appeal should be dismissed with costs as stated in the judgment of my learned brother (Shaw J.).

Civil Appeal No. 46 of 1947

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice.

1947
31st March

FitzGerald C. J.

CA 46/47
Musa
and others
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Nazha
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TEWFIK HANNA MUSA,
and others. . . . . *Applicants.*

v

MALAKEH DAOUD NAZHA,
and another. . . . . *Respondents.*

Appeal, Leave to — Chief Justice — Instances in which Chief Justice grants leave to appeal from judgments of District Courts in their appellate capacity from judgments of Magistrates' Courts — Magistrates' Courts Jurisdiction Ordinance, 1939, Section 12.

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In applications to the Chief Justice for leave to appeal from judgments of the District Courts in their appellate capacity from judgments of the Magistrates' Courts, the Chief Justice is solely concerned with the judgments of the Magistrates' Courts and of the District Courts, and if those judgments do not raise questions of novelty, complexity or general importance, even though the case might in fact have involved such questions, leave to appeal will not be granted by him.

Najib Germanus for applicants.

No appearance by respondents.

Order: In this case Mr. Germanus argued that there are many complex questions of law, and if I accept his presentation of the issue there undoubtedly are points of novelty which might have justified me in allowing the appeal. But I must emphasise that in applications for special leave to appeal, I am concerned solely with the judgment written by the Magistrate and the appellate Court. If it appears to me that those judgments do not raise questions of novelty, complexity or general importance, I will not grant leave to appeal even though the case might in fact have involved questions of novelty. Turning now to the judgment of the Magistrate and the appellate Court. It is quite clear to me that those judgments were based on certain findings of fact. It may be that the Court was wrong in its findings of fact, but I would not allow an appeal on that ground. The finding of fact was an interpretation as to what was the true meaning of the Arabic words of a specific clause of the contract. The Court then proceeded to decide what was intended by the parties in inserting that clause and I cannot see that any point of novelty, complexity or general importance arises from the judgments as they have been written and signed by the Magistrate and the appeal Court. I must, therefore, refuse leave to appeal.

Civil Appeal No. 106 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Hubbard Ag. J.

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FitzGerald C. J.
and
Hubbard Ag. J.

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Hazboun
v
Society for
Education and
Culture "Maaleh"
and others

ANTON HAZBOUN. . . . . *Appellant.*

v

1. SOCIETY FOR EDUCATION AND CULTURE "MAALEH",
2. M. LEVANON,
3. M. ELIASH. . . . . *Respondents.*

Landlord and tenant — Eviction — Contract — Premises leased for purpose of holding a children's day-school — Contract provided that tenant has to pay municipal rates — Tenant entitled to sub-let — Sub-letting for holding an evening-school for adults — Refusal by tenant to pay municipal house rates before production of receipt by landlord — Whether tenant committed breach of contract by sub-letting for holding an evening-school for adults and by refusing to pay municipal house rates before production of receipts by landlord — Where contract is ambiguous Court is entitled to read the contract as a whole to ascertain intention of the parties.

By virtue of a contract of lease the tenant of certain premises was to use them as a day school for children. After sunset the tenant was not entitled to use the premises as a school for children nor was the tenant to do anything else which was likely to distrub the tranquility of neighbouring tenants and inhabitants. The contract further provided that the tenant should pay, *inter alia*, the municipal rates. The lessee sublet the premises for use as an evening school for adults. He also refused to pay the municipal rates before the landlord produced receipts of payment by him of such rates. The landlord then commenced proceedings in the Magistrate's Court of Jerusalem (Civil Case No. 2049/43) for the eviction of the tenant and obtained judgment. On appeal to the District Court of Jerusalem (Civil Appeal No. 89/44) that Court, constituted of the President thereof (Judge Curry), set aside the judgment of the Magistrate. The landlord appealed to the Supreme Court by leave.

In dismissing the appeal, the Court of Civil Appeal,

HELD (1) that as the contract of lease was ambiguous, the Court was entitled to read it as a whole to ascertain what was in the minds of the parties, and as the contract as a whole showed that the intention of the parties was that a children's school should not be held at night and did not exclude all types of schools after sunset, the tenant did not commit a breach of the contract of lease by allowing the holding of an evning school for adults.

(2) that the tenant was justified in refusing to pay the municipal rates before the landlord had produced a receipt showing that he had

in fact discharged those rates and therefore failure to meet that liability without first being furnished with the receipt was not a breach of the condition of the contract.

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E. Georges Elia and Peter Malak for appellant.

M. Levanon for 1st and 2nd respondents.

Third respondent in person.

Judgment: This is an appeal from the District Court of Jerusalem which, sitting in its appellate capacity, reversed an order of the Magistrate granting eviction to the appellant against respondents. It was a case of holding on to leased premises by virtue of the Rent Restrictions Ordinance.

The question in issue was the interpretation of certain clauses of the contract, and whether in fact there was a breach of those clauses. The difficulty was mainly due to the fact that the contract was drawn up in English, which was not the mother tongue of the parties, and in consequence it discloses a certain amount of ambiguity. Taking one of those ambiguous clauses by itself and interpreting it strictly, the contract might have been held to be in conformity with the interpretation given to it by the learned Magistrate. The President of the District Court was of opinion that the contract, being ambiguous, he was entitled to read it as a whole to ascertain what was in the minds of the parties. In this we think he was right.

We come now to examine those clauses of the contract which, it is alleged, were ambiguous and which led to the difficulty. There is a preamble in the agreement which says in general terms that the purpose for which the premises were leased was for a day-school only. It was admitted that not only were the premises used as a day-school but they were sub-let (the respondents being entitld to sub-let) in part to another person who held tutorial classes for adults in the evening.

It is alleged by the appellant that this is a breach of the very specific term that the object was for use as a day-school only. Now apart from this preamble, there were terms which purported to govern this contract drawn up in much more precise language. Among those terms was (F), which reads as follows:-

> "To see that the school shall be held only in the day-time. After sunset he is not entitled to the use of the premises as a school for children, or to do anything else which is likely to distrub the tranquility of neighbouring tenants and inhabitants."

This clause we consider does indeed provide a clue to what was in the minds of the parties when they made the lease.

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From it we infer that the main objection was to provide that a nuisance would not be caused to the neighbours by holding a children's school at night. It must be conceded by all parties that the holding of these tutorial classes could not have caused a nuisance to the other inhabitants, in the sense that holding a children's school after sunset would cause a nuisance. We therefore think that the object of the contracting parties was not to exclude all types of schools after sunset, but only that type of school which would cause a nuisance. We are reinforced in this opinion by the facts which were adduced in the evidence, that the appellant himself had visited the premises on various occasions when the tutorial classes were being held, and he does not appear to have protested against them. We think therefore that the President was entitled to examine the contract as a whole, and having done so, we agree with the conclusion at which he arrived.

There was one other point raised in the appeal: it concerned the provision that the respondents should pay the municipal taxes. The respondents said they were ready at all time to pay these municipal taxes, and that fact can be conceded in their favour, but they said they were not prepared to pay them until the appellant had given them a receipt showing that he had in fact discharged them. We consider that this was a reasonable precaution on the part of the respondents, otherwise they would have had no guarantee that the appellant had in fact paid the taxes to the Municipality. We agree with the learned President that failure to meet this liability without first being furnished with the receipt they demanded was not a breach of the condition of the contract.

For these reasons the appeal must be dismissed, with inclusive costs of LP.10 to the first respondent.

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THE LAW REPORTS OF PALESTINE

Volume 14

1947

APRIL

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate, and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.

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Criminal Appeal No. 10 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Hubbard Ag. J. and Frumkin J.

ATTORNEY GENERAL. . . . . *Appellant.*

v

AHMAD NIMER TAHA ISMAIL. . . . . *Respondent.*

1947
2nd April

FitzGerald C. J.
Hubbard Ag. J.
and
Frumkin J.

CRA 10/47
Attorney General
v
Ismail

Criminal law — Appeal — Filing by Attorney General of appeal against judgment of District Court direct in Supreme Court — Procedure followed not prejudicial to accused — Criminal Procedure (Trial Upon Information) Ordinance, Section 66.

The Attorney General appealed the judgment of the District Court of Jaffa in Criminal Case No. 223/46 on the ground of the inadequacy of sentence. Instead of filing the notice of appeal in the District Court, he filed it in the Supreme Court. At the hearing, the preliminary objection was taken that there was no appeal before the Court.

In overruling the preliminary objection, the Court of Criminal Appeal,

HELD that the fact that the appeal by the Attorney-General was filed in the Registry of the Supreme Court instead of the Registry of the District Court did not in the slightest degree prejudice the accused.

Crown Counsel (A. Hooton) for appellant.

A. Levitsky for respondent.

Ruling: Mr. Levitsky raised a preliminary objection that there is no appeal before this Court. There was he says a lefect in procedure on the part of the Attorney-General, in that ne filed an appeal in the Registry of the Supreme Court instead of the Registry of the District Court. Before the amendment of section 66 of the Criminal Procedure (Trial Upon Information) Ordinance, the Attorney-General could have filed his appeal at the Supreme Court. It seems clear to us that the object of the amendment was purely administrative convenience.

Now it is of course essential in the interest of the efficient administration of justice that the rules of procedure should be strictly adhered to but what is paramount in a Criminal Court is that justice should be done. In this case it cannot be said that the respondent in the appeal is in the slightest degree prejudiced by the procedure followed by the Attorney-General. The fact that the appeal was filed in the Supreme Court instead of the District Court is in no way connected with the merits of the case.

For these reasons this technical objection is overruled.

Civil Appeal No. 168 of 1945.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Curry Ag. J.

1947
3rd April

de Comarmond J.
and
Curry Ag. J.

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ATTORNEY GENERAL. . . . . *Appellant.*

v

KEREN KAYEMETH LEISRAEL Ltd.
and others. . . . . *Respondents.*

Immovable property — Settlement proceedings — Schedule of Rights — Appeal — Decision in a disputed case given before publication of Schedule of Rights — Subsequently Schedule of Rights published — Party aggrieved by decision applied for revision of Schedule of Rights — Refusal of application for revision — Refusal of application for leave to appeal against refusal to revise — Whether aggrieved party entitled to seek revision of Schedule of Rights — Whether appeal by leave lies from refusal to revise — Land (Settlement of Title) Ordinance, Section 33(4).

Claims to certain lands in Meirun village were made at settlement. Government claims were that the lands were forest reserves. The Land Settlement Officer gave a decision in which he allotted part only of the forest reserves to Government. Government sought to appeal that decision of the Land Settlement Officer but its application for leave was refused by the Settlement Officer and its application to the Chief Justice was refused inasmuch as it was out of time. Subsequently the Land Settlement Officer published the Schedule of Rights. Government applied for the revision of the Schedule under Section 33(4) of the Land (Settlement of Title) Ordinance. The Land Settlement Officer refused the application for revision. Government applied for leave to appeal, and the Settlement Officer refused to grant leave to appeal on the ground that he did not consider he had power to grant leave to appeal against his refusal to exercise the discretion vested in him by Section 33(4). Government subsequently obtained leave to appeal from the Chief Justice.

In dismissing the appeal, the Court of Civil Appeal,

HELD (1) that where a decision of a Land Settlement Officer has been given in a disputed case and has been duly notified, the parties cannot seek revision of the Schedule of Rights under Section 33(4) of the Land (Settlement of Title) Ordinance when that Schedule happens to be published subsequent to the decision in the disputed case, except for the limited purpose of having final adjustments made where the necessity for adjustments appears on the face of the Schedule, inasmuch as Section 33(4) is not intended to supply a means of appealing twice against a decision given by a Land Settlement Officer. A Land Settlement Officer, when dealing with an application for revision, is justified in refusing to revise, except in very special circumstances, where the applicant has been a party to the proceedings prior to the posting up of the Schedule of Rights. And the fact that the application for revision embraced parcels not mentioned in the application for leave to appeal against the decision given in a disputed case prior to the publication of the Schedule of Rights does not alter the view expressed above, since there appears to be no reason why it is impossible to appeal, or seek to appeal, against the decision as affecting all the parcels.

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(2) that an appeal by leave lies from a refusal by a Land Settlement Officer to revise the Schedule of Rights on application made to him under Section 33(4) of the Land (Settlement of Title) Ordinance.

Followed: LA 92/34, 2 P.L.R. 471.
CA 455/44, 12 P.L.R. 388.

Crown Counsel (J. Wicks) for appellant.

M. Eliash and M. Scharf for first respondent.

J. Feiglin for 76th respondent.

Henry Cattan and Subhi Khadra for rest of respodents.

de Comarmond J: This is an appeal by the Attorney-General on behalf of the Government of Palestine against the refusal of the Land Settlement Officer, Safad Settlement Area, to revise his decision in the Schedule of Rights posted up on the 15.12.44 in respect of the settlement of rights to lands of Meirun village.

The history of the case is rather unusual. When settlement began in the Meirun area, claims were submitted by Government on the usual printed forms. These claims did not allege the existence of any registered rights, and merely indicated that the areas claimed were unassigned State Domain and were shown on Forest plans which had been forwarded to the Settlement Officer. In short, the Government claims were based on the fact that the areas claimed were Forest Reserves and it is worth mentioning that Forest Reserves are not necessarily on State land (see sections 3, 4 and 12 of the Forests Ordinance, Cap. 61). There were other claimants besides Government, and it was the duty of the Settlement Officer to prepare a schedule of claims for each block as prescribed by section 21 of the Land (Settlement of Title) Ordinance, Cap. 80, to post it up (section 24) and then to investigate all claims publicly after due notice published in the village (section 27(1)). Section 27 also traces out what must be done when there are conflicting claims and it is provided by rule 2 of the Settlement of Title (Procedure) Rules, 1928, that rival claimants shall be notified of the date of hearing of conflicting claims. The Settlement Officer failed to notify the Government officer who had signed the claims of the date fixed for the hearing of the disputed claims, although he had listed Government as being

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the defendant. The Settlement Officer has explained this omission by pointing out that Settlement Officers had received instructions from the Commissioner of Lands and Surveys reminding them of the provisions of section 29 of the Ordinance and informing them not to expect a representative of the Attorney-General to appear on behalf of Government in all settlement cases. The instructions were conveyed in two letters dated respectively 13.5.1938 and 5.11.1939, and Settlement Officers were also thereby asked to request the attendance of a Government representative whenever they considered his presence necessary.

It is not for me to question the wisdom of those communications, but I am not surprised that they have brought about or at least greatly contributed to the difficulty in the present case.

The Settlement Officer pronounced his decision on the 12.10.43 and carefully explained why he decided to allot to Government part only of the Forest Reserves claimed by Government. He, however, allotted to Government two parcels in Block 13680 which had not even been claimed by Government.

Against that decision pronounced on the 12.10.43, Government sought to appeal. Government was undoubtedly entitled to apply for leave to appeal. The Settlement Officer refused to grant leave and gave the explanation that the Government claims amounted to no more than a reminder that the Settlement Officer should order registration in the name of Government, if the claims made by private persons failed. The Settlement Officer added that he had borne section 29 of the Ordinance in mind and that he saw no reason for granting leave to appeal. Application was then made to the Chief Justice under the provisions of section 63 of the Ordinance, but the application was made out of time and was therefore refused. Subsequently, the Settlement Officer published the Schedule of Rights and this gave rise to an application on behalf of the Attorney-General for a revision of the decision set out in the Schedule. Mr. Wicks who appears for the appellant has stressed the fact that this application made under section 33(4) of the Ordinance relates not only to parcels which had been mentioned in the application for leave to appeal but also several other parcels. The significance of this fact will appear later on.

The application under section 33(4) was refused by the Settlement Officer who gave his reasons for such refusal. The next step taken on behalf of Government was to apply for leave to appeal against this refusal. Again the Settlement Officer

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refused leave and the main reason given by him was that he did not consider that he had power to grant leave to appeal against the refusal to exercise the discretion vested in him by section 33(4) of the Ordinance. Leave to appeal was subsequently granted by the Chief Justice.

A preliminary objection was raised before us on behalf of some of the respondents (represented by Mr. Eliash) to the effect that no appeal lies against a refusal by the Settlement Officer to exercise the discretion vested in him by section 33(4) to revise a Schedule of Rights. We ruled that leave to appeal having been granted we would hear the parties and would, if satisfied that the appeal did not lie, dismiss it on that ground.

Section 33(4) of the Ordinance reads as follows:-

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

I confess that I have had, and still have, difficulty in interpreting that subsection as meaning that any person who holds himself out as being a claimant (although he had not made a claim within the prescribed time) may use section 33(4) to urge his alleged claim and presumably force a re-opening of the investigations and the holding of a fresh hearing. Were it not for decisions which I must respect, I would have understood section 33(4) to provide for final adjustments as between parties who had taken part in settlement proceedings. However, it was decided in Land Appeal 92/1934, 2 P.L.R. 471, that the operation of that subsection was not confined to persons who had previously claimed. The learned Judges who gave that decision mentioned that they appreciated the inconsistency between the subsection as interpreted by them and the provisions of the Ordinance (and I would add of the Rules) which regulate the addition of new claims prior to the settlement of rights; it is, therefore, impossible to avoid the conclusion that the point received full attention. I should perhaps call attention to the fact that at the time L.A. 92/1934 was decided the subsection provided for application to be made and revision effected (if at all) within fifteen days. Subsequently, Ordinance 48/39 enacted a new subsection (which is the present subsection (4) of section 33) providing for the application to be made within 30 days from the posting of the Schedule of Rights but not limiting the time for the carrying out of the revision. Land Appeal 92/34 was mentioned with approval in C.A. 455/44, 12 P.L.R. 388, and I therefore must accept that the principle of

new claimants under section 33(4) is established. What constitutes a revision of the decision of the Settlement Officer in the Schedule, and how such revision should be carried out are points which, so far as I know, have not been definitely settled, but I consider myself entitled to hold that a Settlement Officer is justified in refusing to revise, except in very special circumstances, where the applicant has been a party to the proceedings prior to the posting up of the Schedule of Rights. I will go further and say that section 33(4) is not intended to supply a means of appealing twice against a decision given by a Settlement Officer, and I will now proceed to examine this aspect of the matter. I would here mention that I have been at pains to try and understand sections 31, 32, 33(1) and 33(4) and have found them very confusing. Put shortly, my difficuly on the question of appeal is whether the law (as it now stands) provides that the Schedule of Rights is to be published after the investigation of claims referred to in section 27(1) and should deal only with undisputed claims. If this were the correct view, the result would be that the decision in the case of disputed claims would be notified to the parties concerned and to the Registrar and would not appear on the Schedule of Rights. Originally, section 30 of Ordinance 9 of 1928 (now section 31 of Cap. 80) laid down that the Schedule of Rights was to be drawn up after all claims had been investigated and section 33 (formerly 32) provided only for the making of clerical corrections to the Schedule while it was posted up. Then Ordinance No. 28 of 1930 and 33 of 1932 introduced amendments which made it clear that the Settlement Officer was to draw up the Schedule of Rights after investigating such claims as were undisputed and that after the Schedule had been posted up and sent to the Registrar, the latter would be informed of the result of disputed claims. Furthermore, the amendment of the appeal section in 1930 fitted in with the then new scheme by providing for appeals from decisions in undisputed claims, i e. decisions published in the Schedule of Rights. As matters then stood, therefore, and until 1939, it was clear that in a disputed claim the parties could only appeal against the decision notified to them in accordance with section 27(8) of the Ordinance. The amendments made to section 31 by Ordinance 48 of 1939 and 12 of 1942 have befogged the position, and I am not surprised to hear that Settlement Officers do not follow a uniform practice. Anyhow, my view is that in cases where a decision has been given in a disputed case and has been duly notified, the parties cannot seek revision of the Schedule of Rights when that Schedule happens to be published subsequently to the decision in the disputed case, except for the limited

purpose of having final adjustments made where the necessity for adjustments appears on the face of the Schedule.

The view I have just expressed about the use of section 33(4) by a party to a disputed claim does not wholly dispose of this appeal. It remains to examine whether the fact that the application for revision embraced parcels not mentioned in the application made for leave to appeal justifies Mr. Wicks' contention that in so far as these additional parcels are concerned the Settlement Officer was not justified in refusing to revise. I must say that the argument does not alter the view I have already expressed because I do not see why it was impossible to appeal, or seek to appeal, against the decision as affecting all the parcels.

The conclusion I have arrived at, therefore, is that the Settlement Officer was justified in refusing to revise.

When leave to appeal from refusal to revise was made, the Settlement Officer stated that in cases of refusal to exercise his discretion under section 33(4) there is no appeal even with leave. With that view I disagree.

The appeal is dismissed. The respondents other than No. 1 and No. 76 sided with the appellant and I will not allow them any costs. Respondents 1 and 76 will each have costs on the lower scale and LP.20 advocate's attendance fee for each advocate (i.e. Mr. Eliash and Feiglin).

Curry Ag. J: I agree with the judgment of my learned brother, but desire to make one or two further comments. It is true that as a result of numerous amendments the Ordinance is now confused and complicated and it requires to be redrafted by the legislator, but from my interpretation of Section 31 of the Ordinance, it is not possible for Section 33(4) to apply to disputed claims. According to Section 31 the Settlement Officer investigates all the rights and settles those which are undisputed. He then makes out his schedule of rights, stating in all the undisputed cases who is entitled to the land, and in the disputed cases making an entry "disputed". That schedule of rights is posted in the village and a copy sent to the Registrar of Lands. Subsequently, under sub-section (2) he notifies the Registrar of his decision in respect of the disputed claims, but it is to be noted there is no further posting of the schedule in respect of these decisions. It follows, therefore, that as no schedule of rights is posted after the Settlement Officer's decision in respect of disputed claims, it is not possible for Section 33(4) to apply to such cases.

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It would appear that some Settlement Officers do not adopt the correct practice, as I interpret it. Some of them apparently do not post the schedule of rights until after they have made their decisions on the disputed claims, and in fact that is the case here. Had the Settlement Officer in this case posted his schedule of rights after dealing with the undisputed claims, and then merely notified the Registrar of his decision in this matter, Government could not of course have made this application under Section 33(4). In my opinion, however, the fact that the wrong procedure has been adopted by the Settlement Officer does not enlarge the rights of any party.

Coming now to the question whether in the event of the Government having the right to apply under Section 33(4), the Settlement Officer exercised his discretion wrongly in refusing to revise his decision. In the first place, I would remark that this section must be distinguished from a general appeal section. In my opinion, revision should only be exercised by a Settlement Officer in comparatively rare cases. A revision does not mean a re-hearing of the whole case. I consider that it is little more than a request to reconsider his decision in the light of all the evidence already before him — with the possible exception that a party who had not previously claimed, might be allowed to adduce evidence. I certainly do not think it permits claimants who were parties in the Settlement proceedings to adduce further evidence and in fact have a re-trial.

For the foregoing reasons I agree that the appeal must be dismissed and costs allowed, as in the judgment of my learned brother.

Civil Appeal No. 92 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Hubbard Ag. J.

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FARIDEH JERIES NASER,
and others. . . . . *Appellants.*

v

MICHAEL AS'AD ASHKAR. . . . . *Respondent.*

Immovable property — Equitable title — Evidence — Judgment — Equitable title cannot be based on an agreement which is a nullity — Judgment not to be given for a plaintiff on the evidence of a single witness, if contradicted, unless that evidence is corroborated — Evidence Ordinance, Section 6.

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In allowing this appeal from the judgment of the Land Court of Haifa given in Land Case No. 21/43, whereby that Court, constituted of the President thereof (Judge Bourke), dismissed plaintiffs' action for being declared the lawful owners by way of inheritance from their ancestor of certain house property, the Court of Civil Appeal,

HELD (1) that a trial Court should not give judgment for a plaintiff on the evidence of a single witness, if contradicted, unless the evidence of the single witness is corroborated, and the fact that the trial Court disbelieves the evidence of the defendant does not alter the legal position created by Section 6 of the Evidence Ordinance.

(2) that equitable title to immovable property cannot be based on an agreement for sale which is a nullity.

The judgment of the Court was delivered by Hubbard Ag. J.

Henry Cattan for appellants.

Hanna Asfour and Theodore Mogannam for respondent.

Hubbard Ag. J.: This is an appeal from the judgment dated 28.2.46, of the Land Court, Haifa, in Land Case No. 21/43.

The action concerns the title to a certain house property situated in Shefa 'Amr. The appellants are a widow and her grown children who claim to be the lawful owners by way of inheritance from the late Elias Naser Jarrous, and they sought a declaration to that effect together with an order for recovery of possession from the respondent. The respondent contested the claim to ownership, and under a counterclaim based on an agreement for sale he set up an equitable title against the appellants, claiming in the alternative the refund of LP. 600 alleged to have been paid under the agreement.

It is not disputed that the appellants became entitled as owners to shares in the property, in accordance with a certificate of succession issued on 12.7.1926. On 12.2.33 the 2nd and 4th appellants (to whom I shall now refer as Farid and Anis), with the consent of the other appellants, leased the property to the respondent for two years commencing on 1.3.33. At the end of that term Farid and Anis entered into an agreement with respondent whereby he advanced to them the sum of LP. 100 without interest in consideration of their leasing the house to him without rent, that is to say, the loan of the money was in consideration of the use of the house. That agreement was for a period of one year, and it was renewed from time to time with the knowledge and consent of the other appellants, who throughout received from Farid and Anis what was due to them. These facts are all set out in the Statement of Claim, and they are not in issue.

On 14.11.41 Farid and Anis entered into a contract (Exhibit B) with the respondent, whereby they agreed to sell the

house to him in consideration of a sum of LP.300, receipt of which they acknowledged. In clause 4 of that agreement they admitted that the respondent had spent LP.300 on repairs to the house. The case really turned on whether Farid and Anis had acted with the authority, express or implied, of the other appellants when they entered into that contract. The appellants also averred that the admission that the respondent had spent LP.300 on repairs was false, and that he had incurred no expenses whatsoever up to the date of the contract.

The question which raises a difficulty in my mind and which I can answer only in the negative is this: Is there sufficient evidence as required by section 6 of the Evidence Ordinance (as amended) that Farid and Anis were authorised by appellants Nos. 5 and 6, Nadimeh and Aniseh, to sell the property? There is the evidence of the defendant who said: "Anis and Farid were empowered by other heirs to sell. They showed me no paper". Then there follows in the record a reference to para. 5 of Ex. B., which is the paragraph in the agreement to sell which recites that the signatories were empowered to sell. This evidence, in its context, looks very much like mere hearsay. But taking it at its highest, it is both contradicted by Nadimeh and Aniseh and, in my view, uncorroborated. The statement in the contract by Anis and Farid that they were empowered to sell can obviously not bind Nadimeh and Aniseh. Any remarks made out of Court by Farideh and Hanneh which might be taken to constitute either consent or ratification by them personally can also not bind Nadimeh and Aniseh. The evidence as to a statement made out of Court by Farideh to the effect that the two signatories were empowered to sell is only evidence of an admission that she herself empowered them. As regards Nadimeh and Aniseh it is pure hearsay. If Farideh knows of her own knowledge that Nadimeh and Aniseh did in fact authorise the sale, then to make that evidence, she must have testified to it in Court. This she has not done.

The fact that the trial judge thought the appellants were lying is, in my view, immaterial. In fact, s. 6 of the Evidence Ordinance has no application except where the Court does disbelieve a defendant. (The Plaintiffs in this case, for the purpose of the point under consideration, which arises on the counterclaim, were, of course, in the position of defendants). Sec. 6 provides in effect that the Court, although it believes the evidence for the plaintiff and consequently disbelieves the evidence for the defendant, must nevertheless not give judgment for the plaintiff on the evidence of a single witness, if contradicted, unless it is corroborated. If in fact the Court thinks the defence witnesses are truthful, then obviously s. 6 is irrelevant, because the Court will not in such case wish to give judgment for the plaintiff. The fact that the trial Court makes use of invective and calls the plaintiffs "brazen liars" cannot alter the legal position. Nadimeh and Aniseh have contradicted the defendant's statement; this statement is, in my view, uncorroborated by any other evidence; the result is that the trial Court was not entitled to find that Nadimeh and Aniseh consented to the agreement. The agreement being a joint one, it follows that, not having been signed by two of the parties to it, it is a nullity, and no equitable title can be based on it.

I add here that it may well be that if the evidence of the defence witnesses on the relevant point is extremely contradictory then it might be possible to say that there was no real contradiction of a sole witness for the plaintiff. But in the present case the evidence of Nadimeh and Aniseh on the relevant point, i.e. whether or not they consented to the agreement, is quite categorical. It is only in connection with the sale to Kamal Jarrous that the learned Judge found the evidence of appellants so very unsatisfactory.

Mr. Asfour, for the respondent, contended in this Court that the other appellants had held out Anis and Farid as their agents for the purpose of selling the property. The learned Judge did not base his judgment on this ground and I think it is in any case untenable. Permitting persons to act as agents to manage properties and collect their rents cannot, in my view, be deemed to be holding them out as agents to sell such properties.

Finally, on the question of sale or agreement to sell I am in agreement with the trial Judge that the contract was an agreement to sell and I am further in agreement with him that the judgment in C.A. 140/33 creates no estoppel in the present case. That judgment was given on an appeal from a judgment in a possessory action in the Magistrate's Court. The question of sale or agreement to sell was not really in issue in that case, that is to say, it did not fall to be conclusively determined. The question which did arise was whether, in view of the opposite contentions of the parties as to the proper construction of the contract, there was a genuine dispute as to an equitable right to the land. If there was such a dispute, then obviously the question whether the contract was an agreement for sale and gave an equitable right was a question for the Land Court. In my view, the statements in the judgment of the Court of Appeal are "obiter dicta" and the judgment is

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binding between the parties only as determining that there was a genuine dispute on which they should go to the Land Court.

For the reasons I have given I am of opinion that this appeal should be allowed, and that the declaration prayed should be granted. I do not however think it would be proper to make any order in this appeal as to possession, since it may be — I do not say it is so — but it may be that the respondent's occupancy of the house is protected under the Rent Restriction Ordinance, and this matter was never dealt with by the trial Court nor on this appeal. The appellants to have their costs on the lower scale to include a hearing fee of LP.10. The appellants will also have their costs on the lower scale in the Court of trial together with a hearing fee of LP.10.

Shaw J: I concur.

Civil Appeal No. 337 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Frumkin J.

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CO-OPERATIVE SOCIETY PRINTING AHDUTH. . . . . *Appellant.*

v

1. ISRAEL ASHER SHAFIR,
2. YOSEPH KLEIN,
3. AVRAHAM HEIN. . . . . *Respondents.*

Landlord and tenant — Eviction — Estoppel — Agreement for sale of immovable property included provision allowing purchaser to enter into unrestricted possession — Letting by purchaser of property — Inability of purchaser to pay full purchase price — Subsequent agreement between purchaser and vendor cancelling agreement for sale — Action for recovery of possession against purchaser by vendor — Judgment in favour of vendor — Whether tenant can be evicted.

The owner of certain house property in Tel-Aviv entered in 1937 into an agreement for sale of that property to one Stachel. The agreement in question allowed the purchaser to enter into unrestricted possession, including the right to let the property or any part thereof. The purchaser entered into possession and paid the rates due on the property in question and got the rentals. In 1941 Stachel let a store in the property to the Co-operative Society Printing Ahduth. Being unable to pay the balance of the purchase price, the vendor and the purchaser agreed in 1944 to cancel

the 1937 agreement. Subsequently the vendor brought an action for recovery of possession against Stachel, which was not defended, and judgment was given in favour of the vendor. The said judgment included the store occupied by the Co-operative Society. When execution of the judgment was sought, the tenant commenced proceedings in the Magistrate's Court of Tel-Aviv for the setting aside of the judgment of eviction. The Magistrate decided in favour of the Society. The vendor appealed to the District Court of Tel-Aviv (Civil Appeal 107/45) and that Court (Judge Cheshin and Acting Judge Kantrovitch) allowed the appeal, set aside the judgment of the Magistrate and dismissed the Society's action. The Society appealed to the Supreme Court by leave.

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In allowing the appeal, setting aside the judgment of the District Court and restoring the judgment of the Magistrate, the Court of Civil Appeal,

HELD that whatever be the position of the purchaser (Stachel) *vis-à-vis* the vendors (respondents), and taking it for granted that Stachel was not vested with the ownership of the property because the agreement was one for sale and not a sale, *vis-à-vis* the Society (tenant of Stachel) Stachel was a landlord and the Society was entitled to look upon him as such. And Stachel was not at liberty to take away from the Society rights which it had lawfully acquired from a person who, if not the owner, could, at least as regards the lease to it, be regarded as a quasi-agent of the vendors (respondents).

The judgment of the Court was delivered by Frumkin J.

U. Heinsheimer for appellant.

R. Hutory for respondents.

Frumkin J: The Appellant in this case has, since 1941, occupied a store in Tel-Aviv, which he acquired by way of lease from one Stachel who is not a party to the present proceedings. Stachel, in 1937, had entered into an agreement to purchase from the Respondents certain property which included the store in question. It appears that Stachel did not pay the full purchase price, and in 1944, by consent, the agreement of 1937 was cancelled. Thereupon the Respndents brought an action for dispossession against Stachel which, being unopposed, resulted in an order of eviction against him. That order of eviction included the store occupied by the Appellant which forced him to bring the present action. He succeeded in the Magistrate's Court, but on appeal to the District Court the Magistrate's judgment was set aside. Hence the appeal to this Court.

The agreement of 1937 has not been produced, but it is conceded that by virtue of it Stachel was allowed to enter into unrestricted possession, not excluding the right to let the property or any part of it. Moreover, it has not been denied that the Respondents were aware of the occupation by the Appellant which lasted, as mentioned above, from 1941 up to the present day. So whatever be the position of Stachel vis-à-vis the vendors

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(the present Respondents), and taking it for granted that he was not vested with ownership of the property because the agreement was only an agreement to purchase and not a sale, vis-à-vis the Appellant Stachel was a landlrod and the Appellant was entitled to look upon him as such.

It has been argued that Stachel could not confer upon others more rights than he had himself, and that he having agreed to cancel his agreement with the Respondents, the Appellant, who derived his rights from him, is not in a better position. Against that it could be argued with equal force that Stachel was not at liberty to take away from the Appellant rights which he had lawfully acquired from a person who, if not the owner, could, at least as regards the lease to him, be regarded as a quasi-agent of the Respondents.

For these reasons the judgment of the District Court must be set aside and the judgment of the Magistrate restored, with costs to the Appellant here and below, to include LP. 10 advocate's fees for attendance at the hearing of this appeal. The order as to costs in the District Court is reversed.

Shaw J: I concur.

High Court No. 40 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice, Shaw J. and Hubbard Ag. J.

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and
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HC 40/47
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General Officer Commanding British Troops in Palestine and Trans-Jordan and others

ISRAEL ROKACH,
CHAIRMAN OF THE COMMITTEE
OF THE JEWISH COMMUNITY OF
TEL-AVIV. . . . . *Petitioner.*

v

GENERAL OFFICER COMMANDING
BRITISH TROOPS IN PALESTINE
AND TRANS-JORDAN,
and others. . . . . *Respondents.*

High Court — Person petitioning the High Court must have a real interest in the case he brings before that Court.

Israel Rokach, as Chairman of the Committee of the Jewish Community of Tel-Aviv, pursuant to a resolution of the said Committee by which he was instructed and authorised to make a petition to the High Court, petitioned

the High Court for the issue of an order nisi, which was granted, calling upon the General Officer Commanding the British Troops in Palestine and Trans-Jordan and the President of the Military Court to show cause why the judgment of the Military Court sentencing Dov Gruner to death and the confirmation thereof should not be quashed and also calling upon the Commissioner of Prisons and the Officer-in-Charge of the Central Prison, Jerusalem, to show cause why they should not refrain from carrying out the orders of the General Officer Commanding and the President of the Military Court to execute Dov Gruner. At the return, the point was taken that the petition was incompetent in that the petitioner had no real interest in the case.

In discharging the rule nisi, the High Court.

HELD that since the petitioner had no peculiar or distinct grievance of his own, he had no *locus standi* in the case and the petition was incompetent.

Distinguished: HC 5/42, 9 P.L.R. 191.

M. Seligman and M. Kritzman for petitioner.

Attorney General (L.B. Gibson, K.C.) and Solicitor General (M.J. Hogan, K.C.) for respondents.

Order: In the course of the argument on this return the objection has been taken that the application is incompetent in that the Applicant has no real interest in the case. This issue must be determined first, because if we come to the conclusion that the Applicant has no *locus standi,* we cannot entertain the other arguments advanced on his behalf.

The Applicant, Israel Rokach, is the Mayor of Tel-Aviv, and his prayer is that the sentence of death passed upon one Dov Gruner by the Military Court should not be carried out. There is no application by Dov Gruner himself, and it is not suggested that he is restricted from making such an application if he so desired. The Petitioner states that he lodged the petition pursuant to a resolution of the Committee of the Jewish Community of Tel-Aviv of which he is the chairman. He says he is concerned regarding the legality of the trial of Dov Gruner, who is a member of that Community. The question arises, Has the Petitioner such a real interest in the issue as would entitle him to apply for a rule?

A previous petition made by the uncle of the said Dov Gruner was rejected by the Judicial Committee of the Privy Council on the ground that the uncle, who lives in New York, could not be said to be personally interested by the order, and consequently the petition was incompetent. Now the Administration of Palestine provides for the organisation of the various communities on national and religious lines, and it ensures these communities rights and privileges in the way of

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a measure of local autonomy over their own affairs. It may well be therefore that in certain circumstances the head of a community, who can be regarded as the custodian of the rights and privileges of the community, would have a *locus standi* to apply for a writ of this description in matters peculiarly affecting the special rights and privileges accorded to the community.

In Hight Court Case No. 5 of 1942 (9 P.L.R. p. 191) an objection to the legal standing of Israel Rokach, on that occasion also petitioning in his capacity as chairman of the Tel-Aviv Jewish Community, to apply for a similar writ was overruled. In that case, however, the prayer was for a writ of prohibition against the Central Agudat Israel to restrain them from issuing marriage certificates and divorce registration certificates, for the celebration of Jewish marriages. But under article 53 of the Palestine Order-in-Council the Rabbinical Courts of the Jewish Community, (of which community in so far as it is recognised for the purposes of the article the Central Agudat Israel were not members) were given exclusive jurisdiction in matters of marriage and divorce. The head of that community could as we have indicated be regarded as the custodian of those rights and privileges and it was, we presume, because of this that the Court came to the conclusion that Israel Rokach had a real interest in the issue in that case.

It appears to us, however, that the facts in this case are different. The law establishing Military Courts, which the petitioner attacks, applies to every community in Palestine, regardless of race or creed. It has been in force for ten years. Many persons, including a member of the Jewish Community, have been sentenced to death and executed under the provisions of this law, and it has not been suggested that the petitioner ever intervened until this application. That law, on the face of it at all events, derives its validity from an Order-in-Council and an enactment of the legislature of Palestine. In this respect it does not differ from other laws of the territory. We are unable to see that the petitioner has any particular interest in the consequences of this law on the person of Dov Gruner. If the petitioner is aggrieved at all he is only aggrieved in common with the rest of the public and he has no peculiar or distinct grievance of his own.

We come therefore to the conclusion that the petitioner Israel Rokach has no *locus standi* in this case. The petition is incompetent and must be dismissed.

Privy Council Appeal No. 43 of 1945.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

Before: Lord Uthwatt, Sir Madhavan Nair and Sir John Beaumont.

ATTORNEY GENERAL OF PALESTINE. . *Appellant.*

v

FAKHRY AYYAS. . . . . *Respondent.*

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Import, Export and Customs Powers (Defence) Ordinance, 1939 — Whether or not the Ordinance in question when construed as a whole empowers the High Commissioner to prohibit export otherwise than by water — Import, Export and Customs Powers (Defence) Ordinance, 1939, Section 3.

Import, Export and Customs Powers (Defence) Ordinance, Section 5(1)(b) — Whether head (b) of Section in question applicable where export involving only carriage by land was in contemplation — Word "place" in Section 5(1)(b) not limited by the reference to "quay, nor is it confined in its application to a spot which possesses some characteristic other than locality.

This appeal to the Privy Council was against the judgment of the Supreme Court sitting as a Court of Civil Appeal given in Civil Appeal No. 290/44, 11 P.L.R. 602, whereby the Supreme Court allowed an appeal made by Fakhry Ayyas against the judgment of the District Court of Haifa dismissing a claim made by Ayyas for the return of goods to him or the value thereof which had been declared forfeited under Section 5 of the Import, Export and Customs Powers (Defence) Ordinance, 1939, as Ayyas attempted to export the goods out of Palestine by land carriage to Syria without an export permit. The two main legal points were: (1) whether or not the Import, Export and Customs Powers (Defence) Ordinance, 1939, when construed as a whole, empowered the High Commissioner to prohibit export otherwise than by water and (2) whether assuming it did, head (b) of Section 5 of the Ordinance in question applied where export involving only carriage by land was in contemplation. There was also raised the further point that the forfeited goods were not brought to a "place".

In advising His Majesty that the appeal should be allowed, the Judicial Committee of the Privy Council,

HELD (1) that Section 3(1) of the Import, Export and Customs Powers (Defence) Ordinance, 1939, the language of which is clear, unambiguous and sweeping and in which there is nothing to suggest that there is any limitation on the extent of the power to prohibit importation or exportation, empowers the High Commissioner to make any order prohibiting or regulating the exportation from Palestine by any means of all goods or goods of any specified description, and is not limited in its application only to making orders prohibiting or regulating exportation by sea. Accordingly throughout the Import, Export and Customs Powers (Defence) Ordinance, 1939, "export", unless controlled by the context, includes export by land carriage.

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(2) that head (b) of Section 5(1) of the Import, Export and Customs Powers (Defence) Ordinance, 1939, having regard to the fact that the word "exported" in head (a) of Section 5(1) is not confined in its application to export by sea, and also to the fact that head (b) on its general intendment picks up the references to export, carriage coastwise and shipping as ships' stores contained in head (a), with the result that the phrase "If any goods are brought to any quay or other place for the purpose of being exported" — and it is the phrase that has to be construed, not particular words contained in it — has to be looked at in light of the general signification of the word "exported", and bearing in mind the provision contained in Section 26 of the Interpretation Ordinance, applies where goods are brought to a place for the purpose of export by land. The meaning of "place" in Section 5(1)(b) is not limited by the reference to "quay" and the suggestion that sea carriage alone is under contemplation is not inherent in the phrase "quay or other place", and the said words "quay or other place" afford no context for limiting the meaning of "exported".

(3) that the word "place" in Section 5(1)(b) of the Import, Export and Customs Powers (Defence) Ordinance, 1939, is not confined in its application to a spot which possesses some characteristic other than locality.

The judgment of the Board was delivered by Lord Uthwatt.

Judgment: This is an appeal from a judgment of the Supreme Court of Palestine setting aside a judgment of the District Court of Haifa which had dismissed the respondent's claim for the return of certain goods or payment of their value.

The goods in question were claimed by the Government of Palestine (represented in the proceedings by the appellant the A-G for Palestine) to have become forfeited goods under the Import, Export and Customs Powers (Defence) Ordinance 1939. The facts are not in dispute; the only questions for decision relate to the proper construction of the Ordinance.

The respondent in September 1942 bought certain goods in Palestine for export to Syria. He made no effort to obtain a licence for export. On the 18th September 1942 the goods were loaded into two lorries which left Jaffa at 2 a.m. After by-passing Samakh, where there was a customs post, the lorries were stopped by the police about 200 yards from the Syrian border and were then taken to Samakh where the goods were seized. The District Judge who tried the case had no difficulty in drawing the inference of fact that the goods were being carried for purpose of export.

The more directly material provisions of the Ordinance as it stood amended at the date of the seizure of the goods are as follows:—

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"3. — (1) The High Commissioner may by order make such provisions as he thinks expedient for prohibiting or regulating, in all cases or any specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the importation into, or exportation from, Palestine or any specified part thereof, or the carriage coastwise or the shipment as ships' stores, of all goods or goods of any specified description.

(4) For the avoidance of doubt it is hereby declared that, without prejudice to the provisions of the enactments relating to customs with respect to ships and aircraft, the taking into or out of Palestine of ships or aircraft may be prohibited or regulated by an order under this section as an importation or exportation of goods, notwithstanding that the ships or aircraft are conveying goods or passengers, and whether or not they are moving under their own power.

5. — (1) If any goods

(a) are imported, exported, carried coastwise or shipped as ships' stores in contravention either of an order under this Ordinance or of the law relating to trading with the enemy, or

(b) are brought to any quay or other place, or waterborne, for the purpose of being exported or of being so carried or shipped in contravention either of an order under this Ordinance or of the law relating to trading with the enemy,

those goods shall be deemed to be prohibited goods and shall be forfeited; and the exporter or importer of the goods or his agent or the shipper of the goods shall be liable, in addition to any other penalty under the Ordinance relating to customs, to a penalty of two years' imprisonment or a fine of five hundred pounds or both.

(2) If any such order as aforesaid prohibits the exportation of any goods unless consigned to a particular place or person and such goods so consigned are delivered otherwise than to that place or person, as the case may be, the vessel in which the goods were exported shall be deemed to have been used in the conveyance of prohibited goods.

(3) If any goods are imported, exported, carried coastwise or shipped as ships' stores, or are brought to any quay or other place, or waterborne, for the purpose of being exported or of being so carried or shipped, a customs officer may require any person possessing or having control of the goods to furnish proof that the importation, exportation or carriage coastwise, as the case may be, is not unlawful by virtue either of an order under this Ordinance or of the law relating to trading with the enemy; and if such proof is not furnished to the satisfaction of the Director, the goods shall be deemed to be prohibited goods unless the contrary proved.

7. — (1) For the purpose of securing compliance with the provisions of this Ordinance or any order made under section 3 of this Ordinance or with any other Ordinance relating to the importation or exportation of goods or with the law relating to trading with the enemy —

(a) a customs officer may at any time refuse clearance to any ship; . . .

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8. — (1) Where a person about to export goods from Palestine, in the course of making entry thereof before shipment, makes a declaration as to the ultimate destination thereof, and the Director has reason to suspect that the declaration is untrue in any material particular, the goods may be detained until the Director is satisfied as to the truth of the declaration, and, if he is not so satisfied, the goods shall be forfeited.

(2) Any exporter or shipper of goods which have been exported from Palestine shall, if so required by the Director, satisfy him that those goods have not reached any enemy or any enemy territory, and if he fails so to do, he shall incur a penalty of treble the value of the goods or one hundred pounds at the election of the Director, unless he proves that he did not consent to or connive at the goods reaching an enemy or enemy territory, and that he took all reasonable steps to secure that the ultimate destination of the goods was not other than that specified in the documents shown or furnished to the customs officers in connection with the exportation of the goods."

Purporting to act under the powers conferred by Sect. 3 of the Ordinance the High Commissioner by the Licensing of Exports Order 1940 prohibited the export of all goods from Palestine.

There is one provision of the Interpretation Ordinance which is relevant. That provision runs as follows:—

"26. Where the words 'or' 'other' and 'otherwise' are used they shall unless a contrary intention appears be construed disjunctively, and not as implying similarity, unless the word 'similar' or some other word of like meaning is added."

In these circumstances two main questions of construction were debated: first, whether or not the Ordinance when construed as a whole empowered the High Commissioner to prohibit export otherwise than by water; and second, whether assuming it did, head *(b)* of Sect. 5 applied where export involving only carriage by land was in contemplation. A further point was raised by the respondent that the goods in question were not brought to a "place."

The District Judge took the view that the Ordinance regulated the import and export of goods into and out of the country whether it be by sea, land or air and that to restrict the meaning of "other place" to places *ejusdem generis* with "quay" would not be giving effect to the obvious intention of the legislature as gathered from a general survey of the Ordinance.

The Supreme Court did not express any opinion upon the general effect of the Ordinance but was content to rest its decision on a conclusion that "other place" must refer to some place near or close to or part of a waterside.

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For the reasons which they will now state, their Lordships have come to the conclusion that the views expressed by the District Judge are correct.

The first matter to be determined is the general scope of the Ordinance. The respondent contended that as a matter of construction, the powers of the High Commissioner under Sect. 3(1), as regards exportation, extended only to making orders prohibiting or regulating exportation by sea. It was argued that a consideration of this Ordinance as a whole and in particular the terms of head *(b)* of Sect. 5(1), of 5(2), and Sects. 7 and 8, showed that export by sea alone was under consideration, and that Sect. 3(1) should accordingly receive a limited construction.

For the purposes of considering this argument, their Lordships are content to assume that head *(b)* of Sect. 5(1) applies only to export by sea. As regards Sect. 5(2) it is clear that read strictly it proceeds on the footing that where goods are exported, a vessel is concerned. The provisions of Sect. 7(1) do not aid the respondent's argument, for the existence of a particular provision relating to ships carries the point no further. Sect. 8(1) is of more assistance to the respondent by reason that it assumes that an entry before shipment will be made whenever goods are about to be exported from Palestine. Their Lordships express no opinion as to the effect of Sect. 8(2) but again are content to assume in favour of the respondent that it applies only to goods shipped by sea.

The conclusion of the respondent was that on giving due weight to the language and substance of these provisions, the proper inference was that as regards exportation export by sea alone fell within the contemplation of Sect. 3. That Section should as a matter of construction be limited accordingly. The Ordinance would in light of Palestine's land frontiers be somewhat whimsical in character but that, it was argued, was no reason for attributing to the Ordinance a construction repelled by its terms.

In their Lordships' view the argument proceeds upon a false basis. The substantive provision is contained in Section 3. All the provisions on which the respondent relies (other than Sect. 8) are provisions which are ancillary either to Sect. 3 or to some other enactment. Sect. 8 is an independent provision. Their Lordships do not doubt that if Sect. 3(1) was not clear in its intendment, resort might legitimately be made to ancillary provisions related to Sect. 3(1) in order to determine its proper meaning and to resolve any ambiguity. But the language of

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Sect. 3(1) is clear, unambiguous and sweeping. There is nothing in it to suggest that there is any limitation on the extent of the power to prohibit importation or exportation. There is indeed nothing in it to suggest that methods of export are being considered or dealt with at all. These circumstances taken alone are sufficient to preclude a gloss limiting the power to prohibit export to a power to prohibit export by sea carriage. The matter does not however rest there. First, a gloss cannot be put upon exportation without putting the same gloss on importation, for the two matters are in the section dealt with together and there is nothing in any part of the Ordinance to suggest that importation by sea alone is in view. Second, under the Act exportation from or importation into or from a part of Palestine may be prohibited. A land-locked part of Palestine might be selected as an area subject to restrictions on importation and exportation, and obviously sea carriage would then be out of the question. And lastly Sub-sect. (4) "for the avoidance of doubt" declares that an order under Sect. 3(1) may prohibit the taking out of aircraft moving under their own power. The inclusion of any means of export is therefore clear. The result is not that the ancillary provisions suggest a qualification on the terms of Sect. 3 but that some of the ancillary provisions come under the stigma of ineptitude or of incompleteness.

Their Lordships are therefore of opinion that exportation by any means is within the ambit of Sect. 3(1) and that therefore throughout the Ordinance "export", unless controlled by the context, includes export by land carriage.

The next question is the proper construction of head *(b)* of Sect. 5(1). The contention of the respondent is that head *(b)* is confined to "the bringing of goods to a quay or other like place for the purpose of being exported by sea". This contention has to be examined on the footing that the word "exported", unless controlled by the context, is quite general in its signification.

It is beyond question that in head *(a)* of Sect. 5(1) the word "exported" is not confined in its application to export by sea. No reason can be assigned for putting a limitation on its general scope. Head *(b)* on its general intendment picks up the references to export, carriage coastwise and shipping as ships' stores contained in head *(a)*, with the result that the phrase "If any goods are brought to any quay or other place for the purpose of being exported" — and it is the phrase that has to be construed, not particular words contained in it — has to be looked at in light of the general signification of the word "exported". Once the question is stated, the answer is

apparent, when the provision of the Interpretation Ordinance quoted above is borne in mind. The meaning of "place" is not limited by the reference to "quay" and the suggestion that sea carriage alone is under contemplation is not inherent in the phrase "quay or other place". The words "quay or other place" afford therefore no context for limiting the meaning of "exported". In their Lordships' view therefore head 5(1)*(b)* applies where goods are brought to a place for the purpose of export by land.

The remaining question is whether "place" is confined in its application to a spot which possesses some characteristic other than locality. Their Lordships see no reason for accepting any such limitation.

In the result therefore the goods were, in their Lordships' view, duly forfeited according to law.

Their Lordships will humbly advise His Majesty that the appeal be allowed. The respondent will bear the cost of this appeal and of the proceedings in the Supreme Court.

Civil Appeal No. 260 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Frumkin J.

1. ROUGEA BARZILAI,
2. ESTHER PERERA. . . . . *Appellants.*

v

DAVID SLONIMSKY. . . . . *Respondent.*

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Principal and agent — Irrevocable power of attorney given — Transaction between agent and stranger — Stranger not knowing of state of mind of principal — Whether stranger affected by state of mind of principal being feeble and unable to manage his affairs.

An irrevocable power of attorney was executed before a Notary Public whereby the attorney was given, amongst others, the power to mortgage certain immovable properties of the appointor. The attorney mortgaged one of the properties and when the mortgage-debt, on falling due, was not paid, the mortgagee applied for the sale of the mortgaged property. Sale proceedings proceeded and after about a year of the start of the sale proceedings application was made for stay of the proceedings on the ground of the insanity of the appointor. An action was also brought in the District Court of Tel-Aviv for the interdiction of the giver of the power of attorney and an order was given. Subsequently the curators commenced proceedings in the

Land Court of Haifa (Land Case No. 9/42) in which they asked for the cancellation of the mortgage, and, by amendments to the statement of claim made later, since the mortgaged property was in the meantime purchased by the mortgagee and registered in his name in the Land Registry and was on the same day transferred by the new owner (the mortgagee) to another person, they asked for the cancellation of the sale by auction, for the cancellation of the registration in the name of the first purchaser and also the cancellation of the registration in the name of the second purchaser. It was not alleged that the mortgagee had any direct negotiations with the giver of the power of attorney or that he ever met him. From the evidence adduced by the plaintiffs, no evidence having been adduced by the defendants, the Land Court, constituted of the President thereof (Judge Weldon), found that the appointor was at the time of the making of the power of attorney, and in fact had been long before the execution of that power of attorney, of the mentality of a child of imperfect understanding and quite incapable of managing his affairs, and that therefore the mortgage effected by the appointee was null and void, and that consequently the whole sale proceedings and the subsequent registrations in the name of the first defendant and of the second defendant were a nullity. The Court then went on to grant the prayer of the plaintiffs. The defendants appealed.

In allowing the appeal and setting aside the judgment of the Land Court, the Court of Civil Appeal,

HELD that having regard to the fact that the power of attorney was authenticated by the Notary Public and emphasized that it was signed by the free will of the principal who confirmed its contents, and having regard to the fact that there was no evidence that either the mortgagee or his purchaser had any knowledge of the state of mind of the giver of the power of attorney at the relevant times, the mortgagee was justified in treating the attorney as a duly authorised person to represent his principal and bind him, and both he (i.e. the mortgagee) and his purchaser were protected by law.

The judgment of the Court was delivered by Frumkin J.

E. D. Goitein for appellants.

S. Fogel for respondent.

Frumkin J: The facts of this case are fully set out in the judgment of the District Court, and the following are the relevant data. On 23.8.37, the respondent executed an irrevocable power-of-attorney in the name of one Lampkin, authorising him to mortgage two plots of land. The power-of-attorney was executed before the Notary Public who authenticated the document in the following terms:

> "I, the Notary Public of Tel-Aviv, hereby certify that on the date and day following there appeared before me David Slonimsky, who was identified to me by his British Passport No. 1255 given to him in Jerusalem on 24.1.23, and before me he signed on his free will and confirming the contents of this power, in witness whereof I subscribed my name and affixed the seal of my office this 23.8.37.
>
> (Sgd.) Sion Alouf
> Notary Public, Tel-Aviv."

On 2.11.37 the said Lampkin, acting upon the power-of-attorney, executed a mortgage on the plot in dispute in favour of the first appellant. When the period of the mortgage expired in November, 1939, proceedings started before the Execution Office for the enforcement of the mortgage, which lasted for almost three years. About one year after the start of the execution proceedings, an application was made by the brothers of the respondent to stay proceedings on the ground of the insanity of the respondent, and since then proceedings continued simultaneously on the one hand to have the mortgage enforced, and on the other hand to have the respondent interdicted and the mortgage cancelled on the ground of his insanity. The respondent was interdicted in 1942, and his curators brought the present action on 26.6.42. Numerous applications were then made by both sides to the Execution Officer and in Courts, and ultimately the first appellant succeeded in having the plot registered in his name on 27.9.43, and on the same day transferred the plot to the second appellant. The learned Judge in the Court below decided that the respondent, being of unsound mind at the time of the execution of the power-of-attorney and prior to that date, the power-of-attorney and all that followed and was based upon it, namely the mortgage and the execution proceedings and the registration in the name of the second appellant, were invalid. Hence this appeal.

It is not disputed that the respondent was feeble-minded, and it may very well be that the appointee, Lampkin, was aware of his state of mind when he accepted the power-of-attorney, and even that he had acted fraudulently in executing the mortgage in favour of first appellant. I am even prepared to assume that any person coming in contact with the respondent might have realised his feeble state of mind. But the question we are concerned with is whether the first appellant had any knowledge, at the time he advanced the money to Lampkin, of the state of mind of the respondent. We have to bear in mind that the respondent was not interdicted until some five years after the execution of the power-of-attorney and mortgage, and it has never been alleged that the first appellant had any direct negotiations with the respondent or that he ever met him. It appears to me that, being faced with a power-of-attorney formally authenticated by the Notary Public and emphasizing that it was signed by the free will of the principal who confirmed the contents of it, he was justified in treating the agent as a duly authorised person to represent the principal and bind him. Under these circumstances, and there being no evidence that either the first or the second appellant had any knowledge of

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the state of mind of the respondent at the relevant times, they are protected by law.

It follows that the appeal must be allowed, and the judgment of the Land Court set aside, with costs on the lower scale here and below, to include LP.15 advocate's fees for attendance at the hearing of this appeal and LP.15 advocate's attendance fee in the Court below.

Shaw J.: I concur.

Civil Appeal No. 324 of 1946.
Civil Appeal No. 340 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and de Comarmond J.

Civil Appeal No. 324/46.

ESTHER BUKSDORF,
and others. . . . . *Appellants.*

v

HERICLIA POLITIS. . . . . *Respondent.*

Civil Appeal No. 340/46.

YACHIEL KLEINMAN. . . . . *Appellant.*

v

HERICLIA POLITIS. . . . . *Respondent.*

Power of attorney — Given in time of peace — Giver of power became enemy — Validity of such power of attorney.

Prescription — Date from which period of prescription runs against a person out of Palestine — Mejelle, Articles 1660, 1663, 1664, 1665 and 1666.

Land Court — Power of Land Court to grant reliefs purely declaratory — Civil Procedure Rules, 1938, Rule 52(4).

Hericlia Politis, a Greek subject, became in 1917, by purchase from her father, the owner of certain mulk property at present situate in Tel-Aviv. This transaction took place at Constantinople. On information reaching Politis in 1925 that her property had been partitioned and registered in the names of two of her adjoining owners, namely the Government of Palestine and one Claire Calmy, she proceeded to Palestine in 1926 and commenced proceedings in the Land Court of Jaffa (Land Case No. 151/26) against the Government and Claire Calmy. The case dragged on in the Land Court until

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January, 1936, when judgment was given in favour of Politis. Government accepted the decision of the Land Court, but Calmi appealed. The Court of Appeal set aside the judgment of the Land Court and remitted the case to the Land Court to deal with one point. The Land Court carried out the order of the Supreme Court and gave a fresh judgment adhering to its original decision in every respect. Calmy appealed a second time and her appeal was dismissed (See Land Appeal No. 43/36, 4 P.L.R. 73). In January, 1939, the land the subject matter of the dispute was registered in the name of Politis. Politis was faced with the difficulty that certain persons were on the land, and she commenced proceedings in the Magistrate's Court in May, 1939, against those persons for recovery of possession of her land. Two actions were filed, the trial in one of which was stayed pending the result in the other, while the trial of the other action, the defence in which was limitation of action, proceeded practically to its conclusion at which stage the Magistrate decided that although the defendants had encroached on plaintiff's land, yet he had no power to make a decision on the question of limitation of action in a case relating to land, and he adjourned the hearing *sine die* to enable the plaintiff to produce a declaratory judgment of a competent Court declaring that the possession of the land by the defendants for many years did not give them any rights of ownership in the land or rights resulting from the plea of limitation of action. Politis thereafter went to the Land Court of Tel-Aviv and started proceedings in that Court (Land Case No. 5/41) in which she prayed for a judgment declaring that: (a) the defendants had not acquired any rights of ownership in the land in question by virtue of their possession; (b) the defendants Nos. 1-10 had not acquired any rights as a result of their plea of limitation of action in the said Magistrate's Court case; and (c) on 21.5.39 and 13.6.39, the respective dates of the institution of the actions in the Magistrate's Court for the recovery of possession, there was no limitation of action in respect of both actions. This action was brought in 1941 by an advocate on behalf of Politis by virtue of a general power of attorney given by the latter to the former. Politis was in 1941 an "enemy" within the meaning of the Trading with the Enemy Ordinance, 1939, she being a Greek subject domiciled in Greece since before Greece was declared enemy territory on 9th May, 1941. But before instituting the action, her advocate obtained the authorisation of the Custodian of Enemy Property to continue to act on behalf of Politis in her claim for recovery of possession and ownership in respect of her property. In 1945 an application was made for the dismissal of the action on the ground that there was no claim before the Court inasmuch as the authorisation by the Custodian of Enemy Property was ineffective. The Land Court, constituted of the Relieving President thereof (Judge Windham), decided that the Custodian had power to authorise the advocate to continue to act on behalf of Politis, but that as soon as Politis became "enemy" the power of attorney expired and therefore the Custodian's authorisation, which was given some three months after Greece hed been declared enemy territory, was ineffective. Instead of dismissing the action, the Court adjourned the hearing so as to enable Politis to come to Palestine and give a fresh power of attorney to her advocate. Politis came to Palestine, and the action proceeded and judgment was given by the Land Court, constituted of the Relieving President thereof (Judge Rigby), in plaintiff's favour. The defendants appealed. The principal grounds of appeal were: (1) that there was no action proper before the Land Court, inasmuch as the power of attorney given by Politis to her advocate had expired by the time the principal became enemy; (2) that the action in the Land Court was time-barred by reason of the fact that the appellants had been on the land for more than fifteen

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years; and (3) that the Land Court could not either at all or in the circumstances of this case grant the relief claimed and that the relief was purely declaratory.

In dismissing the appeals, the Court of Civil Appeal,

HELD (1) *With regard to the power of attorney:*

(per Shaw J.) that the power of attorney given by Politis to her advocate in time of peace had not expired when Politis became an enemy, but had become inoperative as soon as she (Politis) became an enemy, and her advocate could not, at the request of the Custodian of Enemy Property, have acted under the power of attorney; the operation of the power of attorney had been simply suspended, since the advocate's authority to act thereunder had not been withdrawn by the principal.

(per de Comarmond J.) that an enemy within the meaning of the Trading with the Enemy Ordinance, 1939, is not debarred from suing in Palestine, unless the Custodian of Enemy Property so decided, and therefore the permission granted by the Custodian of Enemy Property to the advocate of Politis, the latter being an enemy, for the recovery of possession and ownership in respect of her property, did have the effect of empowering the advocate to continue acting under the power of attorney given by the principal in time of peace.

(2) that the period of prescription of fifteen years pleaded by the appellants against the respondent, who was in Constantinople in 1925, the distance between which (i.e. Constantinople) and Palestine, having regard to the ordinary means of communication in 1925, was more than the period of a journey ("muddet safar"), did not begin to run against the respondent except from April 1926, the date on which she first arrived in Palestine. And by bringing the two actions in 1939 in the Magistrate's Court for the recovery of possession of her property, which was the only way open to her prior to the amendment of the Land Courts Ordinance by the Land Courts (Amendment) Ordinance, 1939, which came into force on 1st January, 1940, the respondent stopped the period of limitation from running against her. But had the Magistrate dismissed those actions then those actions would not have been effective for the purpose of stopping the period of limitation from running against her, but as the Magistrate adjourned the hearing of those actions until the plea of prescription raised before him by the defendants had been adjudicated upon by a competent Court, Article 1666 of the Mejelle came into play and time ceased to run.

(3) that the declarations sought by the respondent, having regard to the fact that the respondent was faced with the plea of prescription and to the fact that the Magistrate could not dispose of the actions for recovery of possession before adjudication by competent Court on the plea of prescription raised by the defendants, were in regard to rights over land, and therefore the Land Court was the proper Court to give them (the reliefs asked for by the respondent appear in the headnote); and the fact that the reliefs claimed from the Land Court were purely declaratory, having regard to the provisions of Rule 52(4) of the Civil Procedure Rules, 1938, which applies to Land Courts, was immaterial, and the reliefs asked for could be validly granted by the Land Court.

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Approved: LA 49/32.
CA 300/43, 11 P.L.R. 121.
CA 231/45, 13 P.L.R. 10.

Referred to: PCLA 43/36.
CA 89/40, 7 P.L.R. 258.
Ancona v. Marks, 126 Rev. Rep. 645.
Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd., (1916) 2 A.C. 309.
Hugh Stevenson and Sons Ltd. v. Aktiengesellschaft fur Carton-nager-Industrie (1918) A.C. 239.
Ibrahim Mehmet v. Hadji Panayoti Kosmo and others, 1 Cyprus Law Reports 23.
Sovracht Case (1943) A.C. 203.
Tingley v. Muller (1917) 2 Ch. 144.

E.D. Goitein, O. Rotenstreich and A. Hamburger for appellants.

M. Eliash and E. Karwassarsky for respondent.

Shaw J: These are two appeals from the judgment dated 24.9.46 of the Land Court, Tel-Aviv, in Land Case No. 5/41.

In C.A. 324/46 Mr. Goitein and Dr. Rotenstreich appeared for the appellants and in C.A. 340/46 Mr. Hamburger appeared for the appellant. In both appeals Dr. Eliash and Mr. Karwassarsky have appeared for the respondent (original plaintiff). Mr. Hamburger asked that the appeals should be consolidated, and Dr. Eliash agreed to this proposal. After the first hearing Mr. Hamburger did not again appear, so it must be taken that he wished C.A. 340/46 to abide the result of C.A. 324/46.

The facts have been fully set out in the judgment of the trial Court, and it is unnecessary for me to recapitulate them. I shall refer to them later where necessary.

Mr. Goitein has argued the appeal under five heads, and it will, I think, be convenient to deal with it accordingly. Mr. Goitein submits, in the first place, that the appeal must succeed because there was never any proper action before the Land Court. This point was raised in the trial Court in Motion No. 232/45 and a decision was given by Judge Windham on 6.7.45. When that application was made the respondent was admittedly an "enemy", as she was a Greek subject domiciled in Greece before the time when that country was declared to be enemy territory. On 14.7.36 the respondent had given to her advocate

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Mr. Karwassarsky a general power of attorney to act on her behalf. Before this action was instituted (on 19.9.41) the Custodian of Enemy Property, in two letters dated 29.8.41 and 4.9.41 respectively, had authorised Mr. Karwassarsky to continue to act on behalf of the respondent in her claim against Esther Buksdorf and others "for recovery of possession and ownership in respect of her property situated at Shekhunat Brener or Kerem Isteriades". This authorisation was given under the first proviso to Section 3(2) of the Trading with the Enemy Ordinance No. 36/39.

Judge Windham held, and in my opinion held correctly, that the Custodian had power to authorise the respondent to institute her action here. But he further held, on the strength of the decision in C.A. 300/43 (11 P.L.R. 121), that as soon as the respondent became an "enemy", that is to say, upon the enemy occupation of Greece in May, 1941, this power of attorney became void. The learned Judge went on to say —

> "Consequently when the Custodian purported, in August, 1941, to authorise Advocate Karwassarsky to continue to act for the respondent under his power of attorney, it was too late, for the power had expired more than three months before. And the Custodian could not take it upon himself to authorise Karwassarsky to act for the respondent in the absence of any authorisation by the respondent herself, nor did he purport to do so".

On these grounds Judge Windham held that the Custodian's letters purporting to authorise Mr. Karwassarsky to conduct Land Case 5/41 were ineffective for that purpose.

Mr. Goitein submits that the learned Judge had then no alternative but to dismiss the action. Instead of doing so Judge Windham, taking as a precedent the Order dated 21.5.37 in P.L.C.A. 43/36, adjourned the hearing of the action so as to enable the respondent to come to Palestine and give a fresh power of attorney to her advocate.

If I found that the power of attorney had already expired I would agree with Mr. Goitein that there was no case before the Court, and if there was no case before the Court then I think that the action ought then and there to have been dismissed. In addition to the case referred to by Judge Windham (viz. C.A. 300/43) Mr. Goitein has referred us to C.A. 89/1940 (7 P.L.R. 258) where the Court, after reciting Rule 24 of the Civil Procedure Rules, 1938, said (see p. 260) —

> "Counsel argues, and we consider with force, that this Rule must be strictly interpreted and that therefore under it a litigant must act either in person or by an advocate duly appointed on his behalf. Counsel for the appellants contends that a person who holds a power of attorney steps into the shoes of the litigant in person. We do not consider that Rule 24 is open to this construction and are strengthened in our view by Civil Procedure Rule 69(1) and Section 4(2) of the Advocates Ordinance, 1938. In both instances an exception is provided to what is evidently regarded as a general rule that a person must conduct his litigation either in person or by an advocate. The inference from this seems to me to be that in the absence of any such provision the general rule must apply."

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Mr. Goitein has referred to the Sovracht Case (1943 A.C. 203). In that case (see p. 254) Lord Porter said —

> "Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse. That the representatives, legal or non-legal, of a litigant may require to have such intercourse with their principal in the litigation is, I imagine, clear, and I do not think it is an answer to say that in the event it may not be found necessary for the one to communicate with the other. At any moment the necessity may arise. The very relationship requires it even if it is desired only to terminate the mandate itself".

And later, with reference to the case of Hugh Stevenson and Sons Ltd. v. Aktiengesellschaft fur Carton-nagen-Industrie (1918 A.C. 239) Lord Porter said —

> "Both courts below had held the agency determined and the point was not even contested on appeal to your Lordships. It is true that in that instance the agency was a mercantile one, but the prohibition of intercourse with an enemy is not confined to trade, and would, therefore, apply to a solicitor, who, at any rate in this country, is the mandatory of his principal for the purposes of litigation."

It is beyond doubt that, as held in C.A. 300/43, the power of attorney to Mr. Karwassarsky had become inoperative as soon as the respondent became an enemy. That is to say Mr. Karwassarsky could not, at the request of the respondent, have acted under the power of attorney. But the power of attorney still existed. Its operation was, in my view, simply suspended. Mr. Karwassarsky's authority to act under the power of attorney had not been withdrawn by his principal. He had been validly appointed in time of peace, as was the case in Tingley v. Muller (1917, 2 Ch. 144). The present case can be distinguished from C.A. 300/43, where no authority had been given by the Custodian to the agent to act under the power of attorney. I can see no reason why the fact that the respondent had become an "enemy" should put an end to the power of attorney any more than it would put an end to any other juridical relationship that might exist, such as the relationship existing between an "enemy" and an agent who is in charge of his property in this country. In dealing with the property the agent would, of course, be subject to any order made, for example, under the provisions of Section 9 of the Trading with the Enemy Ordi-

nance, 1939. But subject to any such law the juridical relationship would, in my judgment, subsist.

In the Sovracht case to which I have already referred the following appears in the judgment of Lord Porter at the top of page 94 —

> "Before your Lordships no question arises as to the validity of the contract sued upon. It was made with a company incorporated and carrying on business in a friendly state in time of peace. The only question is as to the procedural capacity of the respondents to sue at the present time".

It is, I think, quite clear that his Lordship did not hold that the contract had been invalidated and abrogated on the outbreak of hostilities. The contract still subsisted. At page 98 of Lord Porter's judgment there is the following quotation from the judgment of Le Blanc J. in the case of Hagedorn v. Bell —

> "The principle, upon which the policy of the law interferes, is this, that all trading with an enemy tends to strengthen and assist the enemy, and is, therefore, calculated to defeat the object for which the war was entered into...."

The mere existence of the power of attorney which Mr. Karwassarsky held clearly did not offend against this principle. The position would have been quite different if Mr. Karwassarsky had accepted the power of attorney from Mrs. Politis after she had already become an "enemy". Such acceptance, unless authorised by the Government of Palestine, would have been a trading with the enemy and punishable as such and in those circumstances I would hold the power of attorney to be void *ab initio*.

In the case of Daimler Co. Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd. (1916, 2 A.C. 307) the following appears in the judgment of Lord Parmoor, at p. 352 —

> "The principle applicable is well stated in Ex parte Boussmaker. A bankruptcy claim was admitted on behalf of an alien enemy, the dividend to be reserved during the continuance of the war. The Lord Chancellor, after referring to the general principle that a contract with an alien enemy would be void, says:- 'But if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue: but the contract being originally good, upon the return of peace the right would survive."

A power of attorney is a species of contract of employment, and the power of attorney with which I am dealing was originally good.

In the case of Tingley v. Muller the following appears, in the judgment of Lord Justice Scrutton, at page 180 —

> "... for when the contract was entered into Muller was not an enemy within the meaning of the Proclamation. The power of attorney was made while Muller was in England. Acting on it after he left does not necessarily involve any intercourse or trading with Muller provided the money was not paid to him".

I find, therefore, that the Custodian's letters were effective for the purpose of enabling Mr. Karwassarsky to act under the power of attorney, which was only in a state of abeyance or suspension, and that the action was validly brought by a duly authorised agent.

But even if I had found that the action ought to have been dismissed, I would have held that it was too late now for the appellant to ask for the appeal to be allowed on this ground. The objection does not go to the merits and the action has now been heard on the merits, in the presence of the respondent herself who was represented at the hearing by duly authorised advocates.

In the case of Ancona v. Marks, Vol. 126 Revised Reports p. 646, the following passage appears in the judgment of Pollock C.B. at page 649 —

> "We are all of opinion that the rule ought to be discharged. There is no doubt that the plaintiff, at the time the action was brought, did not know that his name was used, but the question is whether, the securities having been delivered to Greville and Tucker (who on a previous occasion had the plaintiff's permission to use his name) for the purpose of the action being brought on them in the plaintiff's name, and the action having been so brought, and the plaintiff having subsequently ratified the proceedings, he is entitled to retain the verdict. I think he is. In my opinion it makes no difference whether the ratification is before action, or after".

The action was not dismissed by Judge Windham — it was adjourned. And the respondent has now quite clearly ratified the bringing of it. Her ratification of it is shown by the fact that she has continued it and by the fact that Mr. Karwassarsky continues to appear on her behalf.

Mr. Goitein's second submission is that some of his clients have been on the land since 1920 while others have been there since 1922, and that therefore no action by the owner could be heard after 1937, the period of prescription in the case of this (mulk) property being fifteen years.

The respondent was asking for a declaratory judgment — her prayer is set out in para. 10 of the amended statement of claim — and it appears to me to be quite clear that the onus of proving that the appellants had not been in adverse possession for fifteen years was on the respondent. If she had

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brought her action in another form — if she had asked for a declaration of ownership and an order for quiet enjoyment — then undoubtedly the onus of proving fifteen years adverse possession would have been on the appellants. But the action was one for a declaration, or rather several declarations, and the onus of proof was on the respondent. It was, of course, open to her to show either that the appellants had not been in possession for fifteen years or that even if they had been in possession for fifteen years or more there was some lawful excuse sufficient to stop limitation from running against her.

In her statement of claim in the Magistrate's Court in C.C. 5882/39 the respondent had averred — see para. 4(b) — that the appellants had entered the land in 1925 and after. But in her amended statement of claim in the present case — see para. 7 — she pleaded (to use her own words) that —

> "On dates unknown to the second plaintiff, the defendants have trespassed on her land".

The respondent herself had not come to Palestine till 1926, and she was not in a position to give evidence as to the dates of the alleged encroachments. Mr. Rotenstreich, who represented the appellants in the trial Court, called no evidence, but Mr. Y. Kleinman, who appeared in person before the trial Court and who is the appellant in C.A. 340/1946, gave evidence on his own behalf. His evidence is very short and it reads as follows (see p. 7 of the record) —

> "Deft. No. 17. My Barrack has been on the land since 1921 — on whose it is I don't know. I have recently heard Court (sic) claims the land. In 1921 there were riots in Tel-Aviv. Mr. Dizengoff, the then Mayor, told us to go on to the land. We did.
>
> *xxined by Linderman:* I can't swear that this land doesn't belong to Plaintiff.
>
> No xx-ination by Rotenstreich or Frenkel".

So the only evidence as to possession before the trial Court was that of Y. Kleinman who said that he had been there since 1921, and there was no evidence on which the Court could have found that the appellants in C.A. 324/46 had not been on the land for more than fifteen years.

It remains, therefore, to be seen whether there was evidence on which the Court could have found that in any event the period of limitation could not have run against the respondent. This brings me to Mr. Goitein's third point, which is that the respondent's plea that she was absent in Europe, not having lived in Palestine till 1926, is not good for the purpose of stopping the running of limitation.

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The respondent commenced an action for the recovery of her land in 1926 in the Land Court of Jaffa. She made a lady named Claire Calmy (formerly the wife of Mr. David Moyal) and the Government of Palestine, defendants. The Government adopted the role of a passive defendant; it took the attitude that if the respondent could prove her claim it had no objection to handing over to her any part of the land ordered by the Court. Mrs. Claire Calmy, on the other hand, strenuously opposed the respondent's claim. These facts are referred to in the judgment of the Court in L.A. 43/36 (4 P.L.R. 73). It has been submitted by Mr. Goitein that the respondent could have joined and ought to have joined the appellants as defendants in that action, and that she could, in that action, have asked for an order for quiet enjoyment. He has referred us to Article 1635 of the Mejelle which provides that —

> "In an action relating to some specific piece of property, the person in possession must be made defendant".

It is true that if the respondent had joined the appellants (or as many of them as were then on the land) as defendants in her action in 1926, this litigation might not have been so protracted. But in fact she did not join them. It was not till 1939, when she filed her two actions — Nos. 5882/39 and 6807/39 — for recovery of possession in the Magistrate's Court at Tel-Aviv, that the present appellants were sued, and this brings me to Mr. Goitein's fourth submission which is that those actions could not prevent the period of limitation from running against the respondent.

Article 1663 of the Mejelle, as translated in the Civil Law of Palestine and Transjordan by C.A. Hooper, reads as follows:-

> "Limitation which is effective in this connection, that is to say, which prevents an action being heard, relates only to a period of time which has been allowed to elapse without any excuse. The effluxion of time which has occurred by reason of some lawful excuse, such as cases where the plaintiff is a minor, or a lunatic, or an imbecile, and that whether he has a guardian or not, or where the plaintiff has gone to some other country for the period of a journey, or where the plaintiff has been in fear of the power of his opponent, is disregarded. Consequently, limitation begins to run from the time of the cessation or removal of the excuse".

Tyser's translation of this article of the Mejelle (1901 edition) differs markedly from this, and it reads:-

> "In this chapter is considered, that is to say, the lapse of time, which prevents the hearing of actions, is the lapse of time which has taken place without excuse alone.
>
> On the other hand, consideration is not given to time which passes in consequence of one of the excuses allowed by Sher' law.

Such as, a person being an infant, or madman or person of unsound mind, whether the plaintiff has a guardian or not, or a person being in a foreign country a long way off (muddet sefer) or his opponent being a person in power.

Therefore, the beginning of the time which elapses is considered to be from the removal of the excuse.

For example — the time when a person is an infant is not considered in the time passed. The time elapsed from the date when he arrived at full age is considered alone.

Likewise, when a person's action is with one who is in power, if time elapses in consequence of his not being able to bring his action, while the power of his opponent lasts, it does not prevent the hearing of that action.

The time elapsed is only considered from the date when the power ceased".

I would compare especially the words "without any excuse" with the words "one of the excuses allowed by Sher' law", and the words "has gone to some other country for the period of a journey" with the words "being in a foreign country a long way off (muddet sefer)".

Article 1674 provides that a right is not destroyed by the effluxion of time, so the position is that the ownership of the property is not lost — it only means that the owner is barred by limitation from bringing an action to recover his property.

Mr. Goitein has referred to the Cyprus case of Ibrahim Mehmet v. Hadji Panayoti Kosmo and others (Vol. 1, Cyprus Law Reports, p. 12). Article 20 of the Ottoman Land Law (see R.C. Tute's book p. 23) was being considered in that case, and in that article too there are the words "absence on a journey". The following passage occurs in the judgment —

> "Up to about four years ago the owners were resident in Constantinople, and it is impossible to say that either the Sultan or the above-mentioned owners of the Chiftlik have been absent in a distant country or on a journey. We therefore think that they are not entitled to set up their absence in order to prevent the time of prescription running against them".

It would appear that the learned Judges who decided that case would not have held mere residence or, to use Tyser's translation, being in a foreign country, to be a circumstance which would prevent limitation from running for the purposes of Article 20 of the Land Code. Of course, it is Article 1663 of the Mejelle and not Article 20 of the Land Code that we have to construe in the present case, but the two articles are analogous.

Looking at it from the point of view of common sense and consistency I find it difficult to see why absence on a journey should stop the running of limitation while residence in a foreign country would not do so.

In Land Appeal No. 49/32, 4 Rutenberg, p. 1221, the following appears in the judgment of Baker J. —

> "I am aware that under Article 1663 of the Mejelle it is arguable that the time during which a plaintiff was 'a long way off' (muddet el Safer) does not count in estimating the period within which a plaintiff is required to bring his action and that Article 1664 defines Muddet el Safer as a distance of 3 days' journey or 18 hours at a moderate rate of travelling, also that the Cyprus Courts have held that residence in a foreign country was not absence on a journey (muddet el Safer) for the purpose of prescription (see Mehmet v. Kosmo C.L.R. Vol. 1, p. 12).
>
> The Court, however, in the case of Estrangin v. Tyan (Official Gazette September 16, 1926) has held that where the defendant was living in a foreign country such absence was a cause for suspension of the running of the period of prescription (even though the person against whom the plea was put forward had a duly authorised agent in Palestine) and that actual presence in Palestine of the plaintiff during the whole period was required if the period was to run against him.
>
> In accordance with the above decision the judgment of the lower Court must be quashed and the case remitted to enable the appellant to produce evidence as to the dates he was absent and his return to Palestine and to give a fresh judgment following the law laid down in the above quoted case."

And in the judgment of Frumkin J. and Khayat J. in the same case there is the following passage —

> "In view of the provisions of Articles 1663 and 1665 of the Mejelle, prescription does not commence to run until the excuse has ceased to exist. Hence if the appellant or her predecessor in title were not in the country when the house in dispute was built, prescription would not begin to run until their first arrival into this country".

So it is clear that in that case the Court did not follow the decision in the Cyprus case.

In C.A. 231/45 (13 P.L.R. 10) the Court, when considering Article 20 of the Land Code, said (see p. 11) —

> "Mr. Scharf has argued that the examples given in Article 20 as barriers against the running of the limitation period are not exhaustive. We agree with him in that contention. We further agree that it might well be that an absence on military service would be an absence on a journey within the meaning of the Article, but we would point out that not all absences on a journey constitute a sufficient excuse within the meaning of the Article to bar prescription. It appears to us that the absence is qualified by the further condition indicated in the opening words of the Article, that is that it must constitute a valid

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excuse. It is for the Court, therefore, to enquire into each case to ascertain whether in the particular instance the absence on a journey constituted a 'valid absence'."

Having considered the facts stated in the judgment in C.A. 231/45 I am unable to find that that case has overruled the decision in Land Appeal No. 49/32. The latter decision is very clear. And when applied to the present case it means that prescription would not begin to run against the respondent until her first arrival in this country. The only possible qualification might be that prescription would run as from the time when she first came within the statutory distance (muddet el safar) of Palestine. The respondent was in Constantinople in 1925, but the trial Judge held that having regard to the ordinary means of communication in 1925, and in the absence of any evidence to the contrary, the distance between Constantinople and Palestine was more than the period of a journey or "muddet el safar". I am not prepared to say that the learned Judge was not justified in coming to this conclusion.

Assuming therefore that Mr. Goitein's fourth submission is not good, it follows that prescription did not begin to run against the respondent until April, 1926, and as she filed the possessory actions in 1939, those actions stopped prescription from becoming effective. Even if the period be calculated from 1925 (when the respondent first came to Constantinople) there would be no prescription in 1939 as the period of fifteen years had not expired.

With regard to Mr. Goitein's fourth submission I find that the respondent having brought the possessory actions within the period of fifteen years, they did stop prescription from running. The law is contained in Article 1666 of the Mejelle which reads as follows:-

> "If any person brings an action in Court against any other person in respect to some particular matter once in a certain number of years without the case being finally decided, and in this way fifteen years pass by, the hearing of the action is not barred. But any claim made out of Court does not cause the period of limitation to cease to run. Consequently, if any person makes a claim in respect to any particular matter elsewhere than in Court, and in this way the period of limitation elapses, the hearing of an action by the plaintiff is barred".

At the time when those actions were brought the Magistrate's Court was, as it still is, the proper Court for giving recovery of possession of immovable property of any value, as provided in Section 3(c) of the Magistrates' Courts Jurisdiction Ordinance No. 45 of 1939. The Land Courts (Amendment) Ordinance, No.46/39, which came into force on 1.1.40, empowered a Land Court to give an order for the possession of any

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land in respect of the ownership of which it gives a judgment. And even before that Ordinance was enacted, a Land Court could, and sometimes did, give an order for quiet enjoyment or non-interference. But the respondent primarily wanted possession of the land, and it was not encumbent upon her to ascertain whether the appellants intended to plead limitation. She was quite justified in suing in the first instance in the Magistrate's Court. If the Magistrate had finally decided those actions, for example, if he had dismissed them, then they would not have been effective for the purpose of stopping limitation from running. But in fact he did not dismiss them — they are still pending.

A fifth point was argued by Mr. Goitein, and this was that the Land Court could not, either at all or in the present circumstances, grant the relief claimed, as the relief was purely declaratory. I would say that I am unable to find that the submission is well founded. The Land Court was not being asked to make declarations in the air. The Magistrate considered them to be necessary for the purpose of enabling him to dispose of the two possessory actions. The position was quite clear — if there was no question of limitation then the Magistrate could deal with the cases, since the appellants were not claiming ownership. The declarations sought were in regard to rights over land, and therefore a Land Court was the proper Court to give them. And Rule 52(4) of the Civil Procedure Rules, 1938, provides that —

> "No action shall fail on the ground that the relief claimed is declaratory only".

In the result I find that these appeals fail, the respondent having shown that she was entitled to a declaratory judgment in the terms of her prayer.

The respondent must have her costs in each appeal on the lower scale, including an advocate's attendance fee of LP. 12 in each appeal.

de Comarmond J: The respondent in these two appeals is a Greek subject who became the owner in 1917 of a certain area of mulk land at Tel-Aviv. The previous owner was her father and he was a registered owner.

The respondent came to Palestine for the first time in April, 1926, and she has explained that the reason for her visit was that she had heard that her property was being divided up between Government and Mrs. Claire Calmy. In 1926 she commenced an action before the Jaffa Land Court for the recovery of her land. The Government adopted a passive attitude

but Mrs. Calmy opposed the claim. The present respondent ultimately triumphed in 1936 (L.A. 43/36, 4 P.L.R. 73) and the land was registered in her name in 1939. She then began two actions in the Magistrate's Court of Tel-Aviv (Nos. 5882/39 and 6807/39) against certain persons (now appellants) who, so she alleged, had trespassed on the land. In those actions she prayed for recovery of possession, but the defendants having pleaded that the actions were time-barred the Magistrate adjourned both cases pending decision of a competent court on the issue thus raised. I need hardly point out that, in so doing, the Magistrate followed the well-settled jurisprudence which is that when such a plea is raised, the issue must be decided by a Court having jurisdiction in matters of ownership of land; that jurisprudence seems to have been based on the consideration that if the plea succeeds the plaintiff is in fact, if not in law, deprived of his rights as owner. I would add in this connection that the Land Courts Ordinance, as it stood in 1939, did not expressly empower Land Courts to implement their judgments as to ownership by ordering the owner to be placed in possession; it was by an amending Ordinance which came into force in 1940 that the matter was clearly laid down(vide Ordinance 45 of 1939). When in 1939 the present respondent went to a Magistrate's Court to sue for recovery of possession, she was taking a proper course because that Court had (and still has) power to grant her prayer unless the plea of limitation of action is raised. Such plea having been raised, the Magistrate had to wait until a competent court decided whether or not the plea was valid.

The next stage in the litigation was the bringing by the present respondent of an action before the Tel-Aviv Land Court against the present appellants. Put shortly, this action was for a declaratory judgment to the effect that the present appellants (who were the defendants) were not entitled to succeed on the plea raised by them before the Magistrate's Court, namely that the actions for recovery of possession were time-barred. I will later on deal in greater detail with the declarations sought by the plaintiff-respondent. For the present it is sufficient to say that the plaintiff succeeded before the Land Court of Tel-Aviv and that the present appeals were then lodged.

The statement of claim filed in the Tel-Aviv Land Court in 1941 was signed by Mr. Karwassarsky, an advocate, to whom a power of attorney had been given by the present respondent (Mrs. Politis) in 1936. In 1941, Mrs. Politis was residing in Greece and had become an "enemy" by reason of that country having been overrun by the Germans and declared an enemy territory. The defendants moved to have the action dismissed

on the ground that the plaintiff was an enemy and that the power of attorney held by Mr. Karwassarsky had become null and void as soon as the principal had become an "enemy". The motion was heard by Judge Windham who held that the power of attorney had become void and inoperative as soon as the principal had become technically an "enemy". It is important to mention that advocate Karwassarsky had, before filing the statement of claim, obtained two letters from the Custodian of Enemy Property conveying permission to carry on the litigation on behalf of his principal, and furthermore, the Custodian stated on the form of declaration filed in pursuance of the Defence (Courts Applications) Regulations that he had granted a licence under section 3 of the Trading with the Enemy Ordinance to Mr. Karwassarsky to act on behalf of Mrs. Politis in the proceedings before Court. Judge Windham held that the Custodian could not revive a power of attorney which had become void but the learned Judge did not dismiss the action in view of the fact that there was no clear decision in Palestine on the point and he considered it fair to afford the plaintiff-respondent the opportunity of regularising her position.

On this question of power of attorney, I have reached the opinion that the permission granted by the Custodian of Enemy Property to Mr. Karwassarsky did have the effect of empowering the latter to continue acting under the power of attorney. I base this opinion on the provisions of the Defence (Courts Applications) Regulations, 1940, which were in force at the material time and which were made under the authority of the Emergency Powers (Defence) Act, 1939, and of the Emergency Powers (Colonial Defence) Order-in-Council, 1939. The relevant provisions of Regulations 2 and 3 of the aforesaid Regulations were that no civil proceedings could be entertained in any Court unless the plaintiff or his representative filed with the Registrar of the Court a declaration in the prescribed form (to the effect that the plaintiff is not an enemy etc.). When the declaration disclosed that the plaintiff was an enemy, the Registrar was to inform the Custodian of Enemy Property that proceedings had been instituted by an enemy; if the Custodian signified his consent to such proceedings being entertained or failed to signify his refusal within 30 days, the proceedings could be continued.

It seems to me difficult to interpret the aforementioned provisions otherwise than as contemplating that an enemy would not be debarred from suing unless the Custodian so decided. I would also point out that Regulation 2 provided that the plaintiff or his representative would have to file the declaration: this provision implied that the representative of an "enemy"

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was still considered able to act as such at least for the purpose of the Regulations. I have, of course, paid attention to C.A. 300/43 (11 P.L.R. 121) in which mention is made of the Sovracht case (1943) A.C. 203. In the last mentioned case, Lord Porter said the following:-

> "Ordinarily when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse. That the representatives, legal or non-legal, of a litigant may require to have such intercourse with their principal in the litigation is, I imagine, clear, and I do not think it is an answer to say that in the event it may not be found necessary for the one to communicate with the other. At any moment the necessity may arise. The very relationship required it even if it is desired only to terminate the mandate itself".

I have, of course, to pay the utmost respect to the views expressed by the noble Lord and to bear in mind that he also took into consideration the older case of Tingley v. Muller. But I must point out that the excerpt quoted above begins with the word "ordinarily" and that the concluding words of the same passage contemplate that the mandate itself is not automatically terminated. I, therefore, do not consider that Lord Porter's ruling does invalidate the reasoning I have followed with regard to the effect of the Palestine Defence (Courts Applications) Regulations, 1940. I therefore hold that the appellants cannot succeed in their appeal on the ground that the actions were not properly entered.

The next ground of appeal with which I propose to deal is the very important one concerning the question whether the plaintiff-respondent had not left it too late to assert her rights against the alleged trespassers, i.e. the present appellants.

I have already mentioned that it was in 1939 that the respondent began proceedings before the Magistrate's Court for recovery of possession. The period of limitation for bringing an action in respect of mulk property is 15 years (Mejelle, Articles 1660, 1663, 1664 and 1666). Article 1660 lays down that actions relating to real property held in absolute ownership shall not be heard after the expiration of a period of 15 years since action was last taken in connection therewith. Article 1663 then proceeds to temper the harshness of this limitation by providing that under certain circumstances the period of limitation does not run or is interrupted.

My learned brother Shaw J. has set out in his judgment the translations of Article 1663 as given in Hooper's Civil Law of Palestine and Transjordan and in Tyser's translation. There are marked differences between the two but it seems to me

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that in Hooper's translation the words "or where the plaintiff has gone to some other country for the period of a journey" do not seem right. Comparison with the translation of Article 1665 by the same learned author shows that in that article reference is made to places separated "by the period of a journey" and this, in my view, indicates that the expression "period of a journey" in Articles 1663 and 1665 is meant to indicate a minimum distance calculated or estimated as laid down in Article 1664.

It is a matter for regret that decisions given by the Courts in Palestine have possibly been based on different translations of Article 1663. In the Cyprus case of Mehmet v. Kosmo and others (Cyprus Reports Vol. 1, p. 12) it was held that a person who had never resided in Cyprus could not contend that his non-presence in Cyprus was "absence in a distant country on a journey". The Palestine Courts, however, have not adopted the view expressed in Mehmet v. Kosmo; the relevant decision is C.A. 49/32 (Fahima Hanen v. Sheikh Assad Shukeiri) reported in 4 Rotenberg p. 1221 and I need only cite the following excerpt from the judgment of Frumkin J. and Khayat J.:-

> "In view of the provisions of Articles 1663 and 1665 of the Mejelle, prescription does not commence to run until the excuse has ceased to exist. Hence if the appellant and her predecessor in title were not in the country when the house in dispute was built, prescription would not begin to run until their first arrival in this country".

My attention has been called to C.A. 231/45 reported in 13 P.L.R. 10 where it was held that absence on a journey in order to bar prescription under Article 20 of the Ottoman Land Code must constitute a valid excuse and that it was for the Court to enquire into each case to ascertain whether in the particular instance the absence on a journey constituted a "valid absence". It is to be noted that Frumkin J. was again one of the learned Judges who decided C.A. 231/45 and I do not see the slightest justification for the suggestion that C.A. 231/45 establishes the principle that when applying article 20 of the Land Code (or Article 1663 of the Mejelle) a Court would enquire into the reasonableness of the cause of the absence. The facts mentioned in C.A. 231/45 were that the person invoking absence as a bar to the running of the period of limitation was a man who had been in military service from 1908 to 1919 mostly in countries adjacent to Palestine and that he had returned to Palestine for certain periods during his time of service. In such circumstances it is obvious that the Court would have to investigate what portion, if any, of the period of military service could be reckoned as absence within the

meaning of the law and I do not understand the Court to have said or meant anything further.

It seems to me, therefore, that article 1663 of the Mejelle, as already interpreted by this Court, provides that the period of limitation does not begin to run against a person until such person comes to Palestine, unless the foreign country in which such person resided is quite near and therefore within easy reach. Article 1664 lays down what is the minimum distance which justifies absence under articles 1663 and 1665. It does so in a manner which is the reverse of precise, and I am not surprised that, in the present case, the interpretation of the article has given rise to some difficulty: the difficulty being whether the plaintiff-respondent could invoke article 1663 on the strength of the fact that she had been in Europe until 1926. In L.A. 49/32, already referred to by me, Baker J. paraphrased Article 1664 as fixing "a distance of 3 days' journey or 18 hours at a moderate rate of travelling". In my opinion, such is the meaning of the article and in the present case I find no reason for disagreeing with the finding of the learned trial Judge that Constantinople was more than 18 hours away at a moderate rate of travelling.

I, therefore, conclude that the period of limitation of action did not begin to run against the plaintiff-respondent until she first arrived in Palestine, i.e. in April, 1926. In this connection I must say that I do not agree with the learned trial Judge that the period of limitation began to run only in 1939, i.e. after the plaintiff had had the land registered in her name. I am of opinion that time began to run when the alleged trespassers entered on the land and the matter is, I consider, placed beyond doubt by articles 1670 and 1671 of the Mejelle.

I will now refer to the statement of claim which was filed in the Land Court with the object of securing a declaration which would enable the Magistrate to dispose of the actions for recovery of possession. In fact, three declarations were sought:-

(a) that defendants had not acquired any rights of ownership in the land in question by virtue of their possession;

(b) that the defendants had not acquired any rights as a result of their plea of limitation of action put forward before the Magistrate;

(c) that on 21.5.1939 and 13.6.1939, i.e. the dates of the institution of the actions for recovery of possession, the period of limitation of action had not run its full course, i.e. 15 years.

The learned trial Judge has rightly pointed out that the first mentioned declaration is superfluous inasmuch as although an action is time-barred, the defendant does not thereby acquire ownership. This is clear from Article 1674 of the Mejelle.

The second declaration is also superfluous because a defendant does not acquire a right as a result of a plea of limitation of action except the right of having the action dismissed.

The third declaration is the important and relevant one. However, the Court below granted all three declarations because the learned Judge thought it advisable to grant all three declarations in view of the order of the Magistrate in Civil Case No. 5882/39 and in order to dispose of any further difficulties.

The appellants' counsel has submitted that the Land Court could not grant the relief claimed because it was purely declaratory. I do not consider that the submission is well founded. Rule 52(4) of the Civil Procedure Rules, 1938, provides that no action shall fail on the ground that the relief claimed is declaratory only. The rule applies to Land Courts and, in the circumstances of this case, I consider that the Land Court could validly grant the relief prayed for.

Another submission made by the appellants' counsel is that the plaintiff-respondent, when bringing a Land Court action in 1926 to assert her right of ownership, should have also applied for quiet possession as against the appellants. I concede that the plaintiff-respondent might have taken action earlier against the alleged trespassers but, in practice, no result would have been achieved until she had established beyond question that she was the owner of the land. She began Court proceedings in 1926 as soon as she arrived in Palestine and it was only in 1937 that she obtained a final decision (L.A. 43/36) with regard to her right of ownership. I would very much hesitate to accept the view that the present appellants did not know about that litigation but I need say no more on this point except that in 1939, when the plaintiff-respondent went to the Magistrate's Court to evict the appellants, she did thereby stop the running of the period of limitation. Being given that the Magistrate adjourned the cases, Article 1666 of the Mejelle came into play and time ceased to run.

Learned counsel for the appellants has touched upon the question that the statement of claim filed in the Land Court was so couched as to place on the plaintiff the onus of establishing when the period of limitation began to run. This is true, and the plaintiff might have found herself in a very embarrassing position were it not that, in the circumstances, it

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has emerged that the period prior to April, 1926, could not be reckoned against her. Whether the appellants or some of them went on the land as early as 1920 is of no avail to them and all that matters is that in 1939 the period of 15 years fixed by article 1663 of the Mejelle had not elapsed when the plaintiff took steps to obtain possession of her land as against the appellants. Armed with the declaration which she has obtained she may now go back to the Magistrate's Court and the cases there will be decided on any issues which may properly arise there, not including, of course, any issue concerning her right of ownership or any issue as to the actions being statute-barred, which issues have now been disposed of in her favour.

In conclusion I dismiss the appeals on the terms specified by my learned brother Shaw J.

High Court No. 87 of 1946.

In the Supreme Court sitting as a High Court of Justice.

Before: Curry Ag. J. and Frumkin J.

1947
18th April

Curry Ag. J.
and
Frumkin J.

HC 87/46
Arousi
v
Magistrate of
Tel-Aviv
and others

HAMANEH AROUSI,
and another. . . . . *Petitioners.*

v

MAGISTRATE OF TEL-AVIV,
and others. . . . . *Respondents.*

High Court — Affidavit — Circumstances is which advocate may swear affidavit in support of petition to High Court — High Court Rules, 1937, Rule 3.

In discharging the rule nisi directed to the first respondent calling upon him to show cause why his decision in Criminal Case No. 8735/45 requiring each of the petitioners to give a personal bond in the sum of LP. 20 for good behaviour for one year should not be set aside, the High Court,

HELD that as a rule an affidavit in support of an application to the High Court must be deposed to by the petitioner himself, but where petitioner's advocate is in a better position than the petitioner himself to depose as to the facts, the advocate may, in such instances, swear the affidavit in support of the application.

Referred to: HC 67/38, 5 P.L.R. 611.
HC 58/46, 13 P.L.R. 501.

M. Buchalter for petitioners.

Crown Counsel (A. Hooton) for 1st and 3rd respondents.

1947
18th April

Curry Ag. J.
and
Frumkin J.

HC 87/46
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Order: This is a return to an Order Nisi directed to the learned Magistrate to show cause why his order of the 25th June, 1946, in Tel-Aviv Criminal Case No. 8735/45 whereby the petitioners were ordered to give a personal bond in the sum of LP. 20 for good behaviour for one year should not be set aside.

Learned Crown Counsel raised the preliminary objection that no proper petition was before the Court in that the affidavit in support had not been sworn to by the petitioners but by their advocate. Rule 3 of the High Court Rules provides that the petitioner shall depose as to the facts in the petition that they are true, or true to the best of his knowledge and belief. In spite of the very clear limitation of this Rule the High Court has in certain circumstances enlarged its provisions by accepting affidavits deposed to by petitioner's advocate instead of the petitioner. In High Court 67/38 this Court ruled that it had no objection to the practice where the facts deposed to were within the personal knowledge of the advocate and in fact where, as in those execution proceedings, the advocate probably was in a better position to depose as to the facts than the petitioner himself. I think, however, this does not permit an indefinite enlargement of the rule, and the petitioner is the person who must depose as to the facts, save in the exceptional circumstances which exist, for example, in execution matters, where the advocate is in a better position so to do than his client.

In High Court 58/46, an assistant accountant of the Municipal Corporation of Jerusalem swore that to the best of his knowledge and belief matters contained in the application signed by Mr. Saba Said, the advocate of the Corporation, were true. This Court there stated —

> "We agree that such a concession is justified in certain circumstances, the more so as there has been some doubt as to whether more than one affidavit may be filed by one respondent, and this has made it awkward for respondents who cannot personally swear to certain facts. On the other hand, we desire to make it clear that respondents would be well advised not to assume that it is their undoubted right to file affidavits not sworn by themselves; unless the Court is satisfied that such a course is justified and is not prejudicial to the petitioner, any such affidavit may be rejected."

In our opinion no good reason has been shown in this case why the petitioners and not their advocate did not depose to the facts stated in the petition. It would appear that the facts were quite as much within their own knowledge as that of the advocate. Apart from the necessity of as strict a compliance with the rule as is possible, the swearing of affidavits by advocates in such matters is most undesirable, as they may

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be required to go into the witness box to be cross-examined thereon. That a person should be an advocate and a witness in the same cause is a practice to be condemned.

On this ground alone the order must be discharged. Apart therefrom, however, we would mention that there is no merit in the petition. Clearly in this matter the learned Magistrate made an order within the discretion given him by Section 45(2) of the Criminal Code Ordinance, and this Court has time and time again ruled that it would only interfere in matters of discretion if satisfied that it has been exercised in bad faith, or the officer has not directed his mind to the case personally. There is no evidence of any bad faith on the part of the respondent. He has considered the facts and decided that the order was necessary to avoid a breach of the peace, and we will certainly not interfere.

In our opinion in all the circumstances of the case, viz. that petitioners were merely required to enter into a bond to be of good behaviour, which in fact they did and which expires in less than two months, we consider the application frivolous.

Order Nisi to be discharged.

Civil Appeal No. 369 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Shaw J.

1947
22nd April

FitzGerald C. J.
and
Shaw J.

CA 369/46
Salem
and others
v
Fahoum
and others

SELIM ADIB SALEM,
and others. . . . . *Appellants.*

v

YOUSEF FAHOUM,
and others. . . . . *Respondents.*

Municipal elections — Election petitions — Petition to District Court against returning of certain candidates as being elected as municipal councillors — Procedure to be followed in such instances — Municipal Election Petitions Rules, 1935, Rules 2 and 7 — Municipal Corporations Ordinance, 1934, Section 37.

An election petition by five voters at the Nazareth municipal elections against the returning by the Returning Officer of Nazareth of seven candidates as being duly elected was presented to the District Court of Haifa (Civil Case No. 196/46). The petition was accompanied by an application under Rule 2 of the Municipal Election Petitions Rules, 1935, in which the petitioners offered to pay into Court any sum as security or deposit as may be ordered by the Court. On the same day of filing the petition and application, the Registrar of the District Court endorsed the application as follows:- "LP.25

deposit ordered to be paid within seven days of service." The deposit was paid into Court on the same day as the endorsement made by the Registrar, and the petition, together with the application and notice of payment, were served on each of the respondents to the petition, i.e. the seven candidates and the Returning Officer. Some twelve days after the date of the endorsement by the Registrar, a further order was made by the Registrar by which he ordered the payment as further security of LP.50 within seven days of the date of service of the notice to pay and the said sum was paid within the time limit. At the hearing of the petition, counsel for the respondents raised certain objections to the hearing thereof, the principal ones of which were: (1) that the Registrar of the District Court had no power to order security as to costs, such security should be ordered by the Court upon summons; (2) that a summons to determine the security to be paid should have been taken out before the lodging of the petition or at the very latest at the time when it was lodged, and in any case a bond must have been filed at the time the petition was lodged and must not have been in a lesser sum than LP.50; (3) that although under Rule 7 of the Municipal Election Petitions Rules, 1935, two or more candidates may be made respondents to an election petition and their case may for convenience be tried at the same time, yet a petition citing several respondents is deemed under the said rule to be a separate petition against each respondent and the minimum amount of security to be offered must be LP.50 multiplied by the number of respondents; and (4) that an election petition was a special action brought by special rules which must be strictly adhered to and the Court had no power to relax the rules or to extend any time prescribed therein. In reply, it was submitted on behalf of the petitioners that as only one petition was filed one security was sufficient; that under Rule 2(2) of the Municipal Election Petitions Rules, 1935, a summons for the filing of security may be taken out at any time after the lodging of the petition; that the petitioners should not be penalised for an error committed by the Registrar; and that the Registrar was empowered by Section 6 of the Registrars Ordinance, 1936, to fix the security, and they offered to pay into Court whatever amount the Court might order. The District Court, constituted of the President thereof (Judge Weldon), found itself in agreement with the arguments advanced on behalf of the respondents, and in the result ordered the petition to be struck out. The petitioners obtained leave to appeal to the Supreme Court the order of the District Court on the day following the giving of the order and their appeal was filed fourteen days after the grant of leave to appeal.

In allowing the appeal and remitting the matter to the District Court to be dealt with in the light of the judgment of the Court of Civil Appeal, the Court of Civil Appeal,

HELD (1) that under Rule 2 of the Municipal Election Petitions Rules, 1935, the Court and not the Registrar must fix the amount of security in election petitions.

(2) that a Court constituted under Section 37 of the Municipal Corporations Ordinance, 1934, although constituted in a particular way, is, nevertheless, a District Court and not a special tribunal.

(3) that all that a petitioner filing an election petition should do is to file his petition within the time fixed in Section 36(b) of the Municipal Corporations Ordinance, 1934, it is not his duty to give a security or deposit in the minimum sum laid down in Rule 2 of the Municipal Election Petitions Rules, 1935, at the time when he files his petition. And after filing the petition a summons should issue to the respondent calling upon him to appear before

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the Court in order that the amount of the security may be determined, and thereafter the petitioner must, and within the time fixed by the Court, file the necessary bond together with copies for service upon the respondents as required by Rule 2(3).

(4) that in an election petition in which there are more than one respondent, and there is only one trial under Rule 7 of the Municipal Election Petitions Rules, 1935, the security to be deposited should only be one security in the sum of not less than LP. 50 and not more than LP. 150.

Explained: Everett v. Griffith, (1924) 1 K.B. p. 941.

Followed: Kingston-upon-Hull Election Petition, 19 L.T.R. p. 648.

Anton Atallah for appellants.

Walid Salah for five of respondents.

Hanna Asfour for one respondent.

Crown Counsel (M. Heenan) for Returning Officer.

Judgment: This is an appeal from the Order dated 18th November, 1946, of His Honour Judge Weldon sitting in the District Court, Haifa, in Civil Case No. 196/46. This was an election petition which purported to have been brought under section 36 of the Municipal Corporations Ordinance, No. 1/1934.

The trial Court held that the procedure in regard to security had not been properly complied with. That procedure is to be found in Rule 2 of the Municipal Election Petitions Rules, 1935, (Supplement No. 2, 1935 p. 651) which reads as follows:-

"(1) The presentation of an election petition shall be made by lodging it in the office of the District Court with a bond securing the payment by the petitioner of all such costs, charges and expenses relating to the petition as the Court may order the petitioner to pay any person summoned as a witness on the petitioner's behalf or to any respondent.

(2) Such security shall be to such amount not being less than LP.50 or exceeding LP. 150 as the Court may on summons direct, and may be given either by recognizance to be entered into by not more than four sureties or by deposit of money or partly in one way and partly in the other.

(3) In addition to the petition and bond so lodged there shall be lodged in the said office as many copies of the petition and bond as there are respondents named in the petition".

Mr. Anton Atallah for the appellants has told us that his clients were ready to deposit the sum of LP. 150 which he submits is the maximum sum which the Court could order to be deposited, but that the Registrar accepted a deposit of LP. 25 only, which was later raised to LP. 75. Mr. Atallah submits

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that his clients should not be prejudiced by the failure of the Registrar to comply with the Rules. He has referred us to Maxwell on the Interpretation of Statutes in which the following passage appears at page 328 of the seventh edition —

"So, if the appellant was entitled to appeal, subject to the condition of giving security for costs within a certain time, he would be held to have complied with the condition if he offered and was ready to complete the security within the limited time, though it was, owing to the act of the Court, or of the respondent, not completed till long after".

The drafting of Rule 2 leaves much to be desired, but there appears to be no doubt that the Court and not the Registrar must fix the amount of the security. At the same time we do not agree with the submission made by Walid Eff. Salah that the Court as constituted under the provisions of Section 37 is not a District Court. We find that it is a District Court although constituted in a particutar way. We are supported in this view by Section 36 which provides that an election petition shall be presented "to a District Court". It does not say to a special tribunal. We are also supported by Article 40 of the Palestine Order-in-Council, 1922 (Vol. 3, Laws of Palestine, page 2579) which provides that a District Court shall exercise jurisdiction as a Court of first instance in all civil matters not within the jurisdiction of the Magistrates Courts in and for that district. An election petition must be regarded as a civil matter. The learned trial judge referred to the dictum in Everett v. Griffith (1924 1 K.B. p. 941). But the tribunal in England is presided over by a barrister, and so there can be no real comparison between the position in this country and the position in England.

Section 36 of the Ordinance allows fifteen days' time for the presentation of an appeal and, in our judgment, the Rules cannot cut down that period. We do not agree that it is the duty of the petitioner to give a security or deposit, in the minimum sum laid down in Rule 2, at the time when he files his petition. All that he must do is to file his petition within the time fixed in section 36(b) of the Ordinance. Thereafter a summons should issue to the respondents calling upon them to appear before the Court in order that the amount of the security may be determined. The petitioner must thereafter, and within the time fixed by the Court, file the necessary bond together with copies for service upon the respondents as required by Rule 2(3).

Rule 7 of the above mentioned Rules provides that:-

"Two or more candidates may be made respondents to the same petition and their case may, for the sake of convenience, be tried at the same time but such a petition shall be deemed to be a separate petition against each respondent".

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The question has been raised whether, in a case in which there are more than one respondent, the petitioners should be required to give security of not less than LP.50 and not more than LP.150 in respect of *each* respondent. Mr. Atallah has referred us to the Kingston-upon-Hull Election Petition, (L.T.R. Vol. 19, p. 648), and relying on that case we find that where, under Rule 7, there is only one trial, the security to be deposited should only be one security in the sum of not less than LP.50 and not more than LP.150.

Mr. Atallah has submitted that at the date of the judgment (18.11.46) the amendment to section 37 of the Municipal Corporations Ordinance, brought about by Ordinance No. 59/46 (at page 236 of Supplement No. 1 of 1946) was not in force, and that the President of the District Court had no power to dismiss the petition on a preliminary point. We are unable to agree, and we hold that under that section as it then stood the President was empowered to dismiss, without hearing it, a petition which had been improperly brought before the Court.

In the result we find that this appeal must be allowed, and the matter remitted to the President of the District Court, Haifa, in order that it may be dealt with in the light of this judgment. At the hearing Crown Counsel will be at liberty, if he so wishes, to raise again the objections which the trial Judge did not consider it necessary to deal with in view of his decision to strike out the petition. The appellants will have their costs on the lower scale, to include a hearing fee of LP.10.

Civil Appeal No. 208 of 1945.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Abdulhadi J.

1947
23rd April

FitzGerald C. J.
and
Abdulhadi J.

CA 208/45
Qaddoura
v
Haj
and others

HEIRS OF MUHAMMAD YOUSEF QADDOURA
(34 in number). . . . . *Appellants.*

v

HUSSEIN YOUSEF MUHAMMAD EL HAJ
and others. . . . . *Respondents.*

Immovable property — Prescription — Miri land — Judgment declaring title to miri land — Put in execution — Person relying on prescription must establish that judgment became prescribed by lapse of fifteen years in accordance with Article 144 of Ottoman Law of Execution — Ottoman Law of Execution, Article 144.

1947
23rd April

FitzGerald C. J.
and
Abdulhadi J.

CA 208/45
Qaddoura
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and others

Disputes as to the ownership of certain lands in the the Samoui village arose between the heirs of Muhammad Yousef Qaddoura and the inhabitants of the Samoui village, who denied the ownership of the Qaddoura family, and the latter brought an action in the Land Court of Haifa to establish their title. Subsequent to the commencement of the proceedings in the Land Court, the disputants agreed to refer the matter to arbitration and a deed of submission was signed on 1st February, 1923. On the 6th February, 1923, the arbitrators gave their award which confirmed the title of the Qaddouras to one half of the lands in dispute. The award was confirmed by the Land Court on the 24th March, 1923. On the 25th of November, 1928, delivery of possession of the lands covered by the award was carried out by the Execution Officer. On the 24th May, 1941, an application was made for the issue of a notice to the Land Registry Office for the registration of half of the lands covered by the arbitration award in the names of the heirs of Muhammad Yousef Qaddoura. When settlement of title to lands started, the Qaddouras claimed half of the lands of Samoui village at settlement (Case No. 1/Es-Samoui). The villagers denied the Qaddouras' claims except to certain parcels of land, and they relied on their possession since 1923. On behalf of the Qaddouras it was submitted that there was no prescription since in 1928 delivery of possession to them was carried out by the Execution Officer, and in 1941 an application for a notice to the Land Registry to register the lands the subject matter of the award of arbitration was made, and therefore the judgment of the Land Court could not be considered as having lapsed until the expiry of fifteen years inasmuch as the execution of the judgment of the Land Court was carried out in 1928 and the period of fifteen years had not lapsed since that date. The Land Settlement Officer came to the conclusion that the Qaddouras had established their claims to certain parcels only and that the villagers had been in possession of the remaining lands the subject matter of the dispute without opppsition for a period of over ten years, that is to say since 1923; that the action by the Execution Officer of the delivery of possession in 1928 was *ultra vires;* and that the period of fifteen years was confined to the execution of the judgment. The Qaddouras appealed by leave. The whole point in the appeal was whether the judgment of the Land Court which concerned miri land and which was executed in 1928 was still enforceable after the lapse of ten years from the year 1928.

In allowing the appeal, setting aside the decision of the Land Settlement Officer and remitting the case to him to be determined in the light of the judgment of the Court of Civil Appeal, the Court of Civil Appeal,

HELD that in view of the provision contained in Article 144 of the Ottoman Law of Execution to the effect that a decree does not become prescribed until a period of fifteen years has elapsed, a defendant claiming by prescription miri land in respect of which land there is a judgment of a Court cannot succeed in his defence unless the judgment has become prescribed by the lapse of fifteen years in accordance with Article 144 of the Ottoman Law of Execution the provision of which article supersedes the provision in regard to the ten years prescriptive period for possession of miri lands.

M. Eliash and M. Scharf for appellants.

Assistant Government Advocate (Omar Wa'ari) for Government of Palestine.

Anton Atallah and Elias Koussa for greater part of respondents—rest of respondents did not appear.

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FitzGerald C. J.
and
Abdulhadi J.

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Judgment: This is an appeal from the Settlement Officer, Safad Settlement Area, in Case No. 1/Es Samoui. It appears there has been a protracted dispute between the appellants and respondents in regard to the ownership of the lands of Samoui. The appellants, who are a Safad family, claim that by virtue of various deals with the head of the respondents' village they became entitled to approximately one half of the village lands, and that their title thereto was supported by registration and by possession.

The land concerned was found to be suitable for the growing of the profitable tobacco crop, and there is no doubt that the land has been advantageously exploited by the villagers. The resultant profits were the source of the disputes between the appellants and the villagers. There was evidence that leases were signed by some of the villagers which, it was said, constituted a recognition of the title of the appellants. In any case, the whole matter was referred to arbitration, and the arbitrator's award which was given in 1923 substantially upheld the claim of the appellants. This arbitration award was confirmed by the Land Court in 1923. After judgment objection was taken both to the arbitration and to the Land Court proceedings, on the ground that all the villagers were not a party.

We have come to the conclusion that there is no substance in those objections. It follows that the arbitration award must determine the issue if that award is still legally enforceable. The question now arises — Can the appellants rely on the arbitration award, confirmed as it has been by the Land Court? In 1928 there was a delivery by the Execution Officer of certain lands which were covered by the arbitration award of 1923. We have now to decide whether between the date of the execution proceedings of 1928 and 1940, which is the date of the commencement of the settlement proceedings, the award became prescribed.

It can be accepted as established that the respondents have been in possession of the land between 1928 and 1940, and the prescriptive period for possession of this miri land is ten years. The prescriptive period had therefore been exceeded, and relying on this alone the Settlement Officer would have been justified in confirming the respondents in their possession. But it must be borne in mind that the Land Court judgment of 1923 gave the appellants a decree in respect of this land.

We have now to consider the effect of Section 144 of the Execution Law. That section provides that a decree does not become prescribed until a period of fifteen years has elapsed.

The question therefore arises whether this decree supersedes the provision in regard to the ten years prescriptive period for possession of miri lands. We are of opinion that it does. To hold otherwise would be to make Section 144 of the Execution Law meaningless in so far as decrees affecting land are concerned. The section is a statutory enactment promulgated long after the theory of prescription in regard to miri land had been accepted, and if it was intended to exclude decrees in respect of land from the ambit of Section 144 the section would have stated so in specific terms. It follows that the decree of the Land Court which was in favour of the appellants was enforceable at the date of the settlement proceedings, and effect should have been given to it by the Settlement Officer.

The appeal must therefore be allowed, the judgment of the Settlement Officer set aside, and the case remitted to the Settlement Officer to determine in the light of this judgment. Costs of this appeal to be on the lower scale to include LP. 15 advocate's fees.

1947
23rd April

FitzGerald C. J.
and
Abdulhadi J.

CA 208/45
Qaddoura
v
Haj
and others

High Court No. 121 of 1946.

In the Supreme Court sitting as a High Court of Justice.

Before: de Comarmond J. and Hubbard Ag. J.

AHMAD MUHAMMD MAHFOUZ DRIS,
and others. . . . . *Petitioners.*

v

DEPUTY CHIEF EXECUTION OFFICER,
HAIFA,
and others. . . . . *Respondents.*

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25th April

de Comarmond J.
and
Hubbard Ag. J.

HC 121/46
Dris
and others
v
Deputy Chief
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Haifa,
and others

Immovable property — Partition — Jointly owned immovable property incapable of partition put up for sale by public auction — Sale of property in question to highest bidder — Strangers on land refused to leave property — Whether Chief Execution Officer entitled to order eviction of persons on property — Ottoman Law of Partition of Immovable Property, Article 9.

——— — Prescription — Settlement of title to land completed — Subsequent to registration in new register alleged possessors who made no claim at settlement cannot rely on long possession for any period prior to the new registration — Land /Settlement of Title/ Ordinance, Sections 51 and 52.

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de Comarmond J.
and
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and others

Certain lands came under settlement and the Land Settlement Officer ordered the registration of those lands in the name of the owners thereof. Partition proceedings were commenced in the Magistrate's Court of Haifa, and as the lands in question were found to be incapable of partition they were put up for sale by public auction. The lands were inspected by the Chief Clerk of the Magistrate's Court and two experts for the purpose of valuing their price. On the lands there were persons living in huts, one of whom claimed ownership of part by purchase from a certain individual about twenty years ago, while the other two did not claim ownership. The persons found on the lands were told about the partition proceedings and were informed to take any steps to safeguard their interests if they had any claims to make. Partition proceedings proceeded and the lands were sold to Shemen Company, Edmond Levy and Abraham Hassidoff; the last two purchasers sold subsequently their parcels to Shemen Company. The parcel purchased by Shemen Company was registered in its name and subsequently it applied to be put in possession of the property purchased by it at the auction sale. The Assistant Chief Execution Officer ordered eviction. The persons on the land applied for and obtained an order nisi calling upon the Assistant Chief Execution Officer to show cause why his said order in the Haifa Magistrate's Court Execution File No. 629/46 should not be set aside on the ground that the Assistant Chief Execution Officer had no power to order their eviction and that the purchaser had to obtain an eviction order from a competent Court.

In discharging the rule nisi, the High Court,

HELD (1) that Article 9 of the Ottoman Law of Partition of Immovable Property empowers Execution Officers in cases were a purchaser by public auction of immovable property found to be incapable of partition to order the eviction of persons found on the land so sold and who are mere squatters. The purchaser of such property is not required, if there are persons on the land who refuse to deliver possession to him, to go to the competent Court and obtain an order for their eviction.

(2) that where land has been, as a result of settlement operations under the Land (Settlement of Title) Ordinance, entered in the new register under some person's name, an alleged possessor of the land in question, who did not claim at settlement under either Section 51 or Section 52 of the Land (Settlement of Title) Ordinance, cannot come forward and rely on long possession for any period prior to the new registration.

Approved: HC 36/40, 7 P.L.R. 269.

Distinguished: HC 41/43.
HC 86/43, 11 P.L.R. 46.
HC 95/44.
HC 81/45.

The relevant facts appear from the headnote and the order.

Faiz Nazzal and Muhammad Yehya for petitioners.

A. Levin and Miss Salomon for respondents 2, 3 and 4.

de Comarmond J: The three petitioners in this case seek to set aside an order given on the 11th December, 1946, by

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25th April

de Comarmond J.
and
Hubbard Ag. J.

HC 121/46
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the Deputy Chief Execution Officer, Haifa. The said order was to the effect that the Deputy Execution Officer refused to alter a previous order given by him in the same matter regarding the eviction of the petitioners from a certain plot of land.

This Court issued an order nisi directed to the aforementioned Execution Officer (1st respondent) and three other respondents, two of whom are not in fact interested in the matter.

An affidavit in reply has been sworn by Mr. Jacob Salomon, who is the attorney of the second and third respondents in the present proceedings and who was the attorney of respondents 2, 3 and 4 in the partition proceedings which have given rise to the present application.

The following facts will be sufficient to bring out clearly the question which falls to be decided. In 1939, proceedings under the Land (Settlement of Title) Ordinance, Cap. 80, began in respect of certain lands situate between Haifa and Acre. The land with which we are here concerned is parcel 8 of block 10875/Haifa. The settlement proceedings were concluded in 1942, and parcel 8 together with other parcels were entered in the new register. It is of importance to note that all through the course of the settlement proceedings the present petitioners made no move and put in no claim. I need hardly point out that settlement proceedings are conducted in such a way that the persons residing on or near the land to be settled cannot avoid knowing what is going on. I might at this stage refer to Sections 51 and 52 of the Land (Settlement of Title) Ordinance, which enable persons in possession of land to be registered as owners if their possession has been long enough, or as holders of a possessory title if their possession is less than the statutory period but the registered owner cannot be traced. I am of opinion that where no claim at settlement is made by alleged possessors of the land, they cannot, after the land has been entered in the new register under some other person's name, come forward and rely on long possession for any period prior to the new registration.

To revert to the facts of this case. The aformentioned parcel 8, together with parcels 30 and 44, were registered in 1942 in the new register in the name of a number of co-owners, one of whom in 1945 took steps to have a partition carried out between him and his co-owners. The law governing partition is the Ottoman Law published on the 14th Muharram 1332 by an Imperial Iradeh. In pursuance of that law the parcels were inspected, and it was found impossible to divide them in kind

amongst the co-owners. It is recorded in the report of inspection that the first petitioner was seen on the land and that he stated having lived there for twenty years on three dunums which he had bought from a certain Abul Leil. The other two petitioners were also found on the land, and they stated that they had come on the land, had built huts thereon, had never paid rent, and did not claim ownership. The inspection took place on 8.1.46, and all the persons found on the land were told about the partition proceedings and were advised by the Chief Clerk of the Magistrate's Court that if they had any claims to any part of the land they should take steps to safeguard their interests.

The partition proceedings then proceeded as traced out in Articles 8 and 9 of the Law of Partition, and finally the parcels were put up to auction and were finally adjudicated as follows: parcel 8 to Shemen, Ltd. (second respondent) and the other two parcels to respondents 3 and 4. (Shemen Ltd. subsequently acquired the last mentioned parcels).

For the purposes of the present application we are concerned only with parcel 8.

On 2.4.46 parcel 8 was registered in the name of Shemen Ltd. by order of the Magistrate who had dealt with the partition case, and on 28.5.46 Shemen Ltd. applied to the Execution Office, Haifa, and asked to be put in possession thereof. The Deputy Execution Officer dealt with the case: he summoned petitioners to appear before him and heard their advocate's submissions, which were to the effect that the Execution Officer could not evict them and that the purchasers had to obtain an eviction order from a competent Court. At that stage the allegation was that the petitioners had been on the land for thirty years; subsequently the period was alleged to be forty years.

I find it unnecessary to relate minutely the numerous incidents of the proceedings before the first respondent. It is sufficient to say that the first respondent held that he was entitled to order the eviction so as to deliver the land to Shemen Ltd; the matter was adjourned several times in order to afford the present petitioners time to apply to the High Court. On 12.11.46 the first respondent ordered execution to proceed. On 15.11.46 he ordered that force be used if necessary. On 15.11.46 the eviction could not be carried out, although four policemen were present. Subsequently new attempts were made to convince the first respondent that he should not order eviction, and this led to further hearings which culminated on 11.12.46 by the Execution Officer re-affirming his decision but

granting a stay of execution for two weeks. The petitioners then petitioned the High Court.

The crux of the matter is whether Article 9 of the Law of Partition empowers the Execution Officer to evict. For the present purposes I need only mention that Article 9 (see Tute's Ottoman Land Laws, p. 173) provides for sale by auction in accordance with the law concerning the sale of immovable property which is hypothecated, and also provides for the transfer of the property to the highest bidder and for the division of the proceeds amongst the co-owners. The last three lines in Tute should, as held in High Court 36/40 (7 P.L.R., p. 269, in the case of Miller v. Registrar of Lands, Jaffa) read as follows:-

> "The delivery and evacuation of the property sold to the purchaser shall, if necessary, be effected by the Execution Officer."

In the same case the Court remarked that the Execution Officer is only concerned in a case such as the present one, "if the purchaser cannot obtain possession of the property purchased by him. ....." I would add that Article 10 of the Provisional Law for the Mortgage of Immovable Property, to which reference is made in Article 9 of the Law of Partition, provides that after the sale by auction to the highest bidder the Execution Officer, if necessary, will cause the property to be vacated and will deliver it to the purchaser. There is also Article 17 of the Provisional Law Regulating the Right to Dispose of Immovable Property, of the 5th Jumad-il-Awwal, 1331, (Tute, p. 171) which reads as follows:-

> "Actions claiming the ownership of immovable property, sold through the Tapou Office by public auction in accordance with special laws, must be brought before the same is completed..... The Courts are forbidden to hear cases where the claim is brought after the sale has been completed unless the delay was due to a lawful excuse."

A somewhat similar provision is also to be found in Article 115 of the Execution Law of 28th Nissan, 1330.

It seems to me difficult, in presence of the aforementioned texts, to accept the view that in a case like the present one the petitioners cannot be evicted by order of the Execution Officer. To put it bluntly, they have taken no steps whatsoever throughout the settlement proceedings, the partition proceedings, and the public auction proceedings, and now they brazenly expect to remain on the land while the purchaser is put to the trouble of taking the matter to a Magistrate's Court with the prospect of being met by various objections and pleas, causing more delay. The question is whether there is any valid ground for such an attitude. The learned advocate for the petitioners has relied on several cases, which I will now consider.

There is High Court 86/43, 11 P.L.R. 46, which however was not a case of partition ending up with a sale by auction. In other words, it was a case where the property was divisible, and in such a case the Law of Partition makes no mention of delivery of the lots by the Execution Officer.

Another case is High Court 95/44 (1944, A.L.R. 698) but the gist of that case was that the identity of the land sold in execution was in dispute, and this explains why the High Court directed a stay of proceedings for one month in order to enable either party to apply to the appropriate Court to establish their claims. That case is completely foreign to the issue in the present case.

In High Court 41/43 (1943, A.L.R , p. 196) the High Court refused to intervene in a case where the Execution Officer had considered that the occupier of land which had been sold by auction had reasonable grounds to aver that he had been unaware of the auction proceedings and had thus not been in a position to protect his rights prior to the sale. Needless to say, the facts in our case are completely different, and at any rate High Court 41/43 is one of those cases where the High Court found no sufficient reasons for exercising its powers, and pointed out that it was not a Court of Appeal.

Finally there is High Court 81/45 (1946, A.L.R. p. 118) which is a case where the petitioners wanted the Execution Officer to mention in the notice of sale by auction that he could not guarantee vacant possession. Obviously the petitioners had taken up the matter in time and desired to make it clear that they were going to rely on their alleged long possession of the land intended to be sold. The High Court considered that the Execution Officer should have accepted to mention the matter in the notice of sale. In the present instance, as already mentioned, no move has been made by the petitioners until long after the auction proceedings had been terminated.

I have given full consideration to this case because it is obviously an outstanding example of the attitude taken up by mere squatters who seem to be under the impression that they have in all cases more rights than registered owners. In the present case the main fact against the petitioners is that whatever possibility there was for them prior to 1942 to rely on long possession, they lost such rights after the conclusion of the Land Settlement proceedings, so that they cannot now rely on ten years' possession. In addition they did not avail themselves of the opportunity of attempting to make out a case when partition proceedings were carried out and culminated in a sale by auction.

I therefore consider that they have not the slightest justification in contending that in the circumstances of this case the purchasers at auction should have to go to Court to get an order of eviction. I am satisfied that Article 9 of the Law of Partition, read together with the other provisions I have already reviewed, do entitle the Execution Officer to order their eviction so as to deliver the land to the purchasers.

The order nisi is therefore discharged, with LP. 15 inclusive costs.

Hubbard Ag. J.: I concur.

Privy Council Leave Application No. 6 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.
Before: de Comarmond J. and Hubbard Ag. J.

KEREN KAYEMETH LEISRAEL Ltd. . . *Applicants.*
v
SALEH SAID EL NAHAWI. . . . . *Respondent.*

Privy Council — Stay of execution — Application for leave to appeal to Privy Council — Notice of intended application for stay of execution unnecessary where application for stay is made in the course of the hearing of the application for leave to appeal — Palestine (Appeal to Privy Council) Order-in-Council, 1924, Article 7.

Where a party applying for leave to appeal to the Privy Council the judgment of the Supreme Court intends to move for stay of execution of the judgment appealed against, it is unnecessary for that party to give notice to his opponent of his intended application to move for stay of execution if the application for stay is made to the Supreme Court in the course of the hearing of the application for leave to appeal.

M. Eliash for applicants.

Henry Cattan for respondent.

Ruling: We are of opinion that notice of an intended application to move for stay of execution need not be given where the application for stay is made to the Supreme Court in the course of the hearing of the application for leave to appeal. In the present instance, for example, both parties are represented before us and are well aware of the powers vested in the Court by article 7 of the Palestine (Appeal to Privy Council) Order-in-Council; this Court may act under article 7 without being asked by either party, and it would be illogical to hold that one of the parties cannot without notice move the Court to exercise its powers under the said article.

Civil Appeal No. 329 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal

Before: The Chief Justice and Abdulhadi J.

Z. AGERNOWITZ & H. BEN-ARI. . . . *Appellants.*

v

RAYAH ORLINSKI. . . . . *Respondent.*

Arbitration — Award — Mere technical objections, unless they go to the root of the matter, are not in themselves sufficient for upsetting the decision of an arbitrator — For an award to be bad on the face of it, it must disclose some patent error of law.

Advocates Agernowitz and Ben-Ari claimed in the Magistrate's Court of Tel-Aviv (Civil Case No. 635/46) from Rayah Orlinski a certain sum in respect of professional services rendered to Orlinski. Oral negotiations to refer the dispute to an arbitration board appointed by the Jewish Bar Association took place between the parties, they agreed to arbitration and the Association chose two advocates of a Panel of Arbitrators appointed by the Association for the purpose of adjudicating all disputes between advocates and members of the public. The deed of submission signed sometime later by the parties nominated advocates Dickstein and Zundelevitz as arbitrators, and in case of disagreement between the arbitrators, the parties authorised the Jewish Bar Association to appoint an umpire. An award was given by the arbitrators which they signed, and after their signatures they added the words "Members of the Board". The advocates applied for the enforcement of the award, and Orlinski objected to its enforcement on the ground that the award was bad on the face of it, inasmuch as in the deed of submission Messrs. Dickstein and Zundelevitz were appointed as arbitrators whereas in the award they delivered they considered themselves as an Arbitration Board of the Jewish Bar Association. The Magistrate came to the conclusion that the arbitrators assumed that they were acting not as two persons appointed as arbitrators in accordance with the Arbitration Ordinance, but as the Arbitration Board of the Jewish Bar Association sitting in Tel-Aviv, and sitting in that capacity might have prejudiced the arbitrators against Orlinski and favoured the advocates and in the result the Magistrate refused the application. The advocates appealed to the District Court of Tel-Aviv (Civil Appeal No. 86/46) and that Court (Acting Judge Kantrovitch) dismissed the appeal. The advocates appealed to the Supreme Court by leave of the District Court.

In allowing the appeal, the Court of Civil Appeal,

HELD (1) that technical objections to an arbitration award, unless they go to the root of the matter, are not in themselves sufficient for upsetting the decision of an arbitrator.

(2) that for an award to be bad on the face of it, it must disclose some patent error of law.

E. D. Goitein and H. Ben-Ari for appellants.

No appearance by respondent.

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25th April

FitzGerald C. J.
and
Abdulhadi J.

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Agernowitz
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Abdulhadi J.

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Judgment: This is an appeal from the District Court, Tel-Aviv, which in its appellate capacity upheld the decision of the Magistrate to refuse confirmation of an arbitration award.

Once again we emphasize that the Courts will always lean towards upholding an award of arbitration. Mere technical objections, unless they go to the root of the matter, are not in themselves sufficient for upsetting the decision of an arbitrator. Both the learned Magistrate and the learned Judge of the Court of Appeal set this award aside because they came to the conclusion that it was bad on the face of it. Now for an award to be bad on the face of it, it must disclose some patent error of law. The facts of this case are that the dispute was submitted by each party to the arbitration of two named lawyers. The deed of submission further made provision for the appointment of an umpire by the Jewish Bar Association of Tel-Aviv, in case of disagreement. The two lawyers whom both parties accepted as arbitrators, happened to be members of the Jewish Bar Association and members of the Panel of Arbitrators appointed by the Association for the purpose of adjudicating all disputes between lawyers and the general public.

Now we should have thought that the mere fact that the umpire was to be appointed by the Jewish Bar Association of Tel-Aviv would have led to the not unreasonable inference that when the parties agreed to these two gentlemen, they agreed because they were members of the Jewish Bar Association and because they were peculiarly qualified to carry out this arbitration. But it is this membership which the respondent has successfully objected to in both the lower Courts. The substance of the objection was that this fact might have prejudiced the arbitrators against the respondent and favoured the lawyer who was appellant. It seems to us that the onus was on the respondent affirmatively to prove the existence of this prejudice. We fail to appreciate how it could be inferred from the mere fact that the arbitrators were members of the Panel of the Jewish Bar Association or from the reference to that fact which appeared in the award.

In any case it could not in our opinion be held that this factor would label the arbitration award as bad on the face of it.

The appeal must therefore be allowed with costs in the Courts below and costs in this Court on the lower scale to include advocate's attendance fee of LP. 15.

Civil Appeal No. 271 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Frumkin J.

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FitzGerald C. J.
and
Frumkin J.

CA 271/46
Agasee
v
Agasee
and others

SOLOMON AGASEE. . . . . *Appellant.*

v

1. DAVID SHMUEL AGASEE,
2. VICTORIA ABOUTBOUL,
3. JOSEPH AGASEE. . . . . *Respondents.*

Imbecile — Interpretation of term "imbecile" in Article 945 of the Mejelle.

by a deed of gift and renunciation executed before the Notary Public of Haifa on the 29th December, 1944, David Shmuel Agasee gave by way of gift to one of his children, a daughter, all the amounts which he delivered to her or which he transferred to her account, and he discharged his said daughter finally and absolutely from any debt due or might become due from the said daughter. In 1945, one of Agasee's children, a son, Solomon Agasee, commenced proceedings in the District Court of Haifa (Civil Case No. 54/45) for his appointment or the appointment of any other person the Court may deem fit as curator over the person and property of his father David Shmuel Agasee. The application was opposed by the person directly concerned and by the daughter in whose favour the deed was made. It was not contested that the law to be applied to the matter before the Court was that contained in the Ninth Book of the Mejelle and in particular Article 945. Medical evidence as to the state of mind of Agasee was tendered on both sides. The evidence of the father in an informal manner was taken at his house, the father being old and suffering from hernia. The District Court, constituted of the President thereof (Judge Weldon), on the medical and other evidence adduced on both sides, and from what it observed when taking Agasee's evidence, and applying the definition of the term "Ma'atouh" in Article 945 as laid down by the Supreme Court in Land Appeal 7/32 reported in Rotenberg Vol. 3 p. 564, which is to the effect that an insane person (Ma'atouh) is a person seized of a kind of lunacy devoid of violence, came to the conclusion that as a pure question of fact Agasee was not an imbecile within the meaning of Article 945 of the Mejelle, and dismissed the application. The applicant appealed.

In dismissing the appeal, the Court of Civil Appeal,

HELD that in interpreting the term "imbecile" in Article 945 of the Mejelle, having regard to the fact that the Mejelle was not complied in the English language and it does not lend itself easily to translation, it becomes necessary, therefore, to guard against rushing to the conclusion that every person who might be considered an imbecile from the point of view of the English appreciation of the term is an imbecile within the meaning of the Article; what the Article intended to convey was that in order to avoid the legal consequences of his actions, a man must have been in such a state of mind as not properly to understand what he was doing or fully to appreciate the consequences of his act.

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B. Joseph and M. Caspi for appellant.

M. Eliash for first respondent.

A. Weinshall for second respondent.

No appearance by third respondent.

Judgment: This is an appeal from the refusal of the District Court of Haifa to make an order declaring a person to come within the provisions of Article 945 of the Mejelle. The question, as Dr. Joseph for the applicant emphasized, was mainly one of fact. It was therefore primarily an issue for the trial Court to decide after it had heard all the evidence.

Dr. Joseph argues that the trial Court went wrong both in fact and in law. He says that the Judge drew wrong conclusions from the evidence. The transaction that gave rise to this action was the transfer by a father of all his property to one child, to the detriment it is alleged of the interests of his other children. That of course he was quite entitled to do, and if the Court could come to the conclusion that there had been no undue influence, or that he did not fall within the ambit of Article 945, it was bound to give effect to his wishes. The father himself gave evidence, and an important fact to bear in mind is that he gave this evidence before the trial Judge. He was in the witness box some five hours, which afforded the Judge the opportunity of gauging his reactions. Medical experts were called on both sides. Those called for the appellant were able to say that the father, who was 80 years old, suffered from certain defects, such as loss of memory.

Now in regard to Article 945, we would observe that the Mejelle was not compiled in the English language, and it does not lend itself easily to translation. In interpreting the term "imbecile" in Article 945 it becomes necessary, therefore, to guard against rushing to the conclusion that every person who might be considered an imbecile from the point of view of the English appreciation of the term is an imbecile within the meaning of the Article. In our opinion what the Article intended to covey was that in order to avoid the legal consequences of his actions, a man must have been in such a state of mind as not properly to understand what he was doing, or fully to appreciate the consequences of his act.

Dr. Joseph's main complaint is that the evidence of Dr. Herman was not properly appreciated by the trial Judge. Dr. Herman is a specialist in mental and nervous diseases, and as to his professional competence or the authority of his opinion there can be no doubt. His evidence as to mental defectiveness was as follows:-

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"From my observations of what I saw yesterday, limited observation, I gathered the impression that his mentality was somewhat below average of a normal man of his age. Appears to have weak spots in his memory. Failure to recognise his children would support the view that he was not mentally in order. If he made a mistake in the name of the street where he lived for six months would also support this view. He understood mostly what was said to him. He did not seem to understand that he was in Court. Had some difficulty in following the procedure."

The Judge took this evidence in the old man's own house, and we cannot see that there is anything exceptional in the fact that he did not appreciate that a judge sitting in this informal manner did not differ from a Court with all its paraphernalia. Even by itself we do not think that this evidence was such as would lead inevitably to the conclusion that the man was an imbecile within the meaning of the Article. But balanced against other evidence which was given, and in the light of the observations which the trial Judge himself was able to make, we think that he was justified in coming to the conclusion that as a pure question of fact this man was not an imbecile within the meaning of Article 945.

The second point made by Dr. Joseph was that the trial Judge applied the test of lunacy, instead of imbecility. We quite agree with Dr. Joseph that the two tests are entirely separate. A man might well be an imbecile within the meaning of Article 945, and still fall far short of a state of lunacy. But we cannot see that the trial Judge made any such error. On the contrary, it seems to us that he fully realised the distinction. He stated specifically in his judgment that the law to be applied was contained in Article 945 of the Mejelle, and he added that that Article had been exemplified and expanded by a decision of the Supreme Court in Land Appeal No. 7/32. It is clear to us that the object of the Judge in referring to the case was to stress the fact that he fully appreciated the distinction between lunacy and imbecility. His judgment goes on to say:

"Now applying this definition to the evidence before me I find that it cannot be said that this old gentleman's mind is so deranged that his understanding is small; there was no evidence of confusion of speech, but only of some impediment in articulation."

These are the words used in Article 945. It seems to us, therefore, that the test which the trial Judge did apply was the test of imbecility within the meaning of Article 945 and not the test of lunacy.

For these reasons we are of opinion that this appeal must be dismissed, with costs on the lower scale to include LP.15 advocate's attendance fee.

Civil Appeal No. 140 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Curry Ag. J.

A.M. BUXBAUM. . . . . *Appellant.*

v

AVRAHAM SETTON. . . . . *Respondent.*

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de Comarmond J.
and
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Landlord and tenant — Eviction — Action for eviction of tenant on ground that landlord reasonably required the premises for the occupation of himself — Considerations to be kept by Courts in their minds when dealing with such cases — Rent Restrictions (Dwelling Houses) Ordinance, 1940, Section 8(1)(c).

In allowing this appeal from the judgment of the District Court of Jerusalem given in its appellate capacity in Civil Appeal No. 1/46, whereby that Court, constituted of the Acting Relieving President thereof (Acting Judge Ross), dismissed an appeal to it from the judgment of the Magistrate's Court of Jerusalem given in Civil Case No. 71/45 in which that Court dismissed an action for eviction by the landlord based on the ground that he, the landlord, reasonably required the premises for the occupation of himself, and setting aside the judgments of the Magistrate's Court and of the District Court, and entering judgment for the plaintiff-appellant, the Court of Civil Appeal,

HELD that when dealing with eviction cases brought by a landlord against his tenants on the ground that he, the landlord, reasonably requires the premises for the occupation of himself, the Magistrate must put to himself the following question: On the facts before me, has the plaintiff established a genuine present need for the accommodation he claims? If the plaintiff has established a genuine present need, then the Magistrate must put to himself the following question: Is the alternative accommodation offered adequate? If the answer to this is in the affirmative, then thereafter the Magistrate shall consider whether in all the circumstances of the case it is reasonable to give the judgment prayed for.

The relevant facts appear from the judgment.

The judgment of the Court was delivered by Curry Ag. J.

E. D. Goitein and A. Buxbaum for appellant.

J. Eisenberg and A. Perlmutter for respondent.

Curry Ag. J: The appellant, a landlord, brought an action to recover possession of the flat he had leased to the respondent on the ground that it was reasonably required by him. The Magistrate dismissed the action, and that judgment was upheld by the District Court on appeal.

The flat in question is a top flat consisting of six rooms, and the underneath flat, at present occupied by the appellant,

consists of five rooms. Some of the rooms of the top flat are larger than those of the underneath flat

The appellant's family at the time of the institution of the action consisted of seven persons — appellant, his wife and five children, aged 17, 14, 10, 2 and 1 year. Evidence, which was not challenged, was given on behalf of the appellant that he needed a children's maid to sleep in and look after the two babies — in fact they always had a maid prior to the birth of the two babies. Evidence which was not contradicted was also given that his wife held meetings in respect of certain societies for the assistance of the poor and of expectant mothers, which meetings had to be conducted in a certain amount of privacy. Finally, there was evidence that appellant had a library in the house where he did a certain amount of office work.

Now the first question to be asked and answered is, not whether respondent would in the event of the change over suffer as much or greater inconvenience than the appellant suffers at present, but whether in the light of those uncontradicted facts the appellant has shown that he has a genuine present need of the top flat for his own occupation. The flat is used as follows: one room as a sitting-room; a passage room as a dining-room; one bed-room for two girls, one bed-room for one girl and young boy, and the third bed-room for the parents and the baby. I think on those facts alone the only reasonable answer is that the appellant has shown that he has a genuine need of the extra room, and when one considers his very reasonable desire to have a nurse maid to help with the babies, there can be no possible doubt, to my mind, that he has proved a genuine present need for the top flat.

The Magistrate came to the conclusion that the requirement was a capricious one, and it is clear that he has come to the decision as a result of two facts which emerged from the evidence.

Originally the house consisted of the top flat as it is, and a bottom flat of four rooms. In 1941 the appellant built additional rooms adjoining his own. As a result of that extra building he got one extra room, and another flat of two rooms, bath-room and kitchen was formed. In August, 1944, that flat became vacant, and the Magistrate argues that the appellant could have taken in this other flat to have formed one with his own, as there was a connecting door.

This line of reasoning is, in my opinion, quite erroneous. In the first place it must be clearly appreciated that the Rent Restrictions Ordinance was enacted merely to restrict the increase of rents and the eviction of tenants in view of the shortage of accommodation, and there was no intention to deprive landlords of lawful enjoyment of their property. There is no reason why a landlord of several houses or flats should not live as he wishes to live, so long as he acts reasonably. The Ordinance certainly does not entitle a tenant of one flat to say to his landlord — "if you have insufficient accommodation you must join together the two flats you own and live in those rather than claim mine." The Magistrate seems to have overlooked the fact that by joining the two flats the appellant would have had two bath-rooms and two kitchens which were not necessary, and of course he would have lost unnecessarily rent for that other flat. The situation might well have been different had the landlord, when building the other flat, taken some of the rooms, but he actually got a net gain of one room. The Magistrate was wrong in allowing this fact to influence him in his decision on the matter before him.

The second fact from which it appears the Magistrate came to the conclusion that appellant's request was capricious was that on the 17th October appellant sent respondent a letter requesting the latter to sign the lease and pay the rent for the coming year. The respondent altered the date of the beginning of the rental year to 17.12.44 instead of the date of signature, and then returned the lease about the end of October. The appellant apparently kept the forms and said nothing further until respondent sent the rent on the 15th December; appellant then refused to accept the rent and demanded the flat for himself. On those facts the Magistrate seems to have come to the conclusion that the appellant was capricious; but to change one's mind is not being capricious. It must be a change of mind without reason. The mere fact that the size of appellant's family had not changed between October and December does not of necessity mean that the change of mind was capricious. One can well imagine that some sleepless nights, owing to the baby being troublesome, may well have caused appellant's wife, with good reason, to say that it was impossible for her to carry on any longer without a nurse maid. In her evidence she says, "I am the principal sufferer from this state of affairs" — "I felt very nervous during these last months" — "I had no rest for lack of space". One must also not forget the important fact that it had always been their intention to occupy the top flat, and that as far back as 1940 appellant informed respondent that he needed the flat for himself. This was no last minute trumped-up excuse, but clearly a state of affairs finally brought to a head as the result of the extra strain resulting from the 7-months-old baby. Quite rightly, the learned Judge on appeal

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agreed that to describe the appellant's conduct as "capricious" was somewhat wide of the mark (as he expressed it). Having found that appellant's conduct was not capricious, however, the learned Judge decided that the Magistrate's finding that appellant's requirement of the house was not reasonable could be supported. How the Judge came to that conclusion I am quite unable to conceive. Clearly the whole basis of the Magistrate's finding against appellant was his capricious conduct, and if the Magistrate is wrong in that finding, as he is, then equally clearly the evidence supports appellant's claim that he has a genuine present need of the flat.

Having answered that question, it merely remains to consider whether the alternative accommodation was suitable for the respondent. The Magistrate in his judgment found that the plaintiff's flat would have indeed constituted adequate alternative accommodation according to law. That finding undoubtedly is a correct finding. Whilst it is true the number of persons in the two families is the same, more accommodation is undoubtedly required when one has young children, and there was also the nurse to be accommodated. Having found that the alternative accommodation was adequate, however, the Magistrate goes on to say that he was satisfied that by residing with his family in the plaintiff's flat the defendant would have suffered an inconvenience not less than that of the plaintiff and his family. Here again the Magistrate is considering irrelevant facts, for that is beside the point. The question as to the balance of inconvenience does not arise in these cases, and should not be considered by Magistrates. There seems to be some prejudice by Magistrates against landlords as a class, as though they were living on immoral earnings. It is no more immoral to build or buy houses and live on the rents, than to buy goods and resell, living on the profits, or even to buy and sell stocks and shares and live on the profits and dividends — in fact it might well be argued that a man who employs his money in building houses is a benefactor to the community. If Magistrates would only keep their minds free from any of these considerations, and merely consider the following questions, they would find these cases much easier to determine correctly.

The first question for a Magistrate to put to himself is, "On the facts before me, has the plaintiff established a genuine present need for the accommodation he claims?" If he has, the second question then arises, "Is the alternative accommodation offered adequate?", and thereafter consider whether in all the circumstances of the case it is reasonable to give the judgment prayed for.

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In this case there can be no doubt that the appellant has proved a genuine present need of the top flat. He has also shown that there is suitable alternative accommodation for the respondent, and that no circumstance exists which makes it unreasonable to give such a judgment.

In the result, therefore, the judgments of the Magistrate's Court and the District Court are set aside and the costs reversed. Judgment to be entered for plaintiff-appellant as prayed, with costs of the appeal to include an advocate's hearing attendance fee of LP.15.

de Comarmond J.: I concur.

High Court No. 22 of 1947.

In the Supreme Court sitting as a High Court of Justice.
Before: de Comarmond J. and Curry Ag. J.

BOULUS HANNA BOULUS. . . . . *Petitioner.*

v

CHAIRMAN AND MEMBERS OF THE DISTRICT MOTOR REGULATORY BOARD, GALILEE DISTRICT, NAZARETH. . . *Respondents.*

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de Comarmond J.
and
Curry Ag. J.

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Chairman and members of the District Motor Regulatory Board, Nazareth

High Court — Motor Regulatory Boards — High Court will not make an order where a person or a body has no statutory duties or no public legal duties, nor will it make an order to the effect that a person or a body must exercise his or its discretion in a certain manner.

In discharging the rule nisi issued to the respondents calling upon them to show cause why their decision rejecting petitioner's application for a permit to operate a bus service on the Bi'net — Deir el Asad — Acre — Haifa route should not be set aside and why they should not be ordered to recommend the establishment of an omnibus service on the aforesaid route and the issue of a permit to petitioner to operate such service on the said route, the High Court,

HELD (1) that the High Court will not make an order against a person or a body where he or it has no statutory duties or no public legal duties, nor will it make an order to the effect that a person or a body must exercise his or its discretion in a certain manner.

(2) that Motor Regulatory Boards, which are bodies which are not governed by any statutory provision and which have no obligation to carry out certain duties in any specified way, are free to conduct their activities in any manner they like, there is no line of conduct traced out for them and they have no legal responsibility or duty.

1947
30th April

de Comarmond J.
and
Curry Ag. J.

HC 22/47
Boulus
v
Chairman and members of the District Motor Regulatory Board, Nazareth

Referred to: HC 78/39, 7 P.L.R. 35.

E. D. Goitein and J. Rutberg for petitioner.

Legal Assistant (L. Weston) for respondents.

Order: This is a return to an order nisi directed to the respondents calling upon them to show cause why their decision dated the 22nd of January, 1947, refusing petitioner's application should not be set aside and why they should not be ordered to recommend the establishment of an omnibus service on a certain route and the issue of a permit to the petitioner to operate such service.

An affidavit sworn by Mr. Thorne Thorne has been filed on behalf of the respondents, and the deponent was cross-examined. Mr. Thorne Thorne is Deputy District Commissioner, Galilee District, (at present acting District Commissioner). He is the District Commissioner's representative on the District Motor Regulatory Board of Galilee District and as such is the chairman thereof.

The decision referred to in the petition and in the order nisi was to the effect that the aforementioned Board rejected on the 22nd of January, 1947, the application made by advocate Kaiserman on behalf of the petitioner for a permit to operate a new bus service. I might explain that the Board had been approached on several occasions by the petitioner to the same effect, and that the matter had received due attention according to Mr. Thorne Thorne's evidence.

Mr. Weston who appeared for the respondent Board submitted that the application was misconceived in law because the Board is purely advisory and has no statutory duties.

Mr. Weston traced out the history of Motor Regulatory Boards and referred us to the recommendations made by a Board of Inquiry appointed in 1931 to inquire into the motor transport industry in Palestine. It appears from this report which was published in the Official Gazette of 1931 page 871 that a recommendation was made for the creation of Motor Regulatory Boards which would inter alia fix the maximum number of omnibuses plying between municipal areas and outlying settlements or between municipal areas. At page 900 of the Official Gazette for the same year the Government published a statement to the effect that the Government agreed in principle with the recommendation concerning Regulatory Boards. Regulatory Boards have in fact been appointed but no mention of such Boards was ever made in any Ordinance or Regulations

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dealing with road transport. Mr. Weston is, therefore, fully justified in submitting that these Boards have no statutory recognition and no statutory duties.

Mr. Goitein, for the petitioner, has submitted that Regulatory Boards perform a public duty and that, in fact, no new bus route is included in the Schedules to the Road Transport (Routes and Tariffs) Regulations, 1934, and no permit to operate a bus service is issued by the licensing Authority except on a recommendation made by the Regulatory Board. Mr. Goitein also relied on H.C. 78/39, 7 P.L.R. 35 in which it was stated that the Jurisdiction of the High Court of Palestine is "broadly in the nature of mandamus and prohibition" and that "in such matters this Court will exercise a wider jurisdiction, conferred upon it by law, than that of the Supreme Court in England".

In H.C. 78/39 the Court took into consideration article 43 of the Palestine Order-in-Council, 1922, and section 6 of the Courts Ordinance and mentioned the types of cases in which the High Court had intervened. There is nothing in that decision to support the view that the High Court would make an order in a case like the present one where the respondents have no statutory duties or no public legal duties. It is, however, clearly laid down in the said decision that the High Court will not be inclined to intervene where a discretion is vested in a public officer unless he has misdirected himself in law and has failed to direct his mind to the question of discretion. That decision also contains the statement that the Court will not make an order which cannot be effective.

Without venturing to lay down an exhaustive test as to the limits of the jurisdiction exercisable by the Supreme Court sitting as a High Court of Justice, I would say that in the present case the orders sought by the petitioner cannot be made for the following reasons. A Motor Regulatory Board is a body which is not governed by any statutory provision and which has no obligation to carry out certain duties in any specified way. Although these Boards are consulted by Government and by licensing authorities, their advice is not at all required for the carrying out of the provisions of the Motor Transport Laws. Also, this Court will not make an order to the effect that a person or a body must exercise his or its discretion in a certain manner, the more so as, in the present case, there is and cannot be any satisfactory proof that the attitude adopted by the Board is not justified.

Put shortly, the position is that Regulatory Boards are free to conduct their activities in any manner they like, there

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is no line of conduct traced out, and, what is more, they have no legal responsibility or duty.

For the foregoing reasons, the order nisi is discharged.

I wish to add that the facts of the present case tend to show that persons interested in the operation of bus services would feel more satisfied if they were given an opportunity to ascertain that the material points have been taken in consideration. Thus in the present case it is alleged that villages situate at about five kilometres from a main road are not properly served by the existing services and that villagers are overcharged and find difficulty in securing seats in the omnibuses. The petitioner is obviously not convinced that proper information on these points has been made available to the Board. He may be wrong, but it cannot be denied that his feelings are not wholly unreasonable. Whether or not the law should be improved is a matter for the legislature, but, as things now stand, I venture to express the hope that the respondent Board will make quite certain that there is no necessity for improving the transport facilities available to the villagers concerned.

The petitioner will pay LP. 10 inclusive costs to the respondents jointly.

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THE LAW REPORTS OF PALESTINE



GAZA

Volume 14

1947

MAY

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate,
and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.
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High Court No. 42 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and Abdulhadi J.

ELIEZAR ZYLBERBERG. . . . . *Petitioner.*

v

CHAIRMAN OF THE BILLETING AND ACCOMMODATION COMMITTEE and others. . . . . *Respondents.*

1947
7th May

FitzGerald C. J. and Abdulhadi J.

HC 42/47
Zylberberg
v
Chairman of the Billeting and Accommodation Committee and others

Chairman of Billeting and Accommodation Committee — Eviction — Regulation 72A of the Defence Regulations, 1939, does not authorise chairman to order eviction of a person from accommodation occupied by him pursuant to a billeting notice cancelled subsequently.

A billeting notice under Regulation 72A of the Defence Regulations, 1939, (the regulation in question was made by the Defence (Amendment) Regulations (No. 14) of 1942, Supplement No. 2 to Palestine Gazette No. 1215 of 30th July, 1942, page 1232) was served on Abraham Schreiber requiring him to allocate one room in his flat for the accommodation of one Eliezar Zylberberg, an ex-service man. The occupier of the premises made complaint against the billeting notice which was cancelled, but Zylberberg refused to vacate the room. The occupier of the premises, i.e. Schreiber, approached the Chairman of the Billeting and Accommodation Committee who endorsed Schreiber's application for evicting Zylberberg as follows: "To execute and if need be by police force". Thereupon Zylberberg applied for and obtained an order nisi against the Chairman and the Secretary of the Billeting and Accommodation Committee and against Schreiber calling upon the Chairman and the Secretary to show cause why they and each of them should not refrain from executing the decision given by the Chairman in Billeting File No. 55 of Tel-Aviv and why the said decision of the Chairman should not be set aside and/or withdrawn.

In ordering the cancellation of the decision of the Chairman of the Billeting and Accommodation Committee, the High Court,

HELD that Regulation 72A of the Defence Regulations, 1939, does not authorise the Chairman of the Billeting and Accommodation Committee to issue an order to the police to evacuate, if necessary by the use of force, the petitioner from the room occupied by him pursuant to a billeting notice which was cancelled subsequently.

Z. Waldman for petitioner.

Crown Counsel (J. Wicks) for 1st and 2nd respondents.

A. Michaeli for 3rd respondent.

Order: We emphasize that the order we are about to deliver is based on the consideration of one point and one point alone. It is the question of the powers given under Section 72A

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of the Defence Regulations. The facts are that under the Regulations a room in Tel-Aviv was requisitioned by the proper requisitioning authority. There is no doubt that the authority was perfectly entitled to requisition the room. Later, for reasons which seemed good to the requisitioning authority, he decided to cancel the requisition. Here again we think he was perfectly entitled so to do. But having cancelled the requisition notice he purported to issue a further order, which was Exhibit "B" to the petition. We would mention here that under the requisition notice, the petitioner managed to get possession of the room, which he refused to leave when the billeting notice was cancelled. He gave as a reason the fact that, apart from this requisition notice altogether, he had a legal right to remain in this room, a right which in fact he contested in the proper Court, and which is now the subject matter of appeal.

Exhibit "B", interpreted briefly, was an order issued by the Chairman of the Billeting Committee to the police to evacuate the petitioner from the room, if necessary by the use of force. We cannot find in the regulations any authority for the issue of such an order. Under sub-regulation 7 of Regulation 72A the person who is holding by virtue of a Billeting Notice which has been cancelled, is under a legal obligation to return that Billeting Notice when demanded. If he fails to comply with that obligation he is liable to the penalties provided in sub-section 8. We would remark that the regulation makes no mention of an obligation on the person who is in possession by virtue of a billeting notice, to render up vacant possession to the Billeting Officer; the only obligation upon him is to deliver the Billeting Notice. If he chooses to remain on after the Billeting Notice has been cancelled, he is presumably a trespasser, unless he has got some other legal right to remain on the premises. If he has got no such legal right, there is available legal procedure by which he can be ousted from the premises, but the Chairman of the Billeting Committee is not authorised by the Regulations to issue a notice of eviction such as that embodied in Exhibit "B". The order of the Court therefore is that this notice be cancelled.

Income Tax Appeal No. 13 of 1946.

In the Supreme Court sitting under Section 53(1) of the Income Tax Ordinance, 1941.

Before: Curry Ag. J.

SA'EED IBRAHIM ELIAS RADI. . . . . *Appellant.*

v

ASSESSING OFFICER,
SAMARIA DISTRICT. . . . . *Respondent.*

1947
12th May

Curry Ag. J.

ITA 13/46
Radi
v
Assessing Officer, Samaria District

Revenue — Income tax — Rural property tax — Assessment of income tax payable for year 1945-46 — Assessment based on chargeable income of the year 1944-45 — Disallowance of claim for deduction of rural property tax paid by assessee which was allowed under Section 12 of the Income Tax Ordinance, 1941, which section was repealed on 1.4.45 — Whether assessee entitled to deduction of the rural property tax.

The income tax payable by Sa'eed Ibrahim Elias Radi for the year 1945-46 was assessed on his income for the year 1944-45. The assessee claimed deduction of the rural property tax paid by him during the year 1944-45. Section 12 of the Income Tax Ordinance, 1941, allowed such deduction, but the section in question was repealed on the 1st April, 1945. The Assessing Officer disallowed the deduction claimed by the assessee. The latter appealed.

In dismissing the appeal, the Court,

HELD that the assessee was not entitled to have a deduction of the rural property tax paid by him during the year 1944-45 for the year of assessment 1945-46 which assessment was based on his income for the year preceding the year of assessment, namely the year 1944-45, inasmuch as Section 12 of the Income Tax Ordinance, 1941, which allowed such deduction was repealed on 1st April, 1945, and the position is that in the year of assessment 1945-46, an income tax payer has no longer the right to make the deductions allowed by Section 12 until its repeal, although such deductions concerned income for the year preceding the year 1945-46.

Bishara Odeh for appellant.

A. Wittkowski for respondent.

Judgment: The point in this case is as follows. The appellant in respect of the year of assessment 1945/46 claims that he should be allowed a deduction in respect of the Rural Property Tax to be paid during the year of income, i.e. the year preceding the year of assessment.

The Ordinance contained a section — Section 12 — allowing this deduction until its repeal on 1.4.45, so that in the year

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12th May

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ITA 13/46
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Samaria District

of assessment to which this claim refers an income tax payer had no longer the right to make the deduction, although it concerned income for the previous year.

The appeal must accordingly be dismissed, with costs fixed at LP. 1.

Civil Appeal No. 29 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice, Shaw J. and Hubbard J.

1947
13th May

FitzGerald C. J.
Shaw J.
and
Hubbard J.

CA 29/47
London Society
for promoting
Christianity
among the Jews
and others
v
Orr
and others

1. LONDON SOCIETY FOR PROMOTING CHRISTIANITY AMONG THE JEWS,
2. AUDREY STELLA RENDLE,
3. HAIGOHI AIVASIAN (NÉE JAMBAZIAN). . *Appellants.*

v

1. LIONEL ALEXANDER WILLIAM ORR,
2. CONSTANCE MARGARET ORR,
3. STEPHANIE CONSTANCE ORR. . . . *Respondents.*

Tort, English law of — English law of tort as regards negligent acts and omissions causing damage to the person applicable in Palestine by virtue of Article 46 of the Palestine Order-in-Council, 1922.

Contract — Any kind of contract not expressly provided for in the laws of Palestine must be taken to be made under Article 64 of the Ottoman Code of Civil Procedure — Article 109 of the Ottoman Code of Civil Procedure — Article in question when applied to matters of damages arising out of breach of contract contemplates merely financial items and does not cover damages for merely mental suffering — Nor can Article in question be invoked in claims for damages for loss of profits.

Constance Margaret Orr, who was pregnant at the material time, made arrangements for her confinment in the maternity section of the English Mission Hospital of the London Society for promoting Christianity among the Jews. She gave birth to a female child on 14th April, 1943. In the late hours of the night of the 14/15 of April, an injury due to leaking from a hot water bottle put in the baby's cot happened to the infant child. The parents of the infant child and the child, through her next friend (her father), commenced proceedings in the District Court of Jerusalem (Civil Case No. 147/45) against the Society, Miss Rendle, and Mrs. Aivazian, jointly and severally, claiming LP. 18910.546 mils damages for breach of contract to supply skilful, competent and trained nurses and to nurse and to give proper nursing care, equipment and attendance to the child, and alternatively damages for negligence. The statement of claim averred that the injury sustained by the child resulted in (a) third degree burns of the left thigh, left knee joint, left forearm and left hand, resulting in the destruction of the left knee joint, loss of the left knee cap, destruction of the lower epiphysis of the left thigh, with severe damage to tissue, muscle, and bone of the thigh and knee and curving and shortening of the left thigh bone and deformity to the left thigh, loss of the second, third and fourth fingers of the left hand and partial loss of the first finger of the left hand with severe damage to the joint, muscles, tendons, bones, and tissues of the left forearm and deformity to the left forearm and hand; (b) shock resulting from burns, causing damage to the heamopoietic system; and (c) permanent disfigurement and scarring, maiming and crippling, resulting in lameness, partial loss of use of left hand and permanent invalidity. The amount claimed represented (1) special damages in a sum of LP. 8910.546 mils, of which LP. 910.546 mils had already been expended, while LP. 8000 was an estimate of future treatment, and (2) general damages suffered by the child in the sum of LP. 10000 for permanent crippleness, maimedness, disfigurement, incapacity, pain and suffering. The defendants denied liability and they maintained throughout the proceedings that in Palestine negligence, however great and however caused, gives no cause of action if it arises out of a delict or tort. From the evidence adduced, the District Court, constituted of the Acting Relieving President thereof (Acting Judge Ross), found as a fact (1) that the infant plaintiff was injured by water from a leaking hot water bottle while a patient in the defendant Society's hospital, and that the hot water bottle was the property of the Society and had been placed in the infant's bed by the Society's employee; and (2) that all the three defendants were negligent; the Society, in that it failed properly to nurse and care for the infant plaintiff and in that it failed to provide proper and safe equipment for the use of the plaintiff; Miss Rendle, in that she failed to give effective supervision to the nursing of the infant plaintiff and failed properly to test the equipment for the use of the said plaintiff; and Mrs. Aivazian, in that she failed properly to nurse the child and failed also adequately to test the hot water bottle for the child's use. The legal point before the Court was whether, in view of previous decisions of the Supreme Court and especially Civil Appeal No. 113/40, 7 P.L.R. 363, the English common law of torts could be imported into Palestine by virtue of Article 46 of the Palestine Order-in-Council. The District Court held that the English law of torts as regards negligent acts and omissions causing damage to the person may be imported into Palestine by virtue of Article 46 of the Palestine Order-in-Council. Accordingly the Court found the three defendants liable in tort and the defendant Society liable in contract. As to the amount of damages and the submission on behalf of defendants that such amount must be limited to what might be claimed as compensation in lieu of "diyet", the District Court applied the principles governing the award of damages for negligence followed in the English Courts, and awarded LP. 6910.546 by way of special damages, namely 910.546 in respect of sums actully expended to be paid to the father of the infant plaintiff, and LP. 6000 in respect of future treatment. The Court also awarded LP. 8000 by way of general damages. The LP. 6000 and LP. 8000 to be paid into Court and invested for the benefit of the infant plaintiff out of which will be paid the future survey, surgical and medical treatment. The defendants appealed.

In dismissing the appeal, the Court of Civil Appeal,

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13th May

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Shaw J.
and
Hubbard J.

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London Society
for promoting
Christianity
among the Jews
and others
v
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and others

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13th May

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Shaw J.
and
Hubbard J.

CA 29/47

London Society for promoting Christianity among the Jews and others
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and others

HELD (1) that the English common law as to tortuous liability applies to Palestine by virtue of Article 46 of the Palestine Order-in Council.

(2) that any kind of contract which is not expressly provided for in the laws of Palestine must be taken to be made under Article 64 of the Ottoman Code of Civil Procedure which authorises parties to make whatever contracts they please, subject to considerations of public policy.

(3) that Article 109 of the Ottoman Code of Civil Procedure, when applied to matters of damages arising out of breach of contract, contemplates merely financial items and does not cover damages for merely mental suffering, nor can the Article in question be invoked in claims for damages for loss of profits.

Followed: PCA 30/39, 8 P.L.R. 116

Overruled: CA 113/40, 7 P.L.R. 363

Referred to: CA 129/42, 9 P.L.R. 707

J. Asfour, J. Sahyoun and F. Bustany for appellants.

A. Levin and Miss N. Salomon for respondents.

Judgment: This is an appeal against a judgment of the District Court of Jerusalem, whereby the three appellants were adjudged jointly and severally to pay damages for negligence in the sum of LP.14,910. The negligence complained of was held both to give rise to liability in tort and to be a breach of contract. The same sum was awarded in respect of both causes of action.

The action arose out of serious and permanent physical injuries suffered by the infant third respondent when, as a new-born baby, she was under the care of the first appellant Society exercised throught its nursing sister, Miss Rendle, the second appellant, and its probationer, the third appellant. The injuries were caused by a leaking hot water bottle.

The relevant facts are as follows. At the time of the confinement of the second respondent, Mrs. Orr, the first appellants (to whom we shall now refer as the Society) were conducting the maternity section of its hospital in Jerusalem with one nursing sister, Miss Rendle, and with two probationers, one by day and one by night. The third appellant was the night probationer. Apart from Mrs. Orr, there were another lady and her twins, eight days old, in the maternity section.

At about 6 p.m. on 14th April, when Miss Rendle was about to take Mrs. Orr to the labour ward, she noticed in her bed a wet patch on the under sheet near the mouth of the bottle. Being busy with Mrs. Orr, she did not examine the

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bottle but placed it on a window-sill. She did, however, think that since the wet patch was near the mouth of the bottle the leakage must have been caused by looseness of the stopper. This same bottle found its way into the cot in which the new-born child was subsequently placed. Miss Rendle says the bottle must have been in the cot by 7 o'clock that evening. Between the birth of the baby at 8.10 p.m. and 10 p.m., when the routine weighing and washing of the baby was completed, Miss Rendle twice handled the hot-water bottle in the course of taking the baby out of the cot and putting her back again, but she saw nothing to arouse her suspicions. She knew it was the same bottle which had leaked before, but she was satisfied with the explanation of a loose stopper.

The water in the bottle was not changed again until 4 a.m. on the next morning, i.e. 15th April, when it was changed by the probationer. She noticed no leakage when she took the bottle out of the bed, and when she had filled it she tested it as she had been taught to do. She did not, however, squeeze the bottle after filling which, according to the plaintiffs' witness, Dr. Eli Davis, Deputy Director of Medicine at the Hadassah Hospital, is a necessary part of the routine of testing a bottle for soundness. The probationer replaced the filled bottle about 4.10 a.m. and stayed in the same room until 4.30 a.m.

There were two blankets between the bottle and the baby, and the baby was wearing a long sleeved vest, a coatee and long bootees. At 4.30 a.m. the probationer went into the next ward to see the mother of the twins. After a few minutes she heard the baby cry, ran to her and found that her colour had changed, and at once called Miss Rendle, who was with the bady by 4.40. The baby was in a state of collapse, and Miss Rendle gave her an injection of coramine. Dr. MacLean, the doctor in charge of the hospital, was then called, and arrived at 5 a.m.

On these facts the learned trial Judge found against all three appellants in tort: against Miss Rendle and the probationer, for negligence in nursing the baby and in testing the bottle, and against the Society, as being responsible for the torts of its servants. He also found against the Society in contract, on the ground of its failure to provide the adequate nursing and safe equipment it had undertaken to provide.

Two important questions of law arise in this appeal: (1) whether the English law of tort as regards negligent acts and omissions causing damage to the person applies in Palestine; and (2) whether the English law of contract applies, or whether

the Court must be guided only by the relevant provisions of the Ottoman Code of Civil Procedure.

On the question whether the English law of liabilities for tort applies wholly or in part to Palestine, Article 46 of the Palestine Order-in-Council is relevant. The Article is as follows:-

> "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman laws as have been or may be declared to be in force by public notice, and such orders-in-council, ordinances and regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date."

Now the English Law of Torts, except to the limited extent that it has been codified in statutes, is part of the Common Law. Article 46 therefore applies it to Palestine, subject to the two limitations imposed by the Article. Those limitations are:

> "Save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions,"

and the proviso —

> "Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."

There is no statutory law of torts in Palestine, so that the first limitation is not applicable.

We have now to consider the effect of the proviso. In Civil Appeaal 113/40 (7 P.L.R. 1940, p. 363) the Court by a majority decision were of the opinion that it would be a grave injustice to force on Palestine the common law of England which Mr. Justice Copland, who presided in that case, designated as a customary law founded on totally different customs and habits of a totally different race.

The general principles embodied in this decision would appear to have been questioned in a later case (C.A. 129/42, 9 P.L.R. 707). Moreover, since Civil Appeal 113/40 was decided the Privy Council delivered judgment in Appeal No. 30 of 1939 (8 P.L.R. 1941, p. 116) which confirms our opinion that Article 46 imported into Palestine far more of the Common Law of England than the Court who decided Civil Appeal 113/40 supposed.

It seems to us that a perusal of the relevant cases discloses a sufficient conflict of judicial opinion on the issue to justify us in refusing to be bound by the previous decision of this Court in Civil Appeal 113/1940. We have come to this conclusion with less hestitation, as it might well be argued that at the time when Civil Appeal 113/40 was decided conditions in Palestine were such that it could reasonably be said that local circumstances did not render the application of this particular part of the Common Law necessary. We are satisfied, however, that those circumstances, if they ever did exist since the advent of the British Administration, do not exist today. There is now in Palestine a population of 600,000 Jews with western ideas of culture and western ideas of commerce. There is a progressive Arab population of one and a half million, also with strong cultural and commercial ties with Europe. It may be that some specific form of tortuous liability which has its origin in conditions peculiar to the English way of life might be considered out of place in Palestine. But the conception of a person being liable for the negligent performance of an act which he holds himself out by reason of his professional qualifications, or the business he carries on, as peculiarly qualified to perform efficiently, is far too universal to justify us in holding that there is anything in the circumstances of Palestine and its inhabitants which would preclude us from importing (under the provisions of Article 46 of the Order-in-Council) the English law as to tortuous liability.

As regards the law of contract, under Article 64 of the Ottoman Code of Civil Procedure parties may make what contracts they please, subject to considerations of public policy; and any kind of contract which is not expressly provided for in the laws of Palestine must, in our view, be taken to be made under the provisions of this Article. It follows, therefore, that the question of damages in the present case, in which the contract is of such a nature that its breach cannot be remedied, and no notarial notice was therefore necessary to found a claim in damages, and in which no bad faith is alleged, must be governed by Article 109.

Mr. Asfour has submitted that the learned trial Judge went against the weight of the evidence. It appears to us that there is no substance in this submission. As regards the finding that the nursing was inadequate, which, as far as we understand it, refers mainly to the number of nurses, there was the evidence of Dr. Davis which the Court was entitled to rely on. In any case, the injury which occurred does not seem to have been due to an inadequate nursing staff, nor did the learned

Judge so find. The whole question of negligence centres around the leaking bottle, and we are unable to say that the trial Judge was not justified in finding negligence on the part of Miss Rendle. It seems to us that the Judge was not insisting on too rigorous a standard, especially in the case of a new-born baby, when he concluded that Miss Rendle should not have been satisfied with her first speculation that the stopper was loose. She herself said in evidence, "I would normally presume that the stopper was not screwed in properly. Normally it is tested in the usual way to see if there is any other cause of leakage. One has to be on one's guard against perforations." And the defence witness, Miss Morris, said, "If I find a leaking hot-water bottle in a patient's bed I would put it aside with the intention of examining it later. I hope I'd carry my intention out. If I'd had no time to do this, but I saw it had been placed in another patient's bed and I saw it was dry, I'd not remove it, as I would think the leakage was from the stopper. I'd come to this conclusion if I saw no wetness when removing the cover or making any other test. Old bottles are very apt to give round the neck." In the case of Evans v. Kerr (Gloucester Assizes, 30th May, 1945) the patch of discolouration appearing in the rubber of the bottle was a certain sign of weakness in the rubber: the patch could mean only one thing. In the present case the dampness in the bed might have meant either of two things: either a faulty screwing in of the stopper, or a defect in the bottle. It was Miss Rendle's duty to ascertain by an effective test whether there was not some perforation through which the water could have escaped.

For this negligence, if it was the cause of the damage, Miss Rendle is liable in tort, and the Society as her employer; and the Society is also liable in contract for failure to provide safe equipment, the provision of which must, in our view, be considered to have been an implied term in the contract.

But though there was negligence, did the injury to the baby result from that negligence? That is to say, did the perforation in the bottle come into existence before it was placed in the cot by the probationer, so that with proper testing it could have been discovered. We think it is quite clear from the last sentence of the learned Judge's fourteenth paragraph, that he found that it was certainly in existence prior to its being placed in the cot at about 4.10 a.m. on 15th April. That sentence reads as follows: "In parenthesis, it may be noted that none of the defendants relied on or pleaded the possible defence that the leak in the bottle was due to a latent defect which could not have been discovered by the exercise of reasonable

care. Even had they done so, however, it would in my opinion be impossible to come to any conclusion but that there was a hole in the bottle which would have been discovered if ordinary care had been used." Now if ordinary care could have prevented the injury, then the hole must have existed before the refilling at 4.10 a.m.

Since, however, the learned Judge found against Miss Rendle, we think it must be taken that he also found as a fact that the hole was in existence when the bottle leaked into Mrs. Orr's bed, and we do not think that this is a finding with which this Court should interfere. It is, of course, obviously within the limits of possibility that the perforation occurred after 4 a.m. on the 15th. But a judge is not bound to give heed to every remote possibility." The fact of the smallness of the hole, described as a "pin hole", the short period within which the damage was done, the position of the patch of dampness in Mrs. Orr's bed near the neck of the bottle, and other details, all go to lend a high degree of probability to the proposition that the bottle leaked into Mrs. Orr's bed from the same hole from which it leaked into the baby's cot, which is further strengthened by the fact that the bottle itself was never produced to the Court by the appellants, nor any evidence led to establish their defence of inevitable accident. In fact, in our view, the circumstances of this case are such that the maxim "res ipsa loquitur" applies, and in the absence of any reasonable explanation by the appellants, the Court was entitled to hold that the injury to the child was due to want of care. It is on this ground that we think the Court was justified in finding against the probationer in tort.

There remains only the question of the damages awarded. These were awarded by the Court below as follows: special damages (a) in respect of sums actually expended, LP. 910.546, (b) in respect of future treatment, LP. 6000; general damages LP. 8000. The position of an appeal Court in regard to the question whether it ought to interfere with the Judge's judgment as to the amount of damages, was considered in the case of Owen v. Sykes, Law Reports, King Bench Division, Vol. 1, 1936. Applying those principles to this case we do not consider that the trial Judge took an erroneous view of the evidence as to the damage suffered by the child, or made any mistake in giving weight to evidence that ought not to have affected his mind, or in keeping out of consideration something that ought to have affected his mind.

There is no dispute as to the amount of the first head of special damages. Under the second head, the respondents

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originally claimed LP. 8000. In respect of this claim the trial Judge allowed LP. 6000. In the light of the figures produced by the respondents, we cannot say that this was an unreasonable estimate of the cost of future treatment. Finally, the sum of LP. 8000 for general damages, although it might be argued that it was on the generous side, is not such as would justify a revision by a Court of Appeal.

What we have just said concerning damages applies to damages as for a tort. With regard to the breach of contract, we think the appellants are clearly liable to pay the surgical expenses to date, and the future estimated expenses. Two questions, however, arise under Article 109 of the Ottoman Code of Civil Procedure: (1) whether damages for merely mental suffering can be awarded on a breach of contract; and (2) whether the expense which will be incurred owing to the infant respondent's inability to maintain herself when she grows up should be considered as a direct loss, or as a profit of which she will be deprived. These matters were not dealt with in argument before us. In our view, on a proper construction of Article 109, damages cannot be awarded for mental suffering; that Article contemplates purely financial items. As regards the second question, we are of opinion that the bare cost of a suitable maintenance is a direct loss caused by the negligence. If such an injury had happened to a dancer, say, we think the defendant could obviously not be made responsible under Article 109 for the loss of those profits which she might have made in the future by the practice of her act. On the other hand, if by the injury she was rendered incapable of earning her living, we think the defendant would be liable to secure to her a proper and reasonable maintenance. In the present case the sum of LP. 8000 awarded by the trial Judge does not seem excessive if considered from this point of view.

For all the above reasons this appeal must be dismissed, with costs on the lower scale to include a hearing fee of LP. 30.

Civil Appeal No. 141 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Curry Ag. J.

ELIEZER MILLER. . . . . *Appellant.*

v

MANIA (MIRIAM) PINES. . . . . *Respondent.*

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16th May

de Comarmond J.
and
Curry Ag. J.

CA 141/46
Miller
v
Pines

Accounts — Rent — Magistrate's Court — Action in Magistrate's Court for estimated rent of house property — Action for specific sum in respect of one year only — Whether action entertainable by Magistrate's Court.

House property — Jointly owned house property consisting of two flats and two shops — One flat and one shop occupied by one of the co-owners — The other flat and shop let by that co-owner to a stranger — Liability of co-owner for the proportionate share of his co-owner in the estimated rent of the flat and shop occupied by him — Liability of co-owner for the proportionate share of his co-owner in the rent of the flat and shop let to stranger — Mejelle, Articles 597, 1075, 1077 and 1083.

Miller and Pines own jointly house property in Tel-Aviv. The property in question is composed of two flats and two shops. Miller lives in one of the flats and uses one of the shops for his own business. The other flat and shop he gave on lease to strangers. Pines, the other co-owner, claimed in the Magistrate's Court of Tel-Aviv (Civil Case No. 1995/43) her share in the income of the whole house for the year 1st April, 1942, to 31st March, 1943, which she estimated at LP. 99. The defence, which was based on legal grounds, was that the Magistrate's Court had no jurisdiction to deal with the case, inasmuch as the claim was in reality one for accounts which was within the exclusive jurisdiction of the District Court; that the relationship between the parties was in reality one of partnership and not one of joint ownership and therefore outside the jurisdiction of the Magistrate's Court since no action could be brought between partners on particular items before the final dissolution of the partnership by the District Court; that the remedy open to the plaintiff was to proceed under Article 1083 of the Mejelle and ask for the division of the benefit in respect of the future; and that in accordance with Articles 597, 1075 and 1083 of the Mejelle the defendant was not liable in any amount to the plaintiff because the defendant must be looked upon as occupying in person the whole property, although in fact part of it is let to a stranger, but that the position would be different had the plaintiff let the whole house to a stranger in which case he would be liable to the plaintiff for her share in the income, and it was immaterial whether his occupation was with or without the other co-owner's knowledge. The Magistrate held that the action was within his jurisdiction, that the relationship between the parties was not that of partners, that defendant's occupation was with the consent and knowledge of the plaintiff and therefore the defendant was bound to pay plaintiff her share in the income of the house, and that in order to render defendant not liable to pay rent the occupation must be without the plaintiff's knowledge. In the result he ordered defendant

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to pay to the plaintiff the sum of LP. 81.750 mils. The defendant appealed to the District Court of Tel-Aviv (Civil Appeal No. 213/44). The grounds raised before the Magistrate were raised before the District Court. The District Court, constituted of the Relieving President thereof (Judge Windham), held, with regard to the question of action for accounts, that there was nothing to preclude the respondent from bringing the claim as she did for a specific sum as proceeds (according to valuation) for the year under claim, and with regard to the question of partnership, it held that there was no partnership as opposed to mere joint ownership. As to the appellant's liability for the respondent's share in the income of the whole house, the Court dealt separately with (a) the flat occupied by the appellant, (b) the flat and shop let by him, and (c) the shop occupied by him. With regard to the flat occupied by the appellant, the Court found the position to be governed by Articles 597, 1075 and 1083 of the Mejelle, and that the respondent was not entitled to claim in respect of that flat whether appellant's occupation was with or without the consent of the respondent, and the fact that appellant's occupation of the flat was with the consent of the respondent did not render him liable to payment of the respondent's share in the estimated rent of the flat in question, for the words "without the consent of the other co-owner" or similar words in the examples only under the texts of Articles 597 and 1075 cannot be taken as qualifying the general rule set out in the articles themselves, by making the non-consent of the other co-owner a necessary condition to non-liability, and if the occupier need not pay when he occupies without his co-owner's consent, then reason would require that still less need he pay when he has obtained that consent. The remedy open to the respondent was by way of action for division of the benefit as contemplated in Article 1083 and as dealt with in greater detail in Articles 1174 to 1191. With regard to the flat and shop let to the third party, the District Court held that the matter was covered by Article 1077 of the Mejelle and it held that the appellant was liable to the respondent for her share of the rent, and that it was not necessary in order that article 1077 should apply the premises must be let "as a whole". With regard to the shop occupied by the appellant, the District Court held that the matter fell under the general rule of liability of one co-owner to another, to which the special provisions of Articles 597, 1075 and 1083 regarding living in a house, which does not include making use of business premises, form an exception, which general rule is that if one co-owner makes use of the co-owned property he is liable to the other co-owner in proportion to the latter's share, and that if one co-owner derives profit from business premises by using them himself, to the exclusion of his co-owner, he ought equally to account to his co-owner for the latter's proportionate share in so much of that profit as is directly attributable to the use of the premises (in other words, a rent valuation) as distinct from profit resulting from the occupier's own efforts in running the business. In the result the District Court varied the judgment of the Magistrate's Court by ordering the appellant to pay the respondent the sum of LP. 65.800 instead of LP. 81.750. Miller appealed to the Supreme Court by leave and Pines cross-appealed with regard to that part of the judgment of the District Court disallowing her claim for her share in the rent of the flat occupied by Miller.

In dismissing the appeal and the cross-appeal, the Court of Civil Appeal,

HELD (1) that the claim by the respondent for her share in the estimated rent of the house property, which was for a specific sum in respect of one year only and which she estimated at LP. 99, was entertainable by the Magistrate's Court, although an action for an account might have been more suitable.

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(2) that a co-owner occupying jointly owned house property is not liable to pay to his co-owner rent correspondent to the latter's share, whether such occupation be with or without the co-owner's knowledge.

(3) that a co-owner letting part of the jointly owned house property is liable to pay to his co-owner his proportionate share in the rent.

(4) that a co-owner making use, as distinct from living, of jointly owned house property thereby deriving profit from the premises by using them himself, to the exclusion of the other co-owner, is liable to pay his co-owner his proportionate share in so much of that profit as is directly attributable to the use of the premises (in other words, a rent valuation) as distinct from profit resulting from the occupier's own efforts in running the business.

I. Hake for appellant.

I. Olshan and D. Kadouri for respondent.

Judgment: This is an appeal from a decision of the District Court of Tel-Aviv sitting in its appellate capacity.

The parties are co-owners of a certain property consisting of two flats and two shops. The present appellant has been in occupation of one flat and one shop and has leased the other flat and the other shop to a third party. Present respondent claimed before the Magistrate's Court what she considered to be her share of the estimated rent for one year. The learned Magistrate gave judgment in favour of the present respondent in the sum of LP. 81.750. On appeal to the District Court, the learned President upheld the Magistrate's judgment except as to the appellant's liability to pay rent in respect of the flat occupied by himself.

The first point taken by the appellant was that the Magistrate had no jurisdiction and that plaintiff should have brought an action for an account before the District Court. We are in agreement with the learned President that, although an action for an account might have been more suitable, yet in the circumstances of this case there was nothing to preclude the claim from being entertained, being given that it was for a specific sum in respect of one year only.

As to the liability for the payment by the appellant in respect of the flat leased to a tenant and of the two shops, we again entirely agree with the Courts below and we find nothing useful to add to the reasons given.

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Respondent has cross-appealed in respect of the flat occupied by the appellant claiming her share of rent in respect thereof. The learned President has given full attention to this point and we agree with his interpretation.

In conclusion, the appeal and the cross-appeal are hereby dismissed. We grant costs on the lower scale and LP.10 advocate's attendance fee to the respondent.

Civil Appeal No. 138 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Curry Ag. J.

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20th May

de Comarmond J.
and
Curry Ag. J.

CA 138/46
Blum
v
Cappon

RICHARD BLUM. . . . . *Appellant.*

v

AUREL CAPPON. . . . . *Respondent.*

Mejelle, Article 414 — Procedure envisioned under article in question is that referred to in Article 36 of the Ottoman Magistrates Law.

Dr. Blum sued Cappon in the Magistrate's of Haifa (Civil Case No. 2540/44) for fees for professional services rendered in the medical treatment of defendant's son. The plaintiff himself gave evidence and called other doctors as witnesses to prove the estimated fee referred to in article 563 of the Mejelle. The Magistrate found in favour of the plaintiff, except in respect to certain items, and gave judgment accordingly. Cappon appealed to the District Court of Haifa (Civil Appeal No. 12/46). The main ground of appeal was that as there was no agreement between doctor and patient as to the amount of fees, Dr. Blum was therefore entitled to Ejr-el-Misl set out in Article 414 of the Mejelle which should have been ascertained by competent disinterested persons, which was not the case. The District Court, constituted of the Relieving President thereof (Judge Weldon), uphled the submission made by appellant, since the evidence of the doctors called by the plaintiff was not based on their experience but on the tariff laid down by the Medical Association, and it allowed the appeal and dismissed the action on the ground that the plaintiff in the action failed to prove the estimated fee for his services by the evidence of impartial expert witnesses. Dr. Blum appealed to the Supreme Court by leave. The only point in the appeal was whether Article 414 of the Mejelle was applicable to the proceedings.

In allowing the appeal, setting aside the judgment of the District Court, and reinstating the judgment of the Magistrate's Court, the Court of Civil Appeal,

HELD that the procedure envisioned under Article 414 of the Mejelle is that referred to in Article 36 of the Ottoman Magistrates Law, whereunder experts are appointed by the parties or by the Court who draw up a report which is put in as evidence in the case and who do not appear as witnesses unless either party wishes to cross-examine them. Article 414 does not apply where witnesses are called in the ordinary manner to give evidence from the witness box, whether as experts or otherwise.

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H. Cohen and W. Buchsweiller for appellant.

E. Toister for respondent.

Judgment: The facts in this case are very simple. The appellant, an orthopedic surgeon, sued the respondent in the Magistrate's Court for his fees for professional services rendered. The Magistrate gave judgment for the appellant but that judgment was reversed on appeal to the District Court.

In the trial Court the appellant himself gave evidence and he called a Dr. Masdorf and a Dr. Iskovitz to give evidence on the scale of the fees chargeable.

The real issue in this case for decision is whether Article 414 of the Mejelle was applicable to these proceedings.

In our opinion it is clear that the procedure envisioned under Article 414 is that referred to in Article 36 of the Ottoman Magistrates Law. Thereunder experts are appointed by the parties or by the Court. The said experts draw up a report, which is put in as evidence in the case. The experts do not appear as witnesses unless either party wishes to cross-examine them. This is clearly not the procedure which was adopted here, and in view of the repeal of Article 36 it would seem doubtful if such a procedure still exists. In this case the plaintiff merely called witnesses to prove the estimated fee referred to in Article 563 of the Mejelle. When those witnesses were called there was no objection by the defendant to such a procedure being adopted, and in our view it is too late for him to object now. When witnesses are called in the ordinary manner to give evidence from the witness box, whether as experts or otherwise, Article 414 does not in our opinion apply — that being limited as we have already said to cases where experts have been appointed with the concurrence of the Court. Under Article 36 the question as to whether the experts nominated by the parties are disinterested and in fact experts is considered by the Court before they are appointed, and if the Court is of the opinion that a person is not an expert or not disinterested, the party concerned has the opportunity of submitting another name. A party would be most unjustly penalised if after hearing his witnesses it was decided that in fact they were not disinterested, for of course the plaintiff having closed his case, he would — as in this particular case — not be in

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a position to call any further witnesses and he would lose his claim, although the defence called no witnesses and in fact admitted that an undetermined amount was owed to the plaintiff.

In our opinion, when witnesses are called as in this case, even though they give their evidence as experts, the provisions of Section 3 of the Evidence Ordinance apply whereby any person is a competent witness, including one of the parties. It is for the Magistrate to assess the value or weight to be attached to the evidence of such a witness, in view of the fact that he is an interested party or is not particularly qualified to speak as an expert.

For the foregoing reasons we hold that the evidence of the plaintiff, Dr. Masdorf and Dr. Iskovitz was admissible. The learned Magistrate weighed their evidence — there was no rebutting evidence brought — and we therefore see no reason for differing from his judgment.

The judgment of the District Court is accordingly set aside and the judgment of the Magistrate reinstated.

The appellant is entitled to his costs on the lower scale, here and below, and to an advocate's fee for this appeal of LP. 15.

Criminal Appeal No. 136 of 1946.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Shaw J. and Abdulhadi J.

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JACOB HASSON
and others. . . . . *Appellants.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

Criminal law — Criminal proceedings — Town planning — Building — Town Planning Scheme — Attorney General — Erection of a building without a permit — Institution of criminal proceedings by Attorney General on behalf of body concerned — Whether Attorney General entitled to institute the proceedings — Whether necessary, to succeed in a prosecution for building without a permit, that there should be a Town Planning Scheme affecting the land on which the building was erected — Law of Procedure (Amendment) Ordinance, 1934, Section 3 — Municipal Corporations Ordinance, 1934, Section 131 — Town Planning Ordinance, 1936, Sections 11 and 35 — Model Town Planning Bye Laws, 1925, Section 15.

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In dismissing this appeal from the judgment of the District Court of Jaffa in its appellate capacity given in Criminal Appeal No. 58/46 whereby that Court, constituted of the Acting Relieving President thereof (Acting Judge Rogers), dismissed an appeal to it from the judgment of the Magistrate's Court of Jaffa given in Criminal Case No. 4361/45 in which the Court convicted the accused of an offence contrary to Sections 11 and 35 of the Town Planning Ordinance, 1936, and paragraph one of Section 15 of the Model Building Bye Laws of 1925 and each sentenced to pay a fine of LP.7, and ordered the demolition of the building unless within seven months a permit was obtained from the Municipal Council of Jaffa, the Court of Criminal Appeal,

HELD (1) that the Attorney-General is empowered, by virtue of the provisions of the Law of Procedure (Amendment) Ordinance, 1934, to institute criminal proceedings against an accused contravening the provisions of the Town Planning Ordinance, 1936.

(2) that to convict an accused of an offence of building without a permit it is not necessary that there should be a Town Planning Scheme affecting the land on which the building was erected, since Sections 11 and 35 of the Town Planning Ordinance, 1936, and paragraph 1 of Section 15 of the Model Town Planning Bye Laws, 1925, prohibit the erection of a building without a permit, irrespective of whether there is a Town Planning Scheme in existence.

(3) that the word "may" in Section 131 of the Municipal Corporations Ordinance, 1934, does not mean "shall".

Edward Z. Felman for appellants.

Habib Homsi for respondent.

Judgment: This is an appeal from the judgment dated 20.9.46 of the District Court, Jaffa, in Criminal Appeal 58/46.

The appellants were charged in the Magistrate's Court of Jaffa with having contravened sections 11 and 35 of the Town Planning Ordinance, 1936, as amended in 1941, and para. 1 Cap. 15 of the Building Regulations (Municipal Area of Jaffa), 1929. The particulars of the offence were that on 28.6.45 or thereabouts the accused persons "commenced in building a market place consisting of 37 shops in Hatikva, Lydda Street, Block No. 6155, Jaffa, without a licence".

Para. 1 of s. 15 of the By-Laws (at p. 548 of the Official Gazette, 1925) provides that —

> No building or structure or work shall be commenced until notice shall have been given to the Local Commission by the builder on the prescribed form, giving such particulars as are hereunder specified and such additional particulars as the Local Commission may require, and until a building permit has been obtained".

The Magistrate found as a fact that the accused persons were at the time of filing and committal of the offence true

owners of the building in question, and he convicted the three appellants and sentenced each of them to pay a fine of LP.7. He also gave the appellants seven months time within which to obtain a licence from the Municipal Corporation, and in case they failed to obtain it he ordered the demolition of the building by the Local Building and Town Planning Commission.

An appeal from that judgment to the District Court was dismissed, but the presiding Judge gave leave to appeal to this Court.

The first ground of appeal is that the Attorney General was not authorised to institute proceedings in the Magistrate's Court. Mr. Felman who appeared for the appellants has referred to Section 131 of the Municipal Corporations Ordinance, No. 1 of 1934, which provides that any Municipal Corporation or Council may institute proceedings in and appear before any Court, or may appear in any legal proceedings by their Town Clerk, etc. He submits that the word "may" means "shall". We are unable to agree. Section 3 of the Law of Procedure (Amendment) Ordinance, No. 21 of 1934, provides that criminal proceedings before any Magistrate's Court or Municipal Court may be instituted by any of the following persons, that is to say —

(a) the Attorney General or his representative, or

(b) any Police officer, or

(c) any person authorised by any Ordinance in force for the time being to institute such proceedings.

It is abundantly clear that this law, which is later than Ordinance No. 1 of 1934, does empower the Attorney General to institute these proceedings, and s. 6A of the Law of Procedure (Amendment) Ordinance, No. 15 of 1945, further declares that the Attorney General or his representative is empowered to represent such a body as a Municipal Council in such proceedings.

The second ground of appeal is that the learned Magistrate erred in finding the appellants guilty in the absence of any proof that there was a lawfully made Town Planning Scheme in respect of the Block in question, and in the absence of proof of the contents of such scheme, and that the relevant provision was *intra vires* the Town Planning Ordinance, and that the work complained of had been done otherwise than in accordance with the relevant provision of the Scheme.

The fourth ground of appeal is that there was no sufficient evidence to support a finding that the building was within the Jaffa Town Planning Area.

The question whether or not there is a Town Planning Scheme affecting this block does not arise. Sections 11 and 35 of the Town Planning Ordinance No. 28 of 1936 (as amended), and para. 1 of s. 15 of the By-Laws, all prohibit the erection of a building without a permit, irrespective of whether there is a Town Planning Scheme in existence. As regards the fourth ground of appeal we find that there was sufficient evidence before the Magistrate to support a finding that the Block in question was within the Jaffa Town Planning Area. The evidence which was given on that point was uncontradicted.

The third ground of appeal is that there was no evidence sufficient to support a finding that the three appellants were the true owners of the building in question at the time of the commission of the offence. It is not denied that the three appellants were the registered owners of the land on which the shops stand from 28.6.45 to 10.7.45. There was evidence, given by P.W. 2 Yusef Boimholtz who is a building inspector of the Jaffa Municipality, that on 27.6.45 he found 37 small shops which had been built to a height of 50 cm. to 1 m. and that two days later (i.e. on 29.6.45) he found the work still proceeding, and the building was then nearly 3½ metres high. So there was evidence that after the land had been registered in the names of appellants (on 28.6.45) the illegal building operations still went on. The appellants must have been aware, when they negotiated for the purchase of the land, that there was a partly constructed building on it, and they were put on enquiry as to whether that construction was lawful, and it is quite clear that building operations continued after the appellants had become the registered owners. Their liabilities as owners are fixed upon them by s. 35(9) of the Town Planning Ordinance as amended by Ordinance No. 30 of 1941. The genuineness of the sale of the property by the appellants, after they had been the registered owners for only a few days, may well be doubted in view of the admission of the first appellant that he sold to his son and of the second appellant that he transferred his rights to his father. There is more than a suspicion that those transfers were made with a view to making it more difficult for the Municipal Council of Jaffa to prosecute.

The only questions which remain are whether the learned Magistrate was right in ordering demolition, and whether the period of seven months which he allowed is sufficient to enable the appellants to obtain a permit. Where, as in the present case, the building has been constructed without a permit, s. 35(1)(ii) makes the giving of a demolition order obligatory unless the defendant shows good cause to the contrary.

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In the present case there is no question of an honest mistake. The appellants, with their eyes open, wilfully took part in illegal building operations. If they chose to invest their money in such an enterprise they cannot reasonably ask the Court for sympathy or leniency, and they have shown no good cause why a demolition order should not be made. Mr. Homsi has told us that unless it is necessary for some definite purpose, such as the construction of roads, the Municipal Council will not insist on demolition, and we feel sure that the Council can be relied upon not to make any vindictive use of its rights. But we do not want to say anything that might encourage others to do what the present appellants have done. Such persons must not expect their illegal acts to be condoned.

In the result we dismiss the appeal.

Criminal Appeal No. 38 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, de Comarmond J. and Abdulhadi J.

MUHAMMAD ZAYED ABU GHANEM. . . *Appellant.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

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Criminal law — Murder — Act done wilfully in preparing for or to facilitate the commission of an offence or in the commission of an offence — Wilful act done resulted in death — Perpetrator of wilful act had no intention to cause death — Whether perpetrator of wilful act guilty of murder — Criminal Code Ordinance, 1936, Section 214(c).

On the afternoon of the 2nd January, 1947, Abu Ghanem obtained permission from Hijazi, a watchman of an orange grove, to spend the night of the 2nd-3rd January with him (with Hijazi) in the engine room of the grove. There were in the engine room six sheep and three cows belonging to Hijazi's employer. During the night Abu Ghanem struck Hijazi on the head with something hard (a stick) fracturing the base of his shull. He then stole the sheep and sold them the next day. Hijazi died in the early hours of the morning of the 4th January, 1947. Abu Ghanem, who was seen on the afternoon of the 2nd January, 1947, in the grove by the son of the grove owner and to whom, on being asked, Abu Ghanem gave his name and the place he came from, was caught by the grove owner and his two sons at the place where he had said he had lived and the sheep were recovered on the afternoon of the 4th January, 1947, with the assistance of Abu Ghanem from the purchasers thereof. Abu Ghanem was charged with

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murder (Criminal Assize Case No. 13/47) contrary to Section 214(c) of the Criminal Code Ordinance, 1936. There was circumstantial evidence sufficient to connect the accused with the crime, but the point was raised on behalf of the accused that in order to convict the accused of murder contrary to Section 214(c) he must have intended to cause the victim's death and as the evidence showed that he did strike the victim on the head in order to facilitate the commission of the offence of theft and did not intend to cause the victim's death, he could not be convicted of murder. The Court of Criminal Assize (Mr. Justice Hubbard, Judge Smith and Judge Daoudi) was unanimously of the view that the accused was the person who caused the death of the deceased and that on the evidence it appeared that the accused did not intend, when he beat the victim on the head, to cause his death, but as to whether in law the killing amounted to murder or manslaughter the Court differed. Mr. Justice Hubbard and Judge Daoudi were of the view that although on the evidence it appeared that the accused did not intend to cause the death of the deceased, yet that was immaterial, inasmuch as the word 'wilfully' in Section 214(c) must mean that he intentionally did that which in fact caused the death. Judge Smith was of the view that to convict the accused of murder contrary to Section 214(c) he must have intended, when he struck the blow, to cause the death of the victim. The majority of the Court convicted of murder and Judge Smith convicted of manslaughter. The accused appealed.

In dismissing the appeal, the Court of Criminal Appeal,

HELD that where in preparing for or to facilitate the commission of an offence or in the commission of an offence an act is done wilfully and death of another person results from that act, the act done comes within the ambit of Section 214(c) of the Criminal Code Ordinance, 1936, and the perpetrator of the act done wilfully, even though he may not have intended the death of that other person, is guilty of murder. The object of paragraph (c) of Section 214 of the Criminal Code Ordinance, 1936, is to give effect to the well settled principle of English law that if a person, in order to facilitate the commission of a felony, kills another person, he is guilty of murder, even though he may not have intended the death of that other person.

Referred to: CRA 14/38, 5 P.L.R. 129.

Anton Habayeb for appellant.

Crown Counsel (J. Wicks) for respondent.

Judgment: This is an appeal from the Court of Criminal Assize at Jaffa which convicted the appellant of murder. It is unfortunate that each of the three Judges composing the Court wrote a separate judgment. Two of the judges thought a certain confession was admissible in evidence. The President was of opinion that it was not legally admissible. Two of the judges convicted of murder, the third judge considered that the crime was manslaughter.

This appeal raises two questions one of fact and one of law. It clearly emerges that all three judges were unanimous on one point, and that was that apart altogether from the

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confession, the circumstantial evidence pointed irresistibly to the conclusion that the appellant caused the death of Ali Hijazi.

It is obvious from the judgment of Mr. Justice Hubbard that he found the accused guilty on the circumstantial evidence alone. His Honour Judge Smith in his judgment says that "the evidence in the case as a whole even if a confession be excluded points unequivocally to the fact that the accused hit the deceased." Judge Daoudi's judgment contains the following: "even though this statement might not be admissible in evidence I see there is ample and strong evidence against the accused which established his participation in the offence preferred against him. This evidence is circumstantially strong and convincing, the weight of which supersedes the evidence of the eye-witnesses as stated in the judgment of His Honour the President."

In the light of this unambiguous language, the appeal Court cannot but conclude that all three judges were satisfied to convict on the circumstantial evidence alone. It only remains therefore for us to inquire whether the conclusion that the circumstantial evidence warranted a conviction was justified. The circumstantial evidence was that the accused was seen in the engine room with the deceased on the evening of the crime; there was evidence that he intended to spend the night in the hut with the deceased, with the consent of the deceased; no one else was sleeping in the hut that night. Next morning, the young boy found the deceased dying in the hut in the circumstances described by him. The sheep which were in the hut on the previous night were not in the hut. The boy who had identified the accused the previous night in the hut, succeeded in tracing him. The accused pointed out to the police the place where the sheep were to be found. They were found in that place, and in the possession of persons who had no right to that possession. In all the circumstances of the case we consider that the trial Court was justified in coming to the conclusion that this evidence pointed irresistibly to the fact that the appellant caused the death of the deceased.

Judge Smith agreed with this finding but he came to the conclusion that in law the killing amounted to manslaughter and not to murder. He bases this conclusion on the interpretation of section 214(c) of the Criminal Code Ordinance. His interpretation of the sub-section is that an accused when striking the blow must have an intention to cause the death, if he is to be convicted of murder. With respect, we are unable to accept this interpretation. In our opinion the object of para. (c) of section 214 was to give effect to the well settled principle of

English law, that if a person, in order to facilitate the commission of a felony, kills another person, he is guilty of murder even though he may not have intended the death of that other person. Judge Smith has referred to Criminal Appeal No. 14 of 1938, but in our opinion the judgment in that case is far from supporting Judge Smith's contention. Dealing with the point the President of the Appeal Court stated "wilfully does not mean 'non-accidental' applied to acts, it means acts to which the will is a party and excludes negligent acts." In our opinion provided the act was done wilfully, and death results from that act, the act comes within the ambit of sub-section (c), and we are reinforced in this opinion by an examination of Sec. 219. Here there was no question of a negligent act. The stunning of the deceased by the appellant was done wilfully and death resulted from that stunning. It was in our opinion immaterial that the appellant may not have intended the death of the deceased. We are unable to agree with Judge Smith that the omission of the word "wilfully" from para. (d) of section 214 has any special significance in regard to the interpretation of para. (c). In this case we do not feel called upon to interpret sub-paragraph (d), but it may well be that the legislature intended that in the peculiar circumstances covered by sub-paragraph (d) it should not be necessary to prove that the act which caused the death was wilfully done.

In the result the appeal must be dismissed.

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Civil Appeal No. 139 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and de Comarmond J.

PINHAS MOSHE VANNA. . . . . *Appellant.*

v

1. MOSHE YIHIA VANNA,
2. YIHIA MOSHE VANNA,
3. PALESTINE GENERAL MORTGAGE BANK Ltd. . . . . *Respondents.*

Appeal — Party not affected by appeal not cited as respondent to the appeal — Effect of such failure — Civil Procedure Rules, 1938, Rules 313 and 333.

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Moshe Yihia Vanna was the registered owner of house property in Rehovoth. This property is encumbered with a mortgage in the sum of LP. 650 in favour of the Palestine General Mortgage Bank Ltd. The registered owner had the property transferred to one of his sons, Pinhas Moshe Vanna, on certain conditions, one of which was that Pinhas should transfer one third of the property to his (Pinhas's) brother, Yihia Moshe Vanna. Pinhas failed to abide by the conditions, and Moshe and his son Yihia commenced proceedings in the Land Court of Tel-Aviv (Land Case No. 15/42) against Pinhas and the Palestine General Mortgage Bank Ltd. for the amendment of the registration. The Land Court (Judges Mani and Cheshin) granted the prayer and ordered the defendant (Pinhas) to pay the plaintiffs' costs on the lower scale and a sum of LP. 10 attendance fees and to pay as well the costs of the Palestine General Mortgage Bank together with the sum o LP. 5 advocate's fees. Pinhas appealed. In his notice of appeal he named as respondents Moshe Yihia Vanna and Yihia Moshe Vanna only. The prayer was to quash the judgment of the Court below and to reject the claim of the respondents. Written notice under Rule 333 of the Civil Procedure Rules, 1938, was served by the respondents on the appellant in which it was contended that there was no proper appeal, in that the appellant did not cite the Palestine General Mortgage Bank Ltd. as respondent and failed to comply with a condition precedent to the hearing of the appeal by not serving a copy of the notice of appeal upon the Palestine General Mortgage Bank Ltd. which is directly affected by the appeal. An amended notice of appeal was filed in which the Palestine General Mortgage Bank Ltd. was cited as respondent and a copy of the notice of appeal only was served on it, because, said the appellant, it was formally cited as respondent and was not directly affected by the appeal and the appellant applied for no relief against the Bank, and in the last paragraph it repeated the prayer contained in the first notice of appeal, namely to quash the judgment of the Court below and to reject the claim of respondents 1 and 2.

In dismissing the appeal, the Court of Civil Appeal,

HELD that by virtue of Rule 313 of the Civil Procedure Rules, 1938, it is not necessary to serve with the notice of appeal parties who are not affected by the appeal, but those parties should nevertheless be named as respondents to the appeal.

Remarks by the Court with regard to whether failure to cite as respondent a party who is affected by an appeal is a defect in form of the type contemplated in Rule 333, and whether such defect can be remedied by an appellant without any order of the Court and after expiry of the period fixed by law for the filing of the appeal.

M. Kehaty by delegation from *J. Henigman* for appellant.

M. Needer for 1st and 2nd respondents.

Judgment: This appeal was filed on 26.4.46.

In March 1947 the advocate for respondents 1 and 2 gave notice of certain objections which he intended to raise under the provisions of Rule 333 of the Civil Procedure Rules.

It is agreed that in the amended notice of appeal, which was filed on 27.3.47, the defects were remedied with one exception to which we shall refer later.

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The first defect to which exception was taken is that the notice of appeal did not contain the name and address of the General Mortgage Bank of Palestine Ltd. as respondent. That Bank was the second defendant in the action, and the judgment ordered the payment to it of its costs together with the sum of LP. 5. In the original notice of appeal the appellant prayed for the quashing of the judgment, and it is clear that if this Court had quashed the judgment the Bank would have been affected because it would have lost its costs and the sum of LP. 5. If the Bank would be affected by the appeal it ought to have been not only named as a respondent but also served.

We would like to take this opportunity of expressing our views in regard to Rule 313. In our opinion although by virtue of this Rule it is not necessary to serve parties who are not affected by the appeal those parties should nevertheless be named as respondents to the appeal. We are fortified in this view by Rule 313(b) which says that parties who are not affected need not be served. It does not say that they need not be named, and we think it is desirable that they should be named so that the fact that they were parties to the original action may not be overlooked, and so that the Court may, if it thinks fit, direct notice to be served upon them under Rule 333(b).

The amended notice of appeal repeats one of the defects of the first notice in that it again prays for the quashing of the judgment of the Court below. Mr. Kehaty first submitted that the order for costs which the lower Court made in favour of the Bank was made against the 1st and 2nd respondents, but he later agreed that it was made against his client and he said that in any event he would remain liable for those costs.

We would have great hesitation in holding that the failure to cite as respondent a party who is affected by the appeal is a defect in form of the type contemplated in Rule 333. We would hesitate still more before we held that it was a defect which could be remedied by the appellant, without any order of the Court, and after expiry of the period fixed by law for the filing of the appeal. But in the present case the appellant, in spite of the notice, and although he has had over a year's time within which he might have taken steps with a view to remedying the defect, has repeated it in the amended notice of appeal. It may also be observed that Mr. Kehaty agrees that he did not supply copies of documents (other than the notice of appeal) for service upon the Bank. In the circumstances we uphold the objection which Mr. Needer has put forward, and direct the dismissal of the appeal with inclusive costs in the sum of LP. 15. We do not consider it to be necessary to deal with the other objections raised by Mr. Needer.

Civil Appeal No. 137 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Abdulhadi J.

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MUHAMMAD ALI HUSSEINI,
and others. . . . . *Appellants.*

v

MUHAMMAD ADIB MUTAWALLI,
MUTAWALLI OF SINAN PASHA WAQF. *Respondent.*

Immovable property — Waqf — Khulou — Existence of right of Khulou in waqf immovable property — Lessee enjoying right of Khulou — Khulou entitled to tithes so long as he enjoys right of Khulou — Substitution of tithes by an annual payment in accordance with Article 16B of the Palestine Order-in-Council — Person entitled to make' agreement with the Government of Palestine with regard to the annual payment in lieu of tithes — How is Khulou created and manner of extinguishing it.

This appeal was treated as a continuation of Civil Appeal 285/43, reported in 11 P.L.R. 329. The facts relevant to the case appear in the headnote to Civil Appeal 285/43 and in the judgment of the Court of Civil Appeal reported hereinbelow.

In dismissing the appeal, the Court of Civil Appeal,

HELD (1) that a right of Khulou in waqf immovable property is created where a person provides a sum of money (known as mursad) which is expended in the interest of the waqf, for example in building or repairing houses on waqf lands, and where a Khulou is proved, it entitles the holder thereof to remain as lessee on the land over which the Khulou has been granted until the debt is paid back to the holder of the Khulou who must, however, continue to pay rent. The right of Khulou is inheritable.

(2) that the Mutawalli of the Sinan Pasha waqf, who never renounced or alienated permanently the right to the tithes, was the person entitled to conclude an agreement on behalf of the Sinan Pasha Waqf with the Government of Palestine in respect of the compensation for the tithes formerly leviable on the properties belonging to the waqf and mentioned in the statement of claim, and persons who are entitled in the capacity of lessees or in any other temporary capacity to receive the tithes or any payment in lieu thereof are not entitled to sign an agreement with Government which would result in payments being made to them without mention of the reversionary interest vested in the waqf.

Anton Atallah for appellants.

Issa Nakhleh for respondent.

de Comarmond J: This is an appeal from a decision of the District Court of Jaffa given on the 13th day of March, 1946, in

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Civil Case No. 75/42. Leave to appeal was granted by the learned President of the said Court. The appeal is lodged by the defendants.

The second ground of appeal is that the District Court erred "in ordering the return of the evidence and findings to the Court of Appeal and in not giving a fresh judgment dismissing the plaintiff's case." This ground of appeal adverts to the fact that the case first came before the Supreme Court, on appeal, in 1943 and a judgment was in due course delivered on the 30th June 1944 (C.A. 285/43 reported in 11 P.L.R. page 329). That first appeal was lodged by the present appellants against the decision of the Jaffa District Court granting the declaration prayed for by the plaintiff. The Supreme Court allowed the appeal and remitted the case to the District Court "to decide whether the appellants have, in fact, received from these properties sums in excess of the amount originally expended, with the addition of such sum as the District Court considers to represent the improved value of the properties in that village on which the money was expended". When the learned President of the District Court had the case before him again he found, as he puts it, considerable difficulty in ascertaining what was the intention of the Court of Appeal.

The difficulty with which the Court below was faced was whether the Supreme Court had referred the case back for trial of a newly framed issue as provided by rule 342 of the Civil Procedure Rules, 1938. If this were so, the Court below had to decide the fresh issue and return the evidence and the finding to the Supreme Court. The learned President however pointed out that no issue had been framed by the appellate Court. Another possibility was that the Supreme Court wanted additional evidence taken by the Court below as provided by rules 345 and 346. And the third possibility was that the appellate Court had meant to direct a new trial (vide rule 350). Personally, I am of opinion that the appellate Court remitted the case to the District Court to decide a certain issue and intended the evidence and finding to be returned for final determination of the appeal. It is to be regretted that such intention was not more clearly expressed and that, as a result of the uncertainty, the learned President of the District Court did not decide the main point which the appellate Court wanted him to decide. The learned President did however record certain findings which he returned to this Court. In short, the procedure adopted by the learned President is a blending of rules 342 and 345. As a result, I find myself in presence

Civil Appeal No. 137 of 1946.

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MUHAMMAD ALI HUSSEINI,
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v

MUHAMMAD ADIB MUTAWALLI,
MUTAWALLI OF SINAN PASHA WAQF. *Respondent.*

Immovable property — Waqf — Khulou — Existence of right of Khulou in waqf immovable property — Lessee enjoying right of Khulou entitled to tithes so long as he enjoys right of Khulou — Substitution of tithes by an annual payment in accordance with Article 16B of the Palestine Order-in-Council — Person entitled to make agreement with the Government of Palestine with regard to the annual payment in lieu of tithes — How is Khulou created and manner of extinguishing it.

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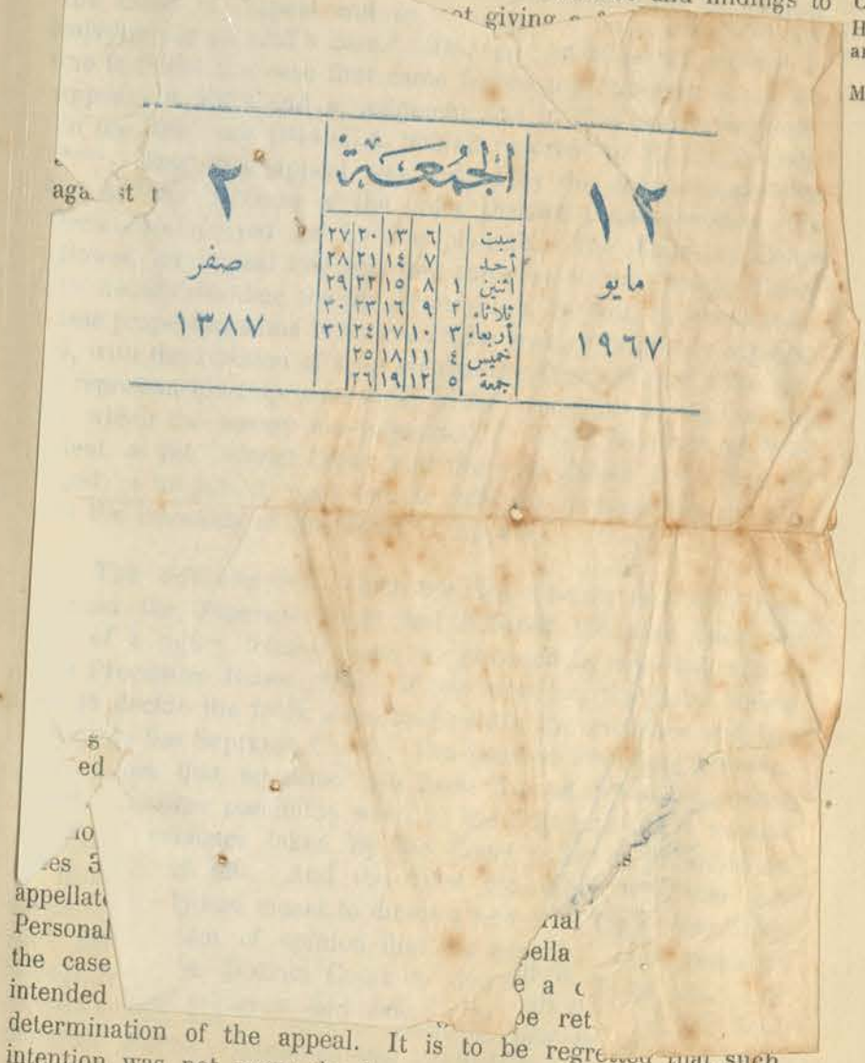
Civil Case No. 75/42. Leave to appeal was granted by the learned President of the said Court. The appeal is lodged by the defendants.

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The second ground of appeal is that the District Court erred "in ordering the return of the evidence and findings to ... not giving ...



... against ... appellate ... Personal ... the case ... intended ... determination of the appeal. It is to be regretted that such intention was not more clearly expressed and that, as a result of the uncertainty, the learned President of the District Court did not decide the main point which the appellate Court wanted him to decide. The learned President did however record certain findings which he returned to this Court. In short, the procedure adopted by the learned President is a blending of rules 342 and 345. As a result, I find myself in presence

of a new appeal which hardly deserves such designation. After some hesitation, I have reached the conclusion that the ends of justice would be better served by dealing with the case as if rule 342 had been correctly followed. No useful purpose would be achieved by sending the case back a second time. I therefore propose to deal with this case as if the case were coming up again before this Court after being referred to the Court below under rule 342. The case has been fully argued before us on that footing and I need only mention that I have kept in view the grounds put forward by the appellants in their latest so-called appeal.

Before going any further, I propose to give an outline of the case. Such an outline is indispensable for the proper understanding of this appeal which has been argued at great length and with great perseverance by Mr. A. Atalla for the appellants and Mr. Issa Nakhleh for the respondent.

The first milestone is a Wakfieh executed some 200 years ago and registered in the year 1280 Hijrieh (i.e. 1861 A.D.) by which Sinan Pasha dedicated as Waqf for charitable and religious purposes vast estates in Syria and Palestine together with their tithes. The existence of this Wakfieh is not disputed; neither is the fact that the tithes formed part and parcel of the dedication. Sinan Pasha had no doubt been authorised by the Sultan to levy and appropriate "ushur" (or a tenth of the produce of the land leviable on believers) in respect of the land granted to him and, when he executed the Wakfieh, the right to the tithes was transferred to the Wakf which is commonly known as the Sinan Pasha Wakf.

The second milestone is a lease (Exhibit D/4) dated 1254 A.H. (1836 A.D.) granted to an ancestor of the present appellants by the Mutawalli of the Sinan Pasha Wakf. The description of the lands which were the subject-matter of lease D/4 is far from precise. The President of the District Court at the very beginning of his first decision given on the 28th July, 1943, stated that the defendants were lessees of the villages of Fajjeh, Shuairah and Sarafand el Amar in the Lydda district, but I must point out that the original lease, i.e. D/4, mentions Sarafand el Kubra in the sub-district of Ramleh (Gaza District), the land known as Fursaan near the said village, three-fourths of the farm of Mulabess in Ramleh sub-district, the whole farm and lands known as Shuairah near Duiariah village, in the district of Safad, and the farm and lands of Fajjeh near "the said village". According to D/4 therefore, Fajjeh is near the village of Duiariah in Safad District, i.e. in North Palestine and

not at all in the neighbourhood of Ramleh or Lydda. In document D/8, however, which was executed some twenty years later, Fajjeh is described as being attached to Sarafand in Jaffa District, i.e. in the same locality as Ramleh and Lydda, and if we look at the latest lease (p. 2) made in January, 1940, we find mention of Sarafand el Amar, Fajjeh and Shuairah, which are undoubtedly in what is now known as Lydda District, i.e. a district embracing Jaffa and Ramleh but far removed from Safad. I will have later on to revert to the question of the number of villages comprised in the successive leases. For the time being, however, I have stressed the lack of precision of the original lease D/4, in order to lead up to the important point as to whether the sentence "all the tithes, fees, produce of the summer crops, and produce of the trees of the said Sarafand el Kubra" occurring therein should be construed as applying not only to Sarafand el Kubra but to all the lands and farms mentioned in D/4. I have reached the conclusion that the words "the said Sarafand el Kubra" must be construed as being a general description of all the leased lands and that the governing idea set out in D/4 is that the lessor was farming out all his rights. In this connection I would call attention to the words "for the purposes of occupying, sub-leasing and exploiting the said lands and enjoying the benefit thereof according to custom for four periods of three years....." occurring in D/4.

The third milestone is a document made in 1274 A.H. (i.e. 1857 A.D.) a copy of which was produced and marked D/8. This document has been the cause of a battle royal throughout the protracted litigation in the present case, and I propose to refer to it as the Khulou document. For the purposes of this appeal, however, I do not find it necessary to investigate all the fine points concerning Khulou. All I need say is that I agree with the view expressed by the learned President in his original judgment to the effect that we have to follow the Hanafite doctrine. After hearing full arguments on the point and taking cognizance of the passages cited from Ashoub's Book on Waqf, and also from Qadry Pasha's work, I also agree with the learned President's opinion that where a Khulou is proved, it entitles the holder thereof to remain as lessee on the land over which the Khulou has been granted until the debt is paid back to the holders of the Khulou who must, however, continue to pay rent. The opinion I have arrived at is that a right of Khulou is created where a person provides a sum of money (known as mursad) which is expended in the interest of a Waqf, for example in building or repairing houses on Waqf lands. The owner or holder of the Khulou is

entitled to occupy the property on which the money has been expended so long as the mursad is not reimbursed, but he must still pay rent. It would seem that the rent may be fixed at a lower figure than the equivalent rent "Ajr el Misl" (vide Ashoub on Waqf, page 247-250) but, whether this is so or not, does not directly affect the position in the present case. The right of Khulou passes by inheritance. Put briefly, the existence of Khulou justifies itself as follows: the Waqf derives a benefit by having its property increased in value or maintained in good order, while the Khulou holder on the other hand enjoys security of tenure until the mursad is repaid to him and, possibly, also derives the advantage of paying a lower rent. One important point, however, is that Khulou is created and established according to certain rules designed to ensure that the mursad has really been employed in improving or maintaining waqf property and, to that end, the matter is duly investigated before the Qadi who, when satisfied that the transaction is genuine, signifies and records his approval. In the present instance the original of D/8 is not very satisfactory because it does not bear the seal of the Qadi who dealt with the matter: this led the Court below to hold that the right of Khulou had not been proved, but when the case came up to the Supreme Court on appeal on the first occasion, that finding was reversed and I need not therefore deal with that particular issue. It is only necessary to mention that Exh. D/8 shows that Sayed Haj Muhd. Ali Eff Husseini had, with the Mutawalli's permission, expended 74,700 Asadi piastres for the rebuilding of 33 houses and effecting repairs at Fajjeh and that the sum thus expended was to be mursad Khulou on the said village and its land, plantations, appurtenances and nahiyas. I would mention at this stage that I find no reason for construing the Khulou document as affecting other lands or villages besides the Fajjeh lands; I will return later on to the Khulou in order to assess its importance, if any, on the face of this appeal.

We have now reached the fourth milestone which is constituted by a number of leases granted by the Mutawalli of the Sinan Pasha Waqf to the Husseinis. It will be remembered that the first lease made in 1254 A.H. was for four periods of 3 years. This, I might point out, is an indication that the letting purported to conform with the provisions governing ijara wahida waqf which had to be let at a rack rent for a period not exceeding 3 years (See Omar Hilmi's Laws of Awqaf, Art. 272). That first lease therefore was to cover a period ending in 1266 A.H. The Khulou document was executed in 1274 A.H. and the gap between 1266 and 1274 has not been explained, so far

as I know. It is most probable that the leases produced in this case are only a few of those that were granted. As a matter of interest I might mention that one lease (Exhibit D/16) does not seem to have attracted much attention, although it is not without importance in view of the fact that it was executed in 1274 A.H. (i.e. in the same year as the Khulou) and makes mention of the repairs to the waqf property. The other leases which have been produced run consecutively from 1320 A.H. (i.e. 1902 A.D.) to December, 1942; they are exhibits p. 8, p. 9, p. 10, p. 11, p. 12, and p. 2. The last one (p. 2) was made in 1940 and expired in December, 1942. These six leases are in respect of Sarafand el Amar, Shuairah and Fajjeh but unlike the lease made in 1254 A.H. which expressly mentioned tithes as being included in the lessees' benefits, they simply mention that the lessees are entitled "to exploit the said lands and enjoy their benefits according to custom (See exhibits p. 8, p. 9 and p. 10) or that the lessees are entitled "to exploit the said lands and enjoy according to custom all the benefits that can be derived from the leased property according to the practice followed under the previous contracts of lease" (See exhibits p. 11, p. 12 and p. 2).

A very important point is whether the aforementioned leases (leaving aside the original lease D. 4) did entitle the lessees to collect and retain the tithes. The Court below has decided this question affirmatively and I consider that the decision is correct. It is true that, at first sight, the omission of the word "tithes" may seem to imply that tithes were excluded from the benefits included in the later leases, but I consider that the reference made to benefits in the later leases must be interpreted as embracing tithes. This view is greatly strengthened by the fact that no tithes were in fact collected by the Mutawallis and also by the nature of the leases which were obviously designed to farm out to the lessees all the benefits accruing to the Waqf. I might mention in support of the last remark that the evidence heard during the first part of the case was to the effect that the lessees never collected any rent from the cultivators, so that the amount collected by them as tithes was really the only financial benefit derived by them from the leases.

It is highly probable that no difficulty would have arisen about the tithes were it not for the fact that in 1935, the Rural Property Tax Ordinance No. 1 of 1935 abolished tithes. In order to compensate the Awqaf for the loss of this source of revenue, Article 16B was inserted in the Palestine Order-in-

Council by the Palestine (Amendment) Order in Council, 1935, authorising the High Commissioner to commute the tithes formerly accruing to each Waqf by making to any such Waqf an annual payment or otherwise. In furtherance of this scheme, the Palestine Government concluded agreements with the Waqf authorities concerned, but difficulties arose in the present case between the Mutawalli and the lessees, and an agreement with Government could not be executed. The litigation then started.

It would perhaps be worth pointing out at this stage that prior to 1935 the Government had been collecting tithes on behalf of Awqaf and paying the money over less a small deduction for expenses of collection. Mr. Gress, Senior Assistant Treasurer, has given evidence to the effect that ever since British Occupation began, the tithes collected on the lands of the Sinan Pasha Waqf had been paid to lessees because it was the established practice. This went on until 1935.

Prior to the filing of a statement of claim in the present case, there had been, so far as I know, two cases before the Courts on the same subject matter. The first case was an action by the present appellants (i.e. the Husseinis) against the present respondent for a declaration that they were entitled to the tithes. The Husseinis based their claim on lease p. 2 which was then in force and they were successful in first instance, but finally, the Court of Appeal (C.A. 237/41, 8 P.L.R. 630) set the decision aside because the Court below had made the finding that the Husseinis had received the tithes for several years whereas at the hearing of the appeal both counsel stated that the Husseinis had received the tithes only for one year prior to 1940, i.e. prior to the beginning of the then current lease which was for 3 years beginning in January, 1940. I must, however, explain that the reference to tithes in C.A. 237/41 must be understood as meaning the annual payment in lieu of tithes which Government was prepared to make as from 1935. That decision cannot be taken as deciding that the Husseinis had not received tithes prior to 1935. The next case was an application to the High Court (H.C. 62/42, 9 P.L.R. 430) by the Mutawalli (i.e. present respondent) for an order against the Chief Secretary to show cause why the latter should not conclude an agreement with the Mutawalli in respect of the commuted tithes. Present appellant No. 7 was, at his request, added as respondent, and the application was ultimately refused, mainly on the ground that there was an alternative remedy.

This takes us to the starting point of the present case. A statement of claim was filed in the Jaffa District Court in 1942

by the Mutawalli of the Sinan Pasha Waqf. The prayer was for a judgment declaring that the plaintiff was the person entitled to:-

"1. Receive any tithes and/or commuted tithes or substituted tax in respect of the aforementioned villages of Sinan Pasha Waqf Lands.

2. Receive any compensation in lieu of tithes, commuted tithes or any other substituted tax dedicated to waqf Takhsisat to Sinan Pasha Waqf and which has been calculated by Government as aforesaid in order that it may be paid to the Waqf in accordance with the Palestine (Amendment) Order-in-Council, 1935, and the arrangement made with the Mutawallis of other private Waqfs thereunder.

3. To conclude an agreement on behalf of Sinan Pasha Waqf with the Government of Palestine in respect of the commutation of such tithes, and or commuted tithes or substituted tax and any payment which shall become due to the Waqf in accordance therewith".

In that statement of claim the plaintiff set out, inter alia, that the defendants who were lessees of the villages of Fajjeh, Shuairah and Sarafand el Amar by virtue of a 3-year lease expiring in December, 1942, had unlawfully represented to the Government that they were owners of rights over the Waqf property and had obtained half the yearly amount paid in lieu of tithes for the three years running from 1936/1937 to 1939/1940 in respect of six villages, the other half having been kept back by the Government pending the signing of an agreement with the Sinan Pasha Waqf. The statement of claim proceeded to explain that the defendants (now appellants) were unlawfully disputing the claim of the Waqf to the compensation in lieu of tithes, hence the necessity for the declarations sought for. In the statement of defence, the defendants averred that "all the benefits are rights of the lessees, the owners of a Khulou mursad who were the testators of defendants and are the defendants after them, but they only claimed rights in respect of the villages of "Sarafand and Fajjeh their lands and accessories and Mazra'at Shuairah". In his reply, the plaintiff (now respondent) challenged the existence of the Khulou and averred that the defendants had never received any tithes except half the annual payment in lieu of tithes for the 3 years preceding 1940 and for the year 1940-41.

So far as I understand, the plaintiff-respondent has not based his case on the contention that by reason of the law abolishing tithes the defendants had since 1935 lost their right to collect tithes or to receive the equivalent thereof.

I cannot help pointing out that there are unmistakable signs that both sides were not at the outset of the litigation quite sure of their position in law and in fact. This has led to a certain amount of confusion, and explains why the real issues were not clearly discerned at first. I have already mentioned that I supported the finding of the Court below regarding the interpretation of the successive leases held by the present appellants in so far as the right to appropriate tithes is concerned. Needless to say, the finding is against the present respondent's original contention. I must now examine how and why the Court below gave judgment in favour of the plaintiff-respondent. First, I would mention that in the penultimate paragraph of his judgment of 28th July, 1943, the learned President of the District Court pointed out that the plaintiff was seeking a declaration in respect of the six villages enumerated in Exh. P. 4, namely Fajjeh, Ain Ghanim, Shuairah, Sarafand el Amar, Sarafand Assafirieh and Rishon,whereas the leases granted to the defendants-appellants and the statement of defence, only mention three villages. The probable explanation is that the Mutawalli (present respondent) had in view the proposed agreement with Government concerning the commuted tithes in respect of the six villages mentioned in Exh. P. 4 which is a document showing the annual payment which Government contemplates making in respect of each of the six villages. The learned President stated in his aforesaid judgment that the defendants (now appellants) had received tithes in respect of all six villages and that the point had not been cleared up but that, nevertheless, the plaintiff was entitled to the declaration he asked for. It is unfortunately not quite clear from the judgment whether the declaration was to embody the three specific declarations set out in the statement of claim, but I consider it safe to assume that such is the meaning of the judgment.

The main question for us to decide is whether the plaintiff-respondent was entitled to such a declaration. This question falls into two parts, namely: is this a case where the plaintiff was justified in applying for a declaration, and if so, has he made out his case?

With regard to the first part of the question, I might recall that the defendants pleaded that a declaratory judgment is only given where there is a vague point of law and that there was no such point in the case. It is hardly necessary to refute such an averment in view of the fact that the existence and the effect of the Khulou were certainly questions of law which needed clarification. My difficulty, however, has

been to decide whether the grant of a declaration would not be futile being given that it will not necessarily solve all the differences between the parties. I have asked myself whether the plaintiff should have taken some other course, such as suing the Government in presence of the present defendants. Being given, however, the special nature of the payments which Government offers to make, I am not at all sure that such a course would have been suitable. I have finally reached the conclusion that the plaintiff was justified in applying for a declaratory judgment and that such a judgment will have at least the advantage of settling who is the party entitled to sign the agreement with Government and will also dispose of the averment that the holder of Khulou holds an indefeasible right to the lands leased.

With regard to the question whether the plaintiff has established his right to a declaration it seems beyond doubt that the Mutawallis of the Waqf never renounced or alienated permanently the right to the tithes. It is impossible to accept the proposition that persons who are entitled in the capacity of lessees or in any other temporary capacity to receive the tithes or any payment in lieu thereof should be thereby entitled to sign an agreement with Government which would result in payments being made to them without mention of the reversionary interest vested in the Waqf.

I therefore find no difficulty in holding that the Court below was justified in granting a declaration to the effect that the plaintiff was the person entitled to conclude an agreement on behalf of the Sinan Pasha Waqf with the Government of Palestine in respect of the "compensation" for the tithes formerly leviable in the six villages already mentioned. In other words, I consider that the plaintiff-respondent was entitled to the third declaration set out in his statement of claim, with however the following qualification, namely that the declaration must be without prejudice to the rights of the defendants-appellants to claim tithes or compensation in lieu thereof, to which they may be entitled by virtue of the leases or the Khulou.

Leaving aside for a moment the Khulou question, I would recall that in his first judgment the President of the District Court held that the defendants were entitled to the tithes by virtue of the leases held by them, the last of which terminated in December, 1942; thereafter, said the President, they were tenants at will. With this last finding I do not agree, because I am not satisfied that a tenancy at will can be reconciled with the principle that a lease of Waqf property cannot be for more

than three years (see Article 272 of Omar Hilmi, already quoted). I consider that as from the expiry of the lease P/2, i.e. the end of December, 1942, the appellants had no further rights to tithes accruing thereafter, or to payments by Government in lieu thereof but, unfortunately, here again there is a complication as regards Fajjeh in respect of which the right of Khulou has been established in the appellants' favour. If, as the appellate Court no doubt intended when it referred the case back to the District Court, the latter had decided whether the Khulou had been extinguished, it would have been possible to ignore it. Unfortunately, the only definite findings which have resulted from the further investigation of the matter by the District Court are that the Khulou was for a sum of LP. 672.300 and that there was no improved value in the village of Fajjeh traceable to the expenditure of that sum. I will here state that, in spite of the arguments put forward on behalf of the appellants, I find no reason to upset or modify those two findings inasmuch as I agree with the reasoning set out in the learned President's last decision on those points. If the aforementioned sum had been repaid by the Mutawalli, any right of the appellants after 1942 to the annual payments by Government would have completely disappeared.

The Court below has found that during the period 1925 to 1942 the sum of LP. 17,950.676 had been received by the appellants in respect of the six villages including Sarafand Assafirieh and Rishon which were not mentioned in any of the leases. It may well be that the appellants have thus appropriated money to which they were not entitled, but this depends on the meaning of the descriptions in the leases which may, or may not, include the last mentioned localities. I consider that it is not possible to decide such an issue because such a decision would be ultra petita. The position would obviously be much simplified if the LP. 672.300 were paid back by the Mutawalli, but this is a matter which does not concern this Court.

To sum up, I am of opinion that the appeal must be dismissed because the plaintiff-respondent is entitled to a declaration, but the declaration which the Court below was willing to make must be modified as hereafter set out. In exercise of the power conferred by rule 350 of the Civil Procedure Rules, 1938, I decide that the declaration should be that the plaintiff is the person entitled to conclude an agreement on behalf of the Sinan Pasha Waqf with the Government of Palestine in respect of the annual payments which the said Government

is prepared to make in lieu of the tithes (or taxes substituted therefor) which were formerly leviable in the villages of Fajjeh, Ain Ghuniem, Shuairah, Sarafand el Amar, Sarafand Assafirieh and Rishon provided that such agreement will be without prejudice to any payments for the period ending in December, 1942, to which the defendants may be wholly or partly entitled by virtue of the leases held by them and also without prejudice to the right of the defendants to establish their right to any payment after 1942 in respect of the village of Fajjeh by virtue of their right of Khulou, the continued existence of which is still an open issue.

I order accordingly. As regards costs, I am of opinion that no costs should be allowed to either side in respect of proceedings subsequent to the decision of this Court given on the 30th June, 1944, and the respondent will therefore have the costs as therein stated, i.e. on the lower scale with LP. 25 advocate's attendance fee.

Abdulhadi J.: I concur.

Civil Appeal No. 35 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Hubbard J.

DAVID MOYAL. . . . . *Appellant.*

v

1. OFFICIAL RECEIVER,
2. ISSA BEIDAS . . . . . *Respondents.*

Bankruptcy — Appeal — Civil Procedure Rules, 1938 — Appeal in a bankruptcy matter — In filing appeal appellant followed procedure laid down in Civil Procedure Rules, 1938, and failed to comply with relevant rules of the Bankruptcy Rules, 1936 — Whether proceedings avoided by reason of non-compliance with Bankruptcy Rules, 1936 — Extent of applicability of Civil Procedure Rules, 1938, to appeals under the Bankruptcy Ordinance, 1936 — Bankruptcy Rules, 1936, Rule 282.

The Official Receiver applied to the District Court of Tel-Aviv in Civil Case No. 271/39 for directions with regard to two sums of money collected by David Moyal in his capacity as trustee of the estate of Issa Beidas, bankrupt, and deposited in the hands of the Official Receiver. The District Court (Judge Mani) made an order on the application. Moyal appealed. He

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filed his appeal in accordance with the procedure laid down in the Civil Procedure Rules, 1938. Notice of objection to the hearing of the appeal was given to the appellant by the bankrupt's advocate. The two objections raised were: (1) that appellant failed to comply with Rule 60 of the Bankruptcy Rules, 1936, and (2) that appellant failed to comply with Rule 61 of the Bankruptcy Rules, 1936. With regard to the first objection the appellant had prior to the notice of objection paid in the Supreme Court, pursuant to an order fixing the amount of deposit to be paid, a sum of LP. 28, and with regard to the second objection, the appellant sent after receipt of the notice to the Registrar of the District Court of Tel-Aviv copy of the notice of appeal. At the hearing of the appeal, the two objections raised were argued for and against.

In overruling the preliminary objections raised, the Court of Civil Appeal,

HELD (1) that the failure by the appellant to comply with Rules 60 and 61 of the Bankruptcy Rules, 1936, which was an omission in the nature of an irregularity and could be cured, did not render the appeal void, regard being had to Rule 282 of the Bankruptcy Rules, 1936. Non-compliance with any of the Bankruptcy Rules, 1936, does not necessarily avoid any proceedings in which the non-compliance occurs — it depends upon the discretion of the Court.

(2) that an appeal under the Bankruptcy Ordinance, 1936, can be treated exactly like any other appeal, and its form and substance judged by those rules which are applicable to it, either specially under the Bankruptcy Ordinance and Rules, or generally under the Civil Procedure Rules, 1938, but where both sets of rules deal with the same subject-matter, then the Bankruptcy Rules should be followed in bankruptcy matters unless there is strong reason to presume that a repeal was intended.

Considered: re Vitoria, ex parte Spanish Corporation Ltd. (1894) 1 Q.B.D. 259.

re Muscovitch and Muscovitch (1939) 1 All E.R. 135.

The judgment of the Court was delivered by Hubbard J.

S. Yifrach for appellant.

Deputy Administrator General (J. Gavison) for first respondent.

George Berouti for second respondent.

Hubbard J: Mr. Berouti, for the second respondent, has raised two preliminary objections to the hearing of this appeal from an order of the District Court of Tel-Aviv made on 17th January, 1947, in Civil Case No. 271/39. The order was one made under the Bankruptcy Ordinance, 1936. Mr. Berouti does not admit that the Civil Procedure Rules apply in the

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case of appeals brought under that Ordinance, but he has nevertheless, "ex abundanti cautela", given the appellant notice under Rule 333 of his objections.

The objections are: (1) that the appellant failed to lodge in this Court the sum of twenty pounds at or before the time of filing the appeal, as required by Rule 60 of the Bankruptcy Rules, 1936; and (2) that the appellant, on entering this appeal, failed to send forthwith a copy of the notice of appeal to the Registrar of the Court appealed from, as required by Rule 61.

The facts as regards the two objections are: that the order appealed against was made on 17th January, 1947; that the appeal was filed in time on 5th February; that the sum of LP. 28 was lodged in this Court on 25th February pursuant to a notice from the Chief Registrar, the appellant having applied under Rule 327 of the Civil Procedure Rules; that the appellant sent a copy of the notice of appeal to the Registrar of the District Court, Tel-Aviv, on 3rd April.

As regards the first objection, Mr. Berouti was unable to furnish us with any authorities, but he dealt at length with the second objection and cited the case of re Muscovitch and Muscovitch (1939, 1 A.E.L.R. 135) as authority for saying that this Court could relieve against a failure to comply with Rule 61 of the Bankruptcy Rules, if at all, only if there were "special circumstances and for good cause shown" as laid down in Rule 283.

The re Muscovitch and Muscovitch case was decided on the basis of re Vitoria, ex-parte Spanish Corporation Ltd. (1894, 1 Q.B.D. 259). It is, I think, clear on a careful consideration of this latter case that the learned judges of the Court of Appeal laid great emphasis on the fact that the Bankruptcy Act, 1883, contained a clause providing that "no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal" (Sec. 104(1)(d)). These words are repeated in Section 108(2)(c) of the Bankruptcy Act, 1914, under which re Muscovitch and Muscovitch was decided. Both Lord Halsbury, L.C., and Kay, L.J., insist on the mandatory character of those words. The Court of Appeal therefore held that since an appeal could only be entertained if the rules were complied with, a failure to comply with Rule 132 of the Bankruptcy Rules, 1886 & 1890 (corresponding to our Rule 61) was not a mere irregularity and could not be cured under Section 143 of the Bankruptcy Act, 1883, (see re Muscovitch and Muscovitch, at page 139, per Wilfrid Greene, M.R.) and

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that the time limited for compliance with the rule could be extended only if there were special circumstances, as required by Rule 351.

In the Palestine Bankruptcy Ordinance there is no section corresponding to Section 108(2)(c) of the Bankruptcy Act, 1914. The result, to my mind, is that the overriding force which the rules had in the minds of the judges in re Vitoria need not influence this Court. I would add here, en passant, that under Section 132(2) of the Act of 1914, all general rules have effect as if enacted in the Act. We have no similar provision in our Ordinance. An appeal under the Bankruptcy Ordinance, therefore, can be treated exactly like any other appeal, and its form and substance judged by those rules which are applicable to it, either specially under the Bankruptcy Ordinance and Rules, or generally under the Civil Procedure Rules. It is obvious, I think, that in view of the scanty rules on matters of appeal in the Bankruptcy Rules, the Civil Procedure Rules must be relied on for many matters. But where both sets of rules deal with the same subject-matter, then the Bankruptcy Rules should be followed in bankruptcy matters unless there is strong reason to presume that a repeal was intended. The English 1915 Bankruptcy Rules provide that, subject to their own provisions, appeals shall be regulated by the Rules of the Supreme Court (Rule 134). It appears to me that even in the absence of such a provision in Palestine, we should follow a similar principle.

In my view, in the present case it is unnecessary to have recourse to the Civil Procedure Rules. I am of opinion that it is covered by Rule 282 of the Bankruptcy Rules, 1936, the relevant part of which reads as follows:

> "Non-compliance with any of these rules ..... shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit."

It is quite plain that what happened in this case was that the appellants mistakenly applied under Rule 327 of the Civil Procedure Rules instead of lodging a deposit under Rule 60 of the Bankruptcy Rules, and forgot altogether about sending a copy of the notice of appeal to the Registrar until reminded to do so by the second respondent's notice. At the present moment a sum of more than LP.20 has been deposited and the notice has been served. There is no affidavit before us as to any prejudice suffered by the second respondent, nor as to any delay in the hearing of this appeal. In my view, the two

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omissions by the appellant were in the nature of irregularities, and there is no reason why this Court should declare the appeal to be void.

I am strengthened in this view by a consideration of the grounds on which the Divisional Court in re Vitoria had overruled the preliminary objection, based on Rule 132 of the Bankruptcy Rules, 1886 & 1890, that no copy of the notice of appeal had been sent to the Registrar of the County Court, for in that case no copy at all was sent. At the hearing before the Divisional Court the argument for the preliminary objection was based on certain cases decided under the Bankruptcy Rules of 1870, where a similar objection had been held fatal. The Divisional Court, however, made this distinction, that while under the Bankruptcy Rules of 1870, the sending of the copy of the appeal notice to the Registrar of the Court appealed from was the only step prescribed to be taken at the time when the appeal was entered for bringing to the notice of the respondent the fact that an appeal had been entered under the Rules of 1886 & 1890, which were those in force at the date of the hearing, the procedure as to appeals was regulated by the provisions of Order LVIII of the Rules of the Supreme Court, which required that the notice of appeal should be served directly upon all the parties to the appeal. The only object, therefore, of sending a copy of the notice of appeal under the Rules of 1886 & 1890 was to ensure the Registrar's having the file of the proceedings in Court. The Divisional Court held that the omission to send the notice was a mere irregularity, which could be cured (1894, 1 Q.B.D. at p. 260).

It is true that this decision of the Divisional Court was overruled, but as I have pointed out, it was overruled mainly on the ground of Section 104(1)(d) of the Act of 1883, and Lord Halsbury, L.C., said in the course of his judgment: "With the greatest possible respect for the opinion of the judges of the Court below, I cannot agree with the view which they seem to have taken on this point, and *I cannot help thinking that Section 104(d) of the Bankruptcy Act, 1883, was not called* to their attention" (ibid at p. 264).

In my view, therefore, we are at liberty to give the words of our Rule 282 their plain meaning, which is that non-compliance with any of the Bankruptcy Rules does not necessarily avoid any proceedings in which the non-compliance occurs — it depends upon the discretion of the Court.

Each case must be treated on its own merits. The appellant has in the breach of one rule been careless, and in the

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breach of the other misadvised in law. But it does not appear that the respondents have been prejudiced, and the irregularities have been cured. Both objections are therefore overruled.

On the question of costs, however, it appears to me that as these objections were caused by the appellant's failure to obey the rules, and that as one defect was cured only after his receipt of the second respondent's notice, the latter is entitled to his costs, which I fix at an inclusive sum of LP.5.

Shaw J: I concur.

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THE
LAW REPORTS OF PALESTINE



Volume 14

1947

JUNE

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate,
and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.

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Civil Appeal No. 187 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Curry Ag. J.

ABDUL SAMAD YUSEF SAADEH. . . . *Appellant.*

v

1. HAIM YAISH.
2. ZEINAB MARZUKA ABBAS HALIM. . . *Respondents.*

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Immovable property — Land Court — Action in Land Court for declaration of title to land alleged to have been unlawfully appropriated — Denial by defendant of appropriating unlawfully land owned by plaintiff but no denial of plaintiff's title — Whether action one for Land Court to determine or one of recovery of possession for Magistrate's Court to decide.

In February 1933, Abdul Samad Yusef Saadeh purchased a plot of land in Jerusalem. One of his adjoining neighbours, Haim Yaish, started erecting a building on his plot of land in 1934. In June, 1942, Zeinab Marzuka Abbas Halim purchased the plot of land and the building thereon of Haim Yaish. In 1944 Saadeh commenced proceedings in the Land Court of Jerusalem (Land Case No. 38/44) in which he alleged that part of his land, namely an area of 14 square metres, was unlawfully appropriated by his adjoining neighbour, Haim Yaish, and asked for judgment declaring his title to that part of the land in dispute, 10 sq.m. of which were occupied by part of the building which Yaish erected, and 4 square metres unbuilt. The defendant, Haim Yaish, pleaded that he did not build on, or otherwise appropriate, land owned by the plaintiff, that there was a waiver of plaintiff's rights, if any, as against him (defendant), and that the Land Court had no jurisdiction to hear the action inasmuch as it amounted to an action for the recovery of possession and the Land Court has no jurisdiction to give a judgment ordering the vacation and delivery of land. The second defendant pleaded that there was no dispute between her and the plaintiff from which it followed that she should not have been cited as defendant, and that she was a *bona fide* purchaser from the first defendant. The Land Court, constituted of the Acting Relieving President thereof (Acting Judge Ross), having regard to the fact that the first defendant did not actually deny plaintiff's ownership but denied that he had built on, or otherwise appropriated, land owned by the plaintiff, held that it had no jurisdiction to decide the action and that the plaintiff should have brought a possessory action in the Magistrate's Court, the view taken by the Land Court being that before its jurisdiction can be established, it is absolutely essential to show that there is a genuine dispute as to ownership of land, and if it can be shown that the action as disclosed by the pleadings is in reality an action of trespass, then the Land Court has no alternative but to decide that it has no jurisdiction. The plaintiff appealed.

In allowing the appeal and remitting the case to the Land Court for hearing on the other issues, the Court of Civil Appeal,

HELD that it was quite clear from the pleadings that there was a claim to ownership by both sides and the matter was therefore one for the Land Court.

1947
2nd June

Shaw J.
and
Curry Ag. J.

CA 187/46
Saadeh
v
Yaish
and another

Zvi Cohen for appellant.

Jawdat Kazimi for second respondent.

First respondent in person.

Judgment: We do not consider it necessary to call on Mr. Cohen to reply.

This is an appeal from the judgment dated 1st May, 1946, of the Land Court, Jerusalem, in Land Case No. 38/44. The only point for decision is whether the action before the Land Court was something more then purely a possessory action.

It is quite clear from the pleadings that there is a claim to ownership by both sides, and the matter is therefore one for the Land Court.

The appeal is allowed, and the case remitted to the Land Court for hearing on the other issues. The appellant will have his costs on the lower scale to include a hearing fee of LP.5 in any event.

High Court No. 29 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: Shaw J. and Curry Ag. J.

1947
3rd June

Shaw J.
and
Curry Ag. J.

HC 29/47
Shannir
v
C.E.O., Jaffa,
and others

ABDALLAH ALI SHANNIR. . . . . *Petitioner.*

v

1. CHIEF EXECUTION OFFICER, JAFFA,
2. NICOLA TARAZI,
3. YONA NOTEA. . . . . *Respondents.*

Execution proceedings — Attachment — Chief Execution Officer — Instances to which Article 77 of the Ottoman Law of Execution applies — Course to be followed by Chief Execution Officer when functioning under Article 77 of the Ottoman Law of Execution — Ottoman Law of Execution, Articles 74, 75, 76 and 77.

Tarazi commenced in the District Court of Jaffa proceedings against Notea and at the same time obtained an order of provisional attachment of goods of defendant alleged to have been found in certain rooms in the grove of Shannir which were leased to Notea. The officer appointed to effect the attachment went to the grove and there attached certain goods. The goods attached were not removed from their place, and Shannir undertook to act as custodian of the goods. Sometime later, the District Court of Tel-Aviv

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in a motion before it, appointed an interim receiver of the property of Notea, who took actual possession of the goods already attached. Thereafter the District Court of Jaffa gave judgment in favour of Tarazi and confirmed the provisional attachment. A little more than a month afterwards, the receiver sold the goods and the sale was confirmed by the District Court of Tel-Aviv. Sale of the goods was ordered by the Chief Execution Officer, Jaffa, but Shannir was unable to bring them since they had already been sold by the receiver. After being notified of the fact, Tarazi applied to the Chief Execution Officer for the attachment of the movable property of Shannir under Article 77 of the Ottoman Law of Execution and an order to that effect was made. Thereupon Shannir applied for and obtained an order nisi from the High Court calling upon the Chief Execution Officer, Jaffa, and Tarazi and Notea to show cause why the order of the Chief Execution Officer in the Jaffa District Court Execution File No. 71/46 should not be set aside.

In making absolute the rule nisi, the High Court,

HELD that Articles 74 to 77 of the Ottoman Law of Execution, which provide for a kind of garnishee proceeding, do not apply to a person who takes charge of property as custodian, which property was on his premises leased to the debtor and which was attached by the Court, but instead of removing it by the officer effecting the attachment, was left in the custody of that person who accepted to act as custodian. Accordingly, Article 77 of the Ottoman Law of Execution had been misapplied in this case.

Observations by the Court with regard to the course to be followed in instances to which Article 77 of the Ottoman Law of Execution applies.

The relavant facts appear from the headnote and the order of the Court.

George Berouti for petitioner.

Jawad Dajani for second respondent.

Shaw J.: This is a return to an order nisi dated 28th March, 1947, calling upon the respondents to show cause why the orders given by the first respondent on 5.10.46 and 13.2.47 in Execution File No. 71/46 of the District Court of Jaffa should not be set aside, and why the attachment which was placed on the property of petitioner on 30.4.46 should not be released.

In 1943 the second respondent brought an action (C.C. 152/43) against the 3rd respondent in the District Court of Jaffa, and at the same time he applied to the Registrar for the attachment of the goods of the third respondent. A provisional attachment was issued and a clerk of the District Court went on 25.10.43 to the orange grove of the petitioner (from whom the third respondent leased part of the grove and certain rooms) and there attached certain goods which were alleged to belong to third respondent.

As is usual in such cases the clerk did not want to remove the goods, and the petitioner undertook to act as custodian of

them. The report (Exh. A/1) of the attaching officer states, with reference to this undertaking by the petitioner, that — "The latter undertook to keep in his custody and take care of these articles, and not allow anybody to take any part thereof, and to deliver the same to the Court or to any Execution Office when so demanded, and that if he fails to do so, he will be held responsible criminally and in civil law".

Subsequently to this attachment the petitioner himself obtained judgment against the 3rd respondent in two cases in the Magistrate's Court at Jaffa, —

(a) for LP.60 and costs, in C.C. 1245/45, filed for execution in File No. 1057/45, and

(b) for LP.30 with interest and costs, in Civil Case 257/46, filed for execution in File No. 279/46.

On 17.1.1946 the petitioner obtained from the Chief Execution Officer of the Magistrate's Court of Jaffa, in Execution File No. 1057/45 referred to above, an order of attachment of the goods of the third respondent.

On 28.1.46, in Motion No. 54/46 of the District Court of Tel-Aviv (Exh.B), Mr. Marc Mani was appointed to be an interim receiver for the purpose of carrying into execution an agreement between a certain Mr. Abraham Zwi Safrai (Shulman) and the third respondent, which had been confirmed by an arbitrator on 17.1.46.

On the same day (28.1.46) the receiver went to the grove and Mr. Berouti, who appears for the petitioner, has informed us that the receiver took actual possession of the goods of the 3rd respondent (which were already under attachment in C.C. 152/43 of the District Court of Jaffa), locked them up with his own locks in the rooms of the 3rd respondent, and sealed up the rooms. Mr. Berouti has further informed us that a clerk from the Execution Office of Jaffa (who had come to the grove in order to attach the same goods in pursuance of the attachment dated 17.1.46 in Execution File No. 1057/45 in which the petitioner himself was the judgment-creditor) actually arrived at the grove on 28.1.46 before the receiver came there, but that the clerk did not make any attachment on the petitioner's behalf.

Mr. Berouti states that although the goods were left at the grove they were in fact taken over by the receiver. But no report was submitted to the District Court of Jaffa by his client.

On 4.3.46 the District Court of Jaffa gave judgment in C.C. 152/43 and confirmed the provisional attachment, but Mr. Berouti says that his client was not informed of these facts.

On 9.4.46 the receiver sold the goods, and the sale was confirmed on 10.4.46 by the District Court of Tel-Aviv.

On the same date (9.4.46) a notice was served by the Execution Office of the District Court of Jaffa calling upon the petitioner to bring the attached goods to the Jaffa Town Clock Square on 20.4.46 for sale by public auction.

On 20.4.46, however, nothing happened as the Execution Office was not functioning owing to the strike, and on 20.4.46 the Execution Officer fixed 4.5.46 for sale of the goods.

On 25.4.46 the receiver objected to the sale on the ground that he had been appointed receiver and had in fact already sold the goods.

On 29.4.46 the second respondent, after being served with the aforesaid application of the receiver, applied to the first respondent for the attachment of the movable property of the petitioner under Article 77 of the Ottoman Law of Execution, and on 30.4.46 the Assistant Chief Execution Officer of Jaffa made an order of attachment accordingly and certain property was attached.

The first observation that I would make is that the attaching officer had not made any valuation of the goods attached. He ought to have done this. In the absence of such a valuation it was not possible for the Assistant Chief Execution Officer, when he made the order dated 30.4.46, to limit the value of the property to be attached. If the Assistant Chief Execution Officer was at all empowered to make an order under Article 77 of the Ottoman Law of Execution he should first have called for evidence as to the value of the property of which the petitioner had undertaken to be custodian. It would clearly be unjust to attach property which was worth a great deal more, unless the petitioner's property happened to be of an indivisible nature. The Assistant Chief Execution Officer gave an order for the "attachment of the movable property" without placing a limit of any kind. For this reason alone I consider that the order was bad. Article 77 authorises the attachment of "such property or other property *equivalent to it*".

But a further question arises and that is whether Article 77 is at all applicable to a person who undertakes the duties of a custodian in circumstances such as these. Article 77 is in Cap. 2 and that chapter is headed — "Attachment of Property in the Hands of a Third Party". Article 74, which is the first article in that chapter, provides that —

"Property in the hands of a third party may be seized by an order of attachment served on him, directing him not to hand such property to the judgment debtor....."

1947
3rd June

Shaw J.
and
Curry Ag. J.

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It is, in my judgment, perfectly clear from this Article, and from Articles 75 to 77, that they provide for a kind of garnishee proceeding. I am quite unable to see how they can be held to apply to a person who takes charge of property as custodian in the circumstances of the present case. If the petitioner had had property of the 3rd respondent in his hands then that property could undoubtedly have been seized "by an order of attachment served on him", that is to say by an order of attachment served on the petitioner. But that is not what happened in the present case.

We have been referred to H.C. 31/36, 4 P.L.R. 49; H.C. 39/38, 4 C.L.R. 3; H.C. 76/43, 10 P.L.R. 482; and H.C. 112/46, 10 P.L.R. 637; and it must be admitted that Article 77 has in the past been used against a custodian in cases similar to this. But in none of those four cases does it appear that any objection was taken as to the applicability of the Article. In H.C. 76/43 Copland J. said: "It is true that the Article is not one that is commonly employed because trustees of property placed in their care by an Execution Officer usually take precautions to see that that property does not disappear....."

If this question had been argued and decided in a previous case, or if there were evidence of a long and well established practice, I would have had the greatest hesitation in giving a contrary decision, but in the absence of both such circumstances I feel bound to hold that Article 77 has been misapplied in the present case.

The order nisi is therefore made absolute. The orders of the 1st respondent dated 5.10.46 and 13.2.47 in Execution File No. 71/46 of the District Court of Jaffa are set aside, and the attachment levied on the goods of petitioner on 30.4.46 must be raised. I do not consider that the second respondent is to blame for having adopted this wrong procedure in this instance and I would therefore order no costs.

Curry Ag. J.: I concur.

Criminal Appeal No. 31 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: Shaw J., Curry Ag. J. and Abdulhadi J.

1. FAHD JUM'AN EL MUSA,
2. MUSA DIAB QASSEM EL AHMAD. . . . . *Appellants.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

1947
4th June

Shaw J.
Curry Ag. J.
and
Abdulhadi J.

CRA 31/47
Musa
and another
v
Attorney General

Criminal law — Sexual offences — Rape — Corroboration — In sexual offences it is settled practice not to convict on the uncorroborated evidence of the complainant — Criminal Code Ordinance, 1936, Section 152.

In this appeal from the judgment of the District Court of Haifa given in Criminal Case No. 229/46, whereby that Court, constituted of the President thereof (Judge Weldon), convicted the first appellant of robbery and of attempted rape and the second appellant of robbery and of rape, and sentenced the first appellant to fifteen and five years imprisonment for each of the offences of which he was found guilty and the second appellant to fifteen and ten years imprisonment for each of the offences of which he was also found guilty, the sentences to run concurrently, the Court of Criminal Appeal, in allowing the appeal of the second appellant and acquitting him on both counts, and dismissing the appeal of the first appellant but reducing the sentences to ten and five years imprisonment, the sentences to run consecutively,

HELD that it is settled practice in Palestine that in sexual offences a Court cannot convict on the uncorroborated evidence of the complainant. In this particular case the majority of the Court (Shaw J. and Abdulhadi J.) held that the facts as disclosed in the evidence constituted the necessary corroboration of the story of the complainant, while Curry Ag. J. was of the view that there was no corroboration of the story of the complainant. (The facts which the majority considered as establishing corroboration of the complainant's story appear in the judgment of the Court of Criminal Appeal reported hereinafter).

The relevant facts appear from the judgment

Referred to: CRA 54/38, 5 P.L.R. 338.
CRA 138/40.
CRA 118/42, 9 P.L.R. 479.
R. v. Jackson (1936) "Times" p. 4.

Jamal Hamid for appellants.

Crown Counsel (J. Wicks) for respondent.

Judgment of Shaw J. and Abdulhadi J: This is an appeal from the judgment dated 3.4.47 of the District Court of Haifa

in Criminal Case No. 229/46. The two appellants were charged with the offence of robbery under Sections 287 and 288(1), and rape under Section 152 of the Criminal Code Ordinance.

There was evidence that on 22.6.46, in the afternoon, the three complainants were returning to the settlement of Eilon when they were waylaid by four Arabs. Three of the Arabs were carrying rifles and the fourth was carrying a stick and a dagger. These Arabs forced the walking party to leave the road and go down into the wadi some considerable distance off the road. There they robbed the complainants, Rachel Levine and Yacov Rakovsky, of their wrist watches; stole the shirts of the two men; tied up the two men with their hands behind their backs, and made them lie face downwards; and then forcibly took the girl some little way apart where three of them raped her in turn. After this the two men were released, and they returned with the girl to the settlement and the matter was reported to the Police.

At an identification parade, which was held on 25.6.46 at the Bassa Police Post, Rachel and Yacov picked out the first appellant, but the witness Rudolf Levine failed to identify him. At a second parade which was held at Acre on 6.7.46 Rachel picked out the second appellant, but the other two witnesses failed to identify anybody.

So far as the robbery is concerned there was evidence on which the Court could find that the offence had taken place, and indeed Jamal Eff. Hamid, who has appeared for both of the appellants, does not suggest that there was no robbery. His case is that although there was a robbery his clients did not take part in it. As regards the charge of rape, however, he further submits that there was no evidence which corroborated the statement of the girl Rachel, and that therefore the Court could not find that the offence of rape had been committed.

We shall deal first with the question of the robbery. As we have already said there is no doubt at all that a robbery was committed in the manner stated by the witnesses. The robbers were armed with dangerous weapons, and they are therefore liable, if convicted, to suffer imprisonment for life. It is not suggested that any Arabs were present at the time who did not take part in the offence. It therefore follows that if either of the two appellants was present he is guilty of committing robbery. So the question is whether there was evidence upon which the Court could properly find that either or both of the appellants was present at the time. The case rests entirely upon the evidence of identification. There was no

other evidence that the appellants had been seen near the scene of the crime, nor was any stolen property recovered from their possession.

So far as the first appellant — Fahd Jum'an el Musa — is concerned, we have no hesitation in holding that there was evidence upon which the trial Court could convict him of robbery. It has been submitted by Jamal Eff. that the identification parades were not properly conducted. The trial Court was satisfied that those parades were properly conducted, and we can see no ground for not agreeing with that finding. The first appellant was identified by the girl Rachel, and Inspector Day who supervised the parade stated that the girl picked him out unhesitatingly and without difficulty, saying "This is the man who had sexual intercourse with me and stole my wrist watch". It is true that when he gave evidence before the trial Court the witness Yacov Rakovsky at first pointed to the second appellant as being the man whom he had identified at the Bassa Police Post. But when cross-examined he corrected this mistake, and there can be no doubt that he had identified the first appellant at the parade which was held on 25.6.46 at the Bassa Police Post.

So far therefore as concerns the conviction of the first appellant on a charge of robbery the appeal must stand dismissed.

We shall now deal with the charge of robbery against the second appellant. As we have already stated this man was not identified by either of the male witnesses at the parade which was held on 6.7.46. Inspector Day has stated that when Rachel Levine was first brought to that parade the faces of the persons who were on the parade were not muffled. After viewing the parade Rachel asked that the third man in the line, who was the appellant Musa, should put his hatta across the lower part of his face. Inspector Day then told all of the persons on the parade to muffle their faces in that way, and they did so. Rachel then identified the second appellant, and said that he was the man who had his face muffled when he had intercourse with her. When Rachel gave evidence in the trial Court she first stated that none of the three men who had first raped her were present in Court. The record of the trial Court then reads as follows —

> "Witness now says, I think that the accused in Court with a black kaffiyeh (points to accused Musa) is the second or third of the men who committed rape on me."

It is not quite clear from this passage in her evidence whether or not she was expressing a doubt in regard to the identification

of the second accused, or whether she was merely doubtful whether he had been the second or third of those who committed rape on her. Further on in her evidence there is a passage which reads —

> "I am sure that the second accused is one of the men who raped me".

It is unfortunate that the first passage which we have quoted from her statement does not show quite clearly what it was that the words "I think" refer to.

There also appears in her evidence a passage which reads as follows —

> "Second accused's face was covered with his hatta while they were walking with us. It was not covered when he committed rape."

That statement differs materially from what she had said when she identified the second appellant at the parade.

The witness Rudolf Levine did not identify the second appellant in the trial Court. The other witness Jacob Rakovsky did so, but as he had failed to identify him at the time of the parade we do not think that any weight could safely be attached to his identification of this appellant in Court.

The position therefore is that the second appellant was identified only by the witness Rachel Levine; that she did not immediately identify him when she saw him on the parade; and that there is at least some doubt whether she had seen him unmuffled at the time when the offences were committed.

The Court does not appear to us to have considered the question whether the witness Rachel Levine might not have been honestly mistaken in regard to this man. The second appellant denied the charge on oath, stating that at the time of the offence he was harvesting in the Fassuta lands. It may be observed that the two appellants do not belong to the same tribe. The first appellant being a member of the Kheilitat Arabs, while the second appellant is a member of the Arab Muwassi.

A Court of Appeal should always have the greatest hesitation in upsetting a Court of trial upon a question of fact. But in a criminal case the evidence must be not only sufficient. It must also be satisfactory. The guiding principle, as affirmed in the case of R. v. Jackson, reported at p. 4 of the "Times" dated 1.12.36, is that "while the prosecution must prove its case beyond all reasonable doubt, the defence was under no such onus, but need only raise a reasonable doubt in the minds of the jury".

The learned Judge having failed to consider the possibility of mistake, and the evidence being such as we have indicated, we think that the second appellant is entitled to be acquitted, and we acquit him accordingly on both charges.

We now come to the charge of rape as against the first appellant. It may be here observed that the trial Judge convicted the first appellant of attempted rape which is punishable under Section 154 of the Criminal Code with a maximum sentence of seven years imprisonment.

Mr. Wicks who has appeared on behalf of the Attorney General has submitted, and we think properly submitted, that in Palestine a Court cannot convict of a sexual offence unless the evidence of the complainant is to some extent corroborated. He has referred us to Criminal Appeal No. 54/38, 5 P.L.R. 338. At p. 340 the following passage occurs in the judgment —

> "It is quite clear that according to English law, which for this purpose now applies, in order to convict of sexual offences, the evidence of the complainant must be, to some extent, corroborated. It is obvious that, as a matter of safety, this must be so, otherwise charges could be made which it might be very difficult for an innocent person to refute."

It is, we think, not true to say that according to English law corroboration is essential in such cases. It is perfectly true, however, to say that although in law it is not essential it is in practice usually required. In such cases the Judge warns the jury that it is not safe, as a general rule, to convict upon the uncorroborated testimony of the prosecutrix, particularly where the case is consent or no consent, but that if they are satisfied of the truth of her evidence they may, after paying attention to the warning, nevertheless convict.

The position in Palestine in matters of sexual offences appears to be closely analogous to, if not precisely the same as it is in, the case of the evidence of an accomplice. In Palestine it is settled practice, as binding now as a rule of law, that a Court cannot convict on the uncorroborated evidence of an accomplice. Corroboration may of course be found in the appearance of the prosecutrix, the state of her clothes, the result of an examination by a medical man, or the conduct or statement of the prisoner. Evidence of a complaint made by the girl or woman shortly after the alleged offence is not the required corroboration of her story as it does not come from an independent quarter. Putting it in other words she cannot corroborate herself.

Before dealing with the question of corroboration we have certain observations to make in regard to the evidence of the girl Rachel. In the first place it is clear that the trial Court believed her evidence, and credibility is essentially a matter

for the trial Judge who saw the witness and heard her give her evidence. There was no reason why the trial Court should not accept her evidence. There was no reason why Rachel should make a false charge of rape against persons whom she did not know — persons who, so far as she knew, might never be traced by the police. And the matter about which she gave evidence concerned an experience of a kind that no normal respectable woman would wish to speak about in public. At the date of occurrence Rachel Levine was a married woman aged nineteen.

We now come to the question of corroboration. We consider that the following facts can properly be taken into consideration in this connection —

(a) The evidence of Rachel's two companions. Rudolf Levine stated, after describing how he and Yacov Rakovsky were tied up, —

> "We were both face downwards. Two of the men guarded us, then two of the others changed places with them. Changed one at a time. Did not see from where they came. Did not see Rachel. Had she remained there I would have seen her. Some time later Rachel returned very excited and in a disarranged state. It seemed a long time she was away."

Yacov Rakovsky said —

> "They made us lie face downwards on the ground. Then I heard them threatening Rachel and she cried out, and then I heard the sound of people moving away. I turned my face round. Did not see Rachel. Saw three of the men standing near. These men went and came. They were guarding us. About 30-40 minutes later one of the Arabs untied me helped by Rafael (sic) who was released before me. Then Rachel returned. She appeared very excited and her hair disarranged. She was doing something to her trousers. I did not see exactly what it was."

And in cross-examination this witness said —

> "Do not remember whether 2 or 3 men guarded us at a time . . . I heard Rachel say — "Leave me". I do not remember if this was the first time I have mentioned this. She did not tell us anything when she returned. Did not ask her anything. I knew she had been raped. Knew that from her being dragged away, her cry 'leave me', her return with hair disordered and doing something to her trousers, and from the gestures of the Arabs and their rough behaviour."

This evidence is quite consistent with that of Rachel. The stealing of the wrist watches and shirts had already taken place, and there was no reason whatever why the girl should be taken to another place.

(b) Rachel had stated that when her shorts were removed they got torn. Those shorts and a pair of pants were exhibited,

and P.W. 3 Police Cpl. David Shefter said with reference to these garments:-

> "Exhibits 1 and 2 were handed over to me by the girl Rachel Levine in the Eilon Colony on the 23rd June. They were torn. Same state as now".

The occurrence had taken place on the 22nd of June.

In the circumstances of this case we consider that the Court could properly hold that there was sufficient corroboration of Rachel's evidence. We must, however, observe that in cases like this it is of the greatest importance that medical evidence should be obtained as to the condition of the victim, and that evidence should be placed before the Court whether or not it is favourable to the prosecution. No medical evidence was led in the present case, and it is not clear whether Rachel was ever examined by a doctor. Rakovsky said that she was sent for medical examination immediately after their return to the settlement. Rachel herself stated that she told the nurse at the settlement clinic that evening what had happened to her. She was not asked whether the nurse had actually examined her, and the nurse was not a witness.

It is also very important that clothing which the victim was wearing at the time, and which might therefore have shown signs of semen, should be sent for chemical examination. That was not done in the present case.

Rachel told the Court that the first appellant had tried to commit rape upon her while she was standing and that he did not succeed. For this reason the Court convicted the first appellant of attempted rape. We would also observe that the fact that she stated that the first appellant had not succeeded in raping her is an additional reason for believing that she is a truthful witness. It would have been quite easy for her to say that all of the four men had raped her, and we see no reason for thinking that she introduced this variation in order to give verisimilitude to a false story.

In the result therefore we hold that there was evidence on which the Court could find the first appellant guilty of attempted rape and we cannot disturb the conviction.

Finally we come to the sentences. The first appellant was sentenced to 15 years imprisonment for robbery, and to 5 years for attempted rape, these sentences to run concurrently. He had no previous convictions, and we think that so far as the robbery was concerned 15 years was unduly severe. The offence was undoubtedly of a very serious nature,

and it called for a severe sentence, but we think that a sentence of 10 years would have been adequate. As regards the attempted rape we do not think that five years was excessive. And as this offence was quite distinct from the robbery we think that the sentences should be consecutive. We therefore amend the sentences as follows:- 10 years imprisonment for robbery under section 288(1) of the Criminal Code Ordinance, and 5 years for attempted rape under section 154 of the Criminal Code Ordinance, these sentences to take effect consecutively. The result is that the total period of the first appellant's sentence is unchanged.

Judgment of Curry Ag. J: I regret to start this judgment by stating that I consider this case was badly investigated and badly prosecuted in the trial Court, for which it seems the accused are expected to suffer.

I agree with the majority of the Court that there is sufficient evidence of identification to convict accused 1 of the charge of robbery and that there is insufficient evidence of identification of accused 2 to connect him with the crime. We are thus left with the charge of rape against accused 1.

As was said in Cr. A. 118/42 the evidence in cases of rape should be very carefully scrutinized. It is quite a common thing in this country for complainants to add a charge of rape to one of assault or robbery and it is not easy for an accused to defend himself successfully against such a fabricated charge. It has been the practice of the Courts in this country to require corroboration of complainants' allegations in such offences (Cr. A. 138/40). What are the facts in this case as disclosed by the evidence before the Court?

Rachel Levine, a married woman of 19½ years, was out walking with two men, four Arabs came upon them, robbing them of their wrist watches and then tying up the two men. It is then alleged that they took the girl away into the bushes and in turn raped her. The following are extracts from the evidence of the girl upon the matter:-

> "The man with the khaki beret took me away and made me lie down. I resisted. He removed my shorts. These are the ones I was then wearing. He tore them. He then removed my underwear. He committed rape on me. I resisted and struggled. Some of his companions came and encouraged him to finish. When he finished another of the Arabs came and raped me."

Later in her evidence she says:-

> "When the 3rd man was finished the fourth man came. I had managed to get on my feet. He tried to commit rape with me whilst I was standing. He did not succeed. I did not tell my companions what had happened as we were on our way back. They knew what was going on."

Finally she says:—

> "Next day I handed my shorts to P/Cpl. Shefter. They were in the same condition as now. I gave a statement to Cpl. Shefter the day following the incident. I told the nurse at the settlement clinic that evening what had happened to me."

That is the complainant's story on this matter. What corroboration of that story have we got? In rape cases the most usual and the most important corroborative evidence is that of a doctor and in a case such as this where a girl complains of having been raped by 3 men after resisting and struggling, as she says, one would expect, if her story is true, medical evidence showing that intercourse had in fact taken place; evidence of stains of semen on her underclothes; evidence of bruises on her thighs and other parts of her body when she resisted and struggled. If a doctor did examine her and found no such signs, it would be very strong evidence indeed to discredit her complaint. It is not clear whether she was medically examined. She says that she told a nurse at the clinic what had happened and one of the men said in his evidence that she was medically examined. It was essential that she should be medically examined and also her underclothes and if this was not done I consider the Police were grossly negligent and merit the severe censure of the Court. If she was in fact examined it was the bounden duty of the prosecution to produce as a witness the person who did examine her. Personally I have never heard of a case of rape when medical evidence was not adduced. To test the credibility of a complainant's story in such cases it is always important to know when she first mentioned the matter to anyone. We know that she did not mention it to the men. She says she mentioned it to the nurse, but the nurse was never called to testify on that point.

What actual facts of rape have we? According to her evidence the first man raped her, unaided, although she resisted and struggled. I would merely say that in my opinion it is physically impossible for a man, unaided, to rape a girl who resists, without causing her injuries which will leave very definite marks. No questions were put to the girl as to how exactly the man managed to rape her if she resisted. One must not suffer from a false sense of modesty in such cases, for it is only by getting exact details of the act from the complainant one is able to test the truthfulness of her story. On this aspect

of the case I would only venture one further comment and that is I am extremely surprised that a girl of 19½ was not in a much more distressed state after having been raped by three ruffians than this girl apparently was. One would have expected the reaction to have made her hysterical and to have reduced her to tears — but apart from statements by the men that she was excited and in a disarranged state there is no other sign of the rape. In fact the only signs of the alleged rape which appeared to the witness Rakovsky were that her hair was disarranged and she was doing something to her trousers and the gestures of the Arabs and their rough behaviour (whatever that may mean). We are not told what their gestures or behaviour was which indicated that rape had taken place. After a most careful examination of the record the only alleged corroborative evidence I can find is that she returned to the men in an excited state doing something to her trousers and that the day after the incident she produced to the Police torn underwear. In my opinion that is totally inadequate corroborative evidence of rape. Had medical evidence been called, had even the nurse been called, had even details been given of the manner in which the rape was carried out, the accused might well have been in a position to have destroyed the story of the complainant. As it is he must suffer, for it is not possible for him to disprove a mere story that her hair was disarranged, that she was excited and that a day after the event her underclothes were proved to be torn. However, the first accused was not convicted of rape by the learned trial Judge but of attempted rape. Of attempted rape there is not one shred of evidence and I am indeed surprised that Crown Counsel should support such a conviction. The alleged evidence of the attempted rape consists of the following statement by the woman:

> "I had managed to get on my feet. He tried to rape me whilst I was standing."

Of course, that is no evidence of attempted rape. It is no proof of attempted murder or attempted rape to say "the accused attempted to murder me or attempted to rape me." It is not for the witness to tell the Judge what offence in his or her opinion the accused has committed. It is for the witness to relate the facts that took place and for the Judge to determine whether or not those facts constitute the crime in law with which the accused is charged. Other than the fact that the complainant is of the opinion that the accused attempted to rape her we have not the slightest idea what happened. Not every act towards a girl amounts to attempted rape. I can well imagine some girls, forcibly kissed, might consider it a

matter of attempted rape. It may well be, if we knew what the accused did, we would find it only amounted in law to an indecent act. As I have said, the girl has pronounced judgment and the trial Judge has adopted her judgment as his. Of course there is not one iota of corroborative evidence of this attempted rape as her underwear was torn before by the first accused and neither of the two men witnesses have anything to say regarding this attempted rape.

For the forgoing reasons I am of the opinion that there was no evidence at all of attempted rape and that there was insufficient corroborative evidence of rape even if this accused was considered as an aider and abetter in respect of the alleged rapes by the other accused.

Criminal Appeal No. 48 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Shaw J. and Curry Ag. J.

BAR-KOCHVA DANOCH. . . . . *Appellant.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

Criminal Law — Evidence — Affirmation — Corroboration — Evidence taken on affirmation — Whether such evidence requires corroboration — Criminal Procedure (Trial Upon Information) Ordinance, Section 34.

——— — Premeditation — Preparation — Provocation — Preparation of oneself for committing offence of killing with premeditation may cover a very long period of time or it may be effected in minutes — Provocation to accused taking place some months before commission of offence of killing with premeditation too remote to be advanced successfully as a defence — Criminal Code Ordinance, 1936, Section 216.

In dismissing this appeal from the judgment of the Court of Criminal Assize (Mr. Justice Hubbard, the President of the District Court of Tel-Aviv, Judge Windham, and Judge Mani) in Criminal Assize Case No. 11/47, whereby that Court found the accused guilty of murder contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced him to death, the Court of Criminal Appeal,

HELD (1) that the evidence of a witness given on affirmation in accordance with the provisions of Section 34 of the Criminal Procedure (Trial Upon Information) Ordinance does not in law require corroboration,

(2) that preparation of oneself for committing the offence of killing with premeditation may cover a very long period of time, or it may be effected in minutes. In this particular case, by stabbing deceased with a knife in the chest or abdomen which, and that could be inferred from the evidence, was encased in either a sheath or a belt by the accused's waist, the accused, who was by trade a butcher and usually carried his butcher's knife with him, must have made some preparation to get the knife ready and it could not be alleged that he carried the knife in a position ready for an aggressive attack at any moment. Accordingly in the circumstances the trial Court was justified in coming to the conclusion that there had been preparation.

(3) that the act of provocation to the accused, which occurred some months before the commission of the offence of killing with premiditation by the accused, the result of which crippled the accused for life, was far too remote to enable it to be advanced successfully as a defence.

E. D. Goitein for appellant.

Crown Counsel (J. Wicks) for respondent.

Judgment: In this appeal two main contentions were advanced by Mr. Goitein, they were indeed the only two points that could arise.

The first turned on the admission of the evidence of the boy Mizrahi. He was affirmed instead of being sworn. The law on the question of the affirmation or swearing of a witness is contained in section 34 of the Criminal Procedure (Trial Upon Information) Ordinance. Generally speaking, the section visualises two cases where a witness can be affirmed instead of being sworn. The first exception is contained in section 34(1) and it is in the case where the taking of an oath is contrary to the religious belief of the witness or where he has no religious belief. The second is the case of a child too young to understand the nature of an oath. Now it is true, as Mr. Goitein has argued, that a certain confusion of thought is undoubtedly engendered by a comparison of page 4 of the record with page 2 of the judgment. It might be argued (it must be argued Mr. Goitein submits) from page 4 of the record, that the reason for allowing an affirmation was the reason authorised in section 34(2), that is that the witness was a child. But turning to the judgment at page 2, it is, in our opinion, quite clear that the reason why the Court affirmed instead of administering an oath was because they were of opinion that the case fell within section 34(1). The second paragraph of page 2 of the judgment states categorically that this course, that is the course of affirming instead of administering an oath, was not adopted because the boy was too young to understand the

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nature of an oath. It is also clear from this paragraph that the Court were alive to the necessity of making an enquiry as to the nature of the witness's religious beliefs. The same paragraph indicates that the result of their enquiry was that the witness did not have religious belief within the meaning of section 34(1). That conclusion is based, as they state, on two grounds; one because the witness in fact did not appear to be aware of any religious sanction in taking an oath, and the second ground was that he declared that he had a very half-hearted belief in the Thora. Now it seems to us that the inference which the Court drew that the witness had no religious beliefs in so far as religion touched the question of an oath was a justifiable conclusion. It follows in our opinion that they were entitled to affirm this witness in accordance with the provisions of section 34(1). This being so, the evidence given by this witness did not in law require corroboration.

The next ground advanced by Mr. Goitein arose out of the question of the interpretation of section 216(d) of the Criminal Code Ordinance. He says that there was no preparation. Now in regard to preparation it may of course cover a very long period of time, or it may be effected in minutes. There are cases where this Court of Criminal Appeal has held that the mere drawing of a dagger, which the person was carrying, was itself a preparation. Undoubtedly in favour of the accused in this case is the fact that he was by trade a butcher, and that he usually carried his butcher's knife with him. But the evidence of Mizrahi was to the effect that the first attack made on the deceased was from behind. His evidence was that the accused pulled the deceased over and stabbed him in the chest or the abdomen. To do this he must have made some preparation to get the knife ready, because it cannot be alleged that he carried a knife in a position ready for an aggressive attack at any moment. There was evidence from which it could be inferred that the knife was encased in either a sheath or a belt by his waist. In the circumstances we consider that the Court was justified in coming to the conclusion that there had been preparation.

The other point raised was the question of provocation. Two sources of provocation were alleged by the accused. One, which was admitted, was the fact that some months previously the accused himself had been the unfortunate victim of a murderous attack by the deceased and his family. In regard to this attack there is no ground for disbelieving the allegation of his counsel that it crippled him for life. The second source of provocation was the allegation of certain insulting and provo-

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cative words used by the deceased. Now in regard to this the trial Court has recorded as a definite finding the fact that they did not believe the accused, and we see no reason for interfering with this finding. In regard to the attack which crippled the accused, undoubtedly it was provocation, and at the time when it was made it must have been very serious provocation. But in so far as the killing which led to the charge on which the accused was convicted is concerned, this act of provocation was in our opinion far too remote to enable it to be advanced successfully as a defence.

For this reason the appeal must be dismissed.

Civil Appeal No. 125 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Curry Ag. J.

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Shaw J.
and
Curry Ag. J.

CA 125/46
Abu Eid
and another
v
Cronfel
and another

1. SABA ABDALLAH ABU EID,
2. ATALLA SAM'AN EL A'RAJ. . . . . *Appellants.*

v

1. MARIA CRONFEL,
2. ELIAS CRONFEL. . . . . *Respondents.*

Landlord and tenant — Guarantee — Notarial notice — Performance of terms of contract of lease guaranteed — Extension of tenancy by operation of law — No renewal of guarantee — Claim against tenant and his guarantor for value of property destroyed or damaged — Whether guarantor liable in amount claimed — Whether notarial notice necessary before making claim for the value of the property destroyed or damaged — Ottoman Code of Civil Procedure, Article 106.

In this appeal from the judgment of the District Court of Jerusalem given in Civil Case No. 6/45, whereby that Court (Judge Hasna) ordered the appellants, jointly and severally, the first as tenant and the second as guarantor, to pay to the respondents a sum of LP. 344.444 mils the value of property destroyed or damaged by the tenant in the premises which were occupied by him by virtue of a contract of lease for the Hegira year 1362, the performance of the terms of which was guaranteed by the second appellant and which contract of lease was not renewed but became extended by operation of law, namely by the Rent Restrictions (Business Premises) Ordinance, 1941, the Court of Civil Appeal,

HELD (1) that the second appellant, the guarantor of the contract of lease, was only liable as guarantor for the period of the contract of lease, and no renewal of the original period of the lease could affect him unless he subscribed to such a renewal, and when the tenancy became extended by provision of the Rent Restrictions (Business Premises) Ordinance, 1941, the liability of the guarantor was not extended for an indefinite period.

(2) that as the respondents' claim was for the value of property destroyed or damaged, the service of a notarial notice under Article 106 of the Ottoman Code of Civil Procedure on the appellants before instituting the claim was not necessary. Article 106 requires the service of a notarial notice where there is a claim for "damages" on account of non-performance by a party to a contract of a condition in the contract to do some specific act. Had there been a "damages clause" in the contract of lease whereby the lessee became liable to pay X pounds damages if he failed to hand over the premises in good condition at the termination of the lease, then there would be no doubt that a notarial notice would have been necessary.

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The relevant facts appear from the judgment.

The judgment of the Court was delivered by Curry Ag. J.

Miss L. Azoulai for first appellant.

M. Smoira for second appellant.

O. Merguerian for respondents.

Curry Ag. J: The facts in this case are briefly that the first appellant entered into a contract of lease, dated 15.2.43, for the period of the Hegira Year 1362 in respect of business premises. The second appellant guaranteed the first appellant.

The respondents brought an action in the Magistrate's Court of Jerusalem, No. 654/44, alleging various breaches on the part of the first appellant and claiming eviction. On the 28th of September, 1944, judgment was given against the first appellant, and on the 12th October, 1944, the respondents took over the premises from the Execution Office.

In January, 1945, the respondents instituted further proceedings in the District Court claiming the sum of LP. 344.444 mils. This sum is made up as follows: LP. 192.300 mils in respect of damage to the premises; LP. 126.144 mils for rent for the period from the 1st of Muharram of the last Hegira year until the 12th of October, 1944 — the date when the premises were taken over from the Execution Office; and LP. 26 for water. The trial Court gave judgment in favour of the respondents against the appellant (1) as principal, and appellant (2) as guarantor. This is an appeal against that judgment.

The first appellant argues that as regards the rent for the period from the date of the institution of the action for eviction until the premises were handed over to the respondents he was only in occupation as a trespasser, and therefore the claim by the respondents should have been under Article 472 of the Mejelle for an estimated rent.

The respondents have objected that this point was not taken in the statement of defence, and was not made an issue. The appellant relies on clauses 5 and 6 of his defence, and issue 3, but in my opinion these are much too vague to be held to embrace this point as an issue before the Trial Court. Clearly this was a point which should have been pleaded specifically. Moreover, it is further to be noted that the advocate for the appellant in the Trial Court did not argue this point. In these circumstances we do not think it can be raised now.

The appellant argues in the alternative that he is not liable for the rent as he had assigned the lease as he was empowered to do under the contract of lease. The learned trial Judge found that the appellant did not prove an assignment. No document of assignment was produced in evidence, nor were the alleged assignees called to give evidence. In this Court the advocate for the first appellant admitted that she did not know the date of the alleged assignment. On the evidence before him the trial Judge was fully entitled to find that the first appellant had failed to prove an assignment.

Dealing next with the item LP.192.300 — which item is made up of six sub-items — sub-items 1 and 2 are in respect of the removal of certain walls marked A D E F H and X on a plan submitted in evidence. The first appellant admits removing walls A D H and X, but contends there was no corroboration of plaintiff's evidence regarding the removal of the others walls, which defendant had denied. It would appear from the evidence there was no corroboration that the removal of these other walls took place during the occupancy by the first appellant, and therefore it follows he should not have been made liable in respect thereof. The question arises whether the case must be remitted to the lower Court to value the damage in respect of A D H and X, or whether this Court can place a value thereon. The total item amounts to LP.56. In the circumstances we think we can fairly estimate the damage in respect of A D H and X at LP.30. As regards sub-items 3, 4 and 6, first appellant argued that respondents could not claim, as they had not served him with a proper notarial notice giving him the opportunity of effecting the repairs himself. I do not think there is any merit in this argument. The respondent is not claiming this sum by way of "penalty" or "damages" for the breach of a condition of the contract. He is merely claiming the value of property destroyed or damaged. Article 106 of the Ottoman Code of Civil Procedure requires the service of a notarial notice where there is a claim for "damages" on account of non-performance by a party to a contract of a condition in the contract to do some specific act. Had there been a "damage clause" in this contract whereby the lessee became liable to pay X pounds damages, if he failed to hand over the premises in good condition at the termination of the lease, I think there is no doubt that a notarial notice would have been necessary, but that is not the nature of the claim here.

The remaining sub-item No. 5 is in respect of the white-washing. As the first appellant undertook to return the premises at the termination of the lease in the same condition as when he took over the premises, I think there is no doubt he is liable for this item.

Turning now to the claim against the guarantor, appellant No. 2, there can be no doubt that this appellant is only liable as guarantor for the period of the contract of lease. No renewal of the original period of the lease would affect the guarantor unless, of course, he subscribed to that renewal. When the tenancy became extended by provision of the Rent Restrictions (Business Premises) Ordinance, the liability of the guarantor was not extended for an indefinite period. It was, of course, quite open to the respondents to require the first appellant to produce a further guarantee according to the conditions in the original lease.

For the foregoing reasons the judgment of the District Court is set aside, and judgment is to be entered for the respondents for the sum of LP.318.444 mils against appellant No. 1, and as respondents have succeeded almost entirely in their claim, they are entitled to costs here and below on the lower scale, plus an advocate's fee of LP.10, and an advocate's fee of LP.10 for the hearing of this appeal. The appeal of appellant No. 2 is allowed, who is entitled to his costs here and below on the lower scale, and to a hearing fee of LP.10 for this appeal.

Shaw J: I concur.

High Court No. 62 of 1946.

In the Supreme Court sitting as a High Court of Justice.

Before: Shaw J. and Curry Ag. J.

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Shaw J.
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LUNA LEVY . . . . . *Petitioner.*

v

1. ASSISTANT CHIEF EXECUTION OFFICER, TEL-AVIV.
2. ZECHARIA LEVY . . . . . *Respondents.*

High Court — Has power to make an order superseding a previous order made by it.

The High Court has power to make an order superseding a previous order made by it.

The relevant facts appear from the order of the High Court. The order of the High Court in High Court Case No. 35/46 is reported in 13 P.L.R. 328.

The order of the Court was given by Curry Ag. J.

M. Hochman for petitioner.

Z. Kleinxeller for second respondent.

Curry Ag. J: The petitioner obtained a judgment from the Chief Rabbinate, Jaffa-Tel-Aviv District, on the 14th January, 1946, whereby the petitioner's husband — the second respondent — was ordered to pay petitioner LP.10 per month maintenance.

The first respondent refused to execute that judgment, and the petitioner applied to the High Court in High Court Case No. 35/46. In that case the second respondent, in his reply, averred for the first time that he was not a member of the Jewish Religious Community. The petitioner was taken by surprise and could not adduce additional evidence at that stage of the proceedings to prove the contrary. This Court then discharged the order nisi, as it entertained some doubt as to whether respondent 2 was a member of the Jewish Community.

The petitioner now again comes before this Court, as she is entitled to do, asking us to set aside the order of this Court in High Court 35/46, and also the order of first respondent dated 4.3.46.

The second respondent is a foreigner, and two questions arise for the decision of this Court, viz., is he a member of

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Jewish Community, and did he give his consent to the jurisdiction of the Rabbinical Court.

The petitioner in her affidavit swore that she had seen a register of the members of the Jewish Community of Palestine wherein she saw the name of second respondent under No. 11034. She further filed a letter from the General Council (Vaad Leumi) of the Jewish Community of Palestine, dated 27th May, 1946, which states that Zecharia Levy, whose father's name is Yehuda, is registered as a member of the Jewish Community of Tel-Aviv for the year 5704 under No. 11034. The second respondent's reply to this is that in a register entitled "Book of the Adults of the Jewish Community in Tel-Aviv-Jaffa, 704" (1944) which he saw at the Municipality at Tel-Aviv, his name did not appear, although the names of his father and mother were there, but that he found a name identical with his in the register entitled "Book of Adults of the age 18-19 of the Jewish Community in Tel-Aviv and Jaffa for the year 1944 (704)". The argument of the second respondent is that he cannot be this person because in 1944 he was 22 years of age. It is to be noted that the address given was the address at which his parents have lived for many years, and in fact the respondent is now living with them at that address. In our opinion the petitioner has proved that respondent 2 is registered as a member of the Jewish Community.

As regards the second respondent submitting to the jurisdiction of the Rabbinical Court, of that there can be no doubt. In their application for marriage to the Chief Rabbinate both petitioner and respondent 2 declared that they had agreed that in all matters of personal status, alimony, maintenance, Ketuba, etc., that might arise hereafter, and in respect of which the Rabbinate had exclusive or concurrent jurisdiction, should be submitted to the exclusive jurisdiction of the Rabbis.

For the foregoing reasons the order nisi is made absolute and it follows that this order supersedes the order of the Court of 29th May, 1946, in High Court 35/46, and the first respondent is ordered to execute the judgment of the Rabbinical Court of Jaffa-Tel-Aviv District, given on the 14th January, 1946, against second respondent and filed for execution in File No. 478/43, of the Execution Office, Tel-Aviv.

Petitioner is entitled to her costs and an advocate's hearing fee of LP.15.

Shaw J: I concur.

Civil Appeal No. 156 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and de Comarmond J.

DAVID ELAZAROFF. . . . . *Appellant.*

v

ESTATE OF MOSHE BAUM. . . . . *Respondent.*

Magistrates' Courts Procedure Rules, 1940, Rule 147.

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In Civil Case No. 167/44 of the Magistrate's Court of Tel-Aviv part of the evidence in the case was heard by a Magistrate. The Magistrate in question was transferred and the case was completed by another Magistrate who decided to proceed under Rule 147 of the Magistrates' Courts Procedure Rules, 1940, and that other Magistrate completed the case and gave judgment. On appeal to the District Court, the case was remitted to the Magistrate's Court to be heard *de novo*. The aggrieved party appealed to the Supreme Court by leave.

In allowing the appeal and remitting the case to the District Court for determination in the light of its judgment, the Court of Civil Appeal,

HELD that where a Magistrate proceeds with a case under the provisions of Rule 147 of the Magistrates' Courts Procedure Rules, 1940, it is highly desirable, although in law this is not necessary because in matters of procedure a Court of Appeal will assume, unless there is patent evidence on the face of the record to the contrary, that the Magistrate has proceeded in accordance with the rules of procedure, that a note of the reasons why he proceeded under Rule 147 should be made by him in the record. A Magistrate proceeding under Rule 147 is not bound to rehear the evidence already heard by his predecessor.

J. Sussman and I. Yerushalmi for appellant.

I. Hake for respondent.

Judgment: This appeal raises one point only. Unfortunately our decision on that point will not have the effect of determining the litigation. That point concerns the application of Rule 147 of the Magistrates' Courts Procedure Rules. The trial Magistrate, who had taken over a trial which had been commenced by another Magistrate, held that he was entitled so to proceed under the provisions of Rule 147. On appeal to the District Court the learned Judge held that the Magistrate was wrong. The only ground for so holding appears to have been that the learned Judge considered it more satisfactory and equitable that the case should be heard de novo. With all respect to the learned Judge, we would point out that the issue before him was one of law only, and the question of whether

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a purely legal decision was on other grounds satisfactory does not appear to us to have been relevant. Now Mr. Hake has argued that the learned Magistrate was wrong on two grounds. He says that he should have recorded in his record the reasons why he decided that Rule 147 did apply. As to this, we need only say that with respect, we agree with the previous decision of this Court[1] that it is highly desirable that a note of the reasons why a Magistrate proceeded under Rule 147 should be made by him. In law, however, such a note is not necessary because in matters of procedure a Court of Appeal will assume, unless there is patent evidence on the face of the record to the contrary, that the Judge has proceeded in accordance with the rules of procedure. But in this case the very issue as to whether the Magistrate was entitled to proceed was raised, and in the record the Magistrate embodied his decision that he was so entitled. It must be inferred from this fact that the Magistrate was satisfied that the condition precedent to the bringing into force of Rule 147 existed, which is that the previous Magistrate was prevented from sitting.

Mr. Hake has referred us to several English cases, which are all to the effect that it is only in special circumstances, and where the parties consent, that evidence heard before a previous judge can be taken into account by a continuing judge without re-hearing the witnesses. As to this, we would point out that there is no rule in English procedure similar to Rule 147 in Palestine procedure. The rule in our opinion is in as wide terms as possible. We agree with Mr. Hake that the discretion given by the rule is permissive, but it is an absolute discretion. The Magistrate in considering whether he should exercise that discretion would no doubt pay due attention to the fundamental principles underlying the English cases, but he is in no way bound by them. For these reasons we think that the District Court erred in reversing the Magistrate on this point. The result must be that the appeal is allowed. The case is remitted to the District Court for determination in the light of this judgment.

Costs will abide the issue for the purposes of this appeal. We assess the costs of the appellant at LP. 10.

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(1) CA 20/39, 6 P.L.R. 143.

High Court No. 19 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and de Comarmond J.

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and
de Comarmond J.

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BERNARD A. ROZENBLATT. . . . . *Petitioner.*

v

1. REGISTRAR OF LANDS, HAIFA
2. DIRECTOR OF LAND REGISTRATION,
3. EDMOND N. LEVY. . . . . *Respondents.*

Land Transfers Regulations, 1940 — Mandate — Foreign Jurisdiction Act, 1890 — Ultra vires — Palestine Order-in-Council, 1922 — Palestine (Amendment) Order-in-Council, 1939 — Whether the Land Transfers Regulations, 1940, the Palestine Order-in-Council, 1922, and the Palestine (Amendment) Order-in-Council, 1939, ultra vires — How far provisions of the Mandate enforceable by the Municipal Courts of Palestine — Palestine Order-in-Council, 1922, Articles 16D, 17, 88 and 89 — Mandate, Article 15.

Into the Palestine Order-in-Council, 1922, a new Article 16D was introduced by the Palestine (Amendment) Order-in-Council, 1939, in pursuance of which article 16D the High Commissioner made the Land Transfers Regulations, 1940. For the purposes of these regulations, Palestine is divided into two Zones, Zone A and Zone B. The transfer of land situated within Zone A save to a Palestinian Arab is prohibited except in certain cases provided for in Regulation 3. Bernard Rosenblatt, an American citizen and a Jew, purported to purchase from Edmond Levy, also a Jew, certain property in Tira village in the Haifa Sub-District. The Director of Land Registration refused to give his consent to the proposed transfer on the ground that it contravened the Land Transfers Regulations. Rosenblatt thereupon applied for and obtained an order nisi calling upon the Registrar of Lands of Haifa and the Director of Land Registration to show cause why the transfer of certain lands situated at Tira village by Edmond Levy, the third respondent, to the petitioner should not be approved as petitioned in Haifa Land Registry File No. 5/355/47.

In discharging the rule nisi, the High Court,

HELD (1) that the Land Transfers Regulations, 1940, are not *ultra vires* Article 16D of the Palestine Order-in-Council, 1922, which was introduced by the Palestine (Amendment) Order-in-Council, 1939. Even if the above regulations were inconsistent with Article 15 of the Mandate, a point which the Court refrained from deciding, they would not, by reason of such inconsistency, be invalidated, since they were made under Article 16D of the Palestine Order-in-Council, the object of enacting which article was to shake off, in so far as the transfer of land at all events was concerned, the fetters imposed by Article 17(1)(c) of the Order-in-Council, which enjoins that no ordinance shall be promulgated which shall be in any way repugnant to or inconsistent with the provisions of the Mandate.

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(2) that the Palestine (Amendment) Order-in-Council, 1939, is not *ultra vires* the Palestine Order-in-Council, 1922, inasmuch as by Article 88 of the Palestine Order-in-Council, 1922, His Majesty, his heirs and successors in council may at any time revoke, alter or amend the latter Order-in-Council, and the said article is in no way influenced by the provisions of Article 89 of the said Order-in-Council of 1922, the object *inter alia* of which is to enable His Majesty to make laws to ensure that administration will not break down in cases of failure of the local legislature to function. Article 88 deals with a totally different matter than that provided for in Article 89 which is the power to amend the Order-in-Council, and when any amendment is made it is incorporated in and becomes part of the Order-in-Council and can no more be queried in the Municipal Courts than the Order-in-Council itself.

(3) that the Palestine Order-in-Council, 1922, and the Palestine (Amendment) Order-in-Council, 1939, are not *ultra vires* the Foreign Jurisdiction Act, 1890.

(4) that the terms of the Mandate for Palestine are not enforceable in the Municipal Courts of Palestine, save in so far as they are embodied in the Order-in-Council or in the laws made by the legislature of the territory in which the Municipal Courts function.

Referred to: Abeyesekera v. Yajatilake, (1932) A.C. 260.
Citizen Insurance Company of Canada v. Parsons, 7 A.C. 96.
Cook v. Sprigg, (1899) A.C. 572.
Jerusalem-Jaffa District Governor v. Suleiman Murra (1926) A.C. 321; 1 P.L.R. 71.
King v. Earl of Crew, (1910) 2 K.B. 567.
Sammut v. Strickland, (1933) A.C. 702.
Secretary of State in Council of India v. Kamacher boye Sahaba (7 Moo. J.A. 476).
Sobhuza II v. Miller, (1926) A.C. 518.

J. Salomon and J. stoyanowsky for petitioner.

Acting Attorney General (M. J. Hogan) for 1st and 2nd respondents.

A. Levin for 3rd respondent.

Order: The petitioner in this case is an American citizen and a Jew. In February, 1947, petitioner purported to purchase from the 3rd respondent certain property in Tireh village, in the Haifa sub-district. The Director of Land Registration refused to consent to the transfer on the ground that it was contrary to the Land Transfers Regulations. Although the seller, Edmond Levy, associated himself in every way with the arguments

advanced for the petitioner, he was cited in the case as the 3rd respondent.

The case was argued at great length, and we are indebted to Mr. Salomon for the industry he displayed in its preparation and the lucidity with which he presented it. The issue is undoubtedly a matter of considerable public interest because of its political aspect, but it is scarcely necessary to emphasize that this Court is concerned solely with the legal questions involved.

The substance of the petitioner's case is that the regulations under which the Director of Land Registration purported to refuse approval of the transaction are ultra vires. The arguments adduced by counsel for the petitioner were advanced under four heads, viz:-

(a) The Regulations are contrary to the Order-in-Council under which they purported to be made, which was the Palestine (Amendment) Order-in-Council, 1939.

(b) The Palestine (Amendment) Order-in-Council, 1939 is *ultra vires* the Mandate.

(c) Both Orders-in-Council are *ultra vires* the Foreign Jurisdiction Act.

(d) The Palestine (Amendment) Order-in-Council, 1939, is *ultra vires* the Palestine Order-in-Council, 1922.

The Regulations purport to have been made under Article 16D of the Palestine (Amendment) Order in Council, 1939. Paragraphs 1 and 2 of that Article read as follows:-

(1) The High Commissioner may make regulations prohibiting, restricting or regulating transfers of land in Palestine or in any part thereof.

(2) Without prejudice to the generality of the provisions of the foregoing paragraph, it is hereby declared that any such regulations may —

(a) be made applicable only to transfers of land from Arabs to Jews or to other persons not being Arabs; or from Jews to Arabs or to other persons not being Jews; or from Arabs or Jews to any bodies of persons corporate or unincorporate;

(b) invalidate, or otherwise determine the effect of, any transfers made in contravention of the provisions of the regulations; and

(c) prescribe penalties for breach of the regulations.

Purporting to act under that Order-in-Council, the High Commissioner made the Land Transfers Regulations, 1940. The relevant Regulation for the purposes of this case is Regulation 3 which reads as follows:-

3. The transfer of land situated within Zone A save to a Palestinian Arab shall be prohibited:

Provided that the High Commissioner may, if he considers it desirable so to do, —

(a) permit of the mortgage of such land to such companies or societies as he may approve;

(b) permit the transfer of such land by Palestinian Arabs to religious or charitable institutions;

(c) permit the transfer of such land to persons not being Palestinian Arabs if in his opinion such transfer is necessary for the purpose of consolidating existing holdings, or of effecting the parcellation of village musha' within the meaning of the Land (Settlement of Title) Ordinance;

(d) in the case of land within the said Zone owned by persons not being Palestinian Arabs, by general or special order, permit the transfer of such land to persons not being Palestinian Arabs;

....."

Mr. Levin who appeared for the 3rd respondent has argued that apart altogether from the legality of Article 16D of the Order-in-Council, these regulations are *per se ultra vires* the article. His contention is that the regulations must have been made under 16D(2). Article 16D(1), he says, contemplated a geographical limitation only. It was 16D(2) which purported to specify the class of persons in respect of whom the restrictions could be made. If they are made under 16D(2), he continues, they can only restrict transfer of land from Arabs to Jews or other persons not being Arabs, or from Jews to Arabs or other persons not being Jews, or from Arabs or Jews to any body of persons corporated or uncorporated. The regulations, he points out, go beyond this restriction, in that they prohibit a transfer from Jew to Jew, from non-Jew to Jew, from non-Jew to non-Jew, i e. British to British, from a Lebanese, Egyptian or Palestinian Arab to an American Arab, from a corporation to Jews, corporation to non-Jews, corporation to corporation, corporation to non-Palestinian Arab. The result is to create a privileged class of Arabs, a purpose which was never in the contemplation of the legislator.

But in a sense, any person, whether he be Jew or Arab, who under the Order-in-Council is permitted to transfer land is in a privileged position *vis-à-vis* the person who is prohibited from transferring land and I cannot see that this fact vitiates the article. A further objection to the Regulations is, Mr. Levin contends, that it creates a new category of persons known as Palestine Arabs, a class not mentioned in Article 16D of the Order-in-Council. As to this, I would observe that "Palestine Arab" is a more restricted term than "Arab", and if the Order-in-Council permits restrictions to be imposed on all persons

belonging to the Arab class, as in fact it does, there can be no objection to limiting the regulations to a section of that class.

I will now turn to the distinction which both Mr. Salomon and Mr. Levin wish to draw between paragraphs 1 and 2 of Article 16D. Both counsel have argued that 16D(1) and 16D(2) deal with two distinct matters. 16D(1) deals with certain matters, and 16D(2) deals with other matters, and those matters should not be allowed to impinge on each other. They refer to the Citizen Insurance Company of Canada v. Parsons (7 Appeal Cases 1881/1882). That case concerned the construction of sections 91 and 92 of the British North America Act of 1867. Those two sections, which have been considered by the Privy Council in many cases, regulate the distribution of powers between the Dominion Parliament and the Provincial Legislative Assemblies. The sections deal with mutually exclusive, in fact competing, matters; the object of the legislature was to draw a clear distinction between the matters dealt with in s.91 and those covered by Section 92. Section 91 contained the following words: "For greater certainty but not so as to restrict the terms of this section it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say...". Now Mr. Salomon's argument is that he can draw an analogy between Sections 91 and 92 of the British North America Act, and paragraphs 1 and 2 of Article 16D of the Order-in-Council. He says that certain matters are exclusively covered by paragraph 1, and certain other matters are exclusively covered by paragraph 2, and following the argument in the Canadian case, if a matter is dealt with in paragraph 2 it cannot be considered under paragraph 1. The argument at first sight appears attractive, but an analysis of the Canadian Act and the 1939 Order-in-Council leads me to the view that there is no true analogy between the sections 91 and 92 of the British North America Act and paragraphs 1 and 2 of the Article. As I have indicated, the sections of the British North America Act set out to draw a clear line of distinction between the matters which could be dealt with by the Dominion Parliament and the Provincial Legislatures. In my opinion the two paragraphs of Article 16D do not attempt to draw any such distinction. They deal with the same subject matter, that is the prohibition, restriction and regulation of the transfer of lands. Paragraph 2 of the Article is in my view merely explanatory of paragraph 1. If the opening words "without prejudice to the generality of the provisions of the foregoing paragraph" are to have any meaning, it seems to me that what follows cannot

limit or extend the effect of paragraph 1. I come to the conclusion that the power of the High Commissioner is derived from paragraph 1 and that paragraph 2 can only be regarded as a draftsman's "for the removal of doubts" paragraph. Leaving aside for the moment the question, which I will consider presently, as to whether paragraph 1 of 16D is contrary to the Mandate, or any law, the paragraph is as all embracing as it well could be. It cannot be denied that by itself it enables the High Commissioner to place any restriction, territorial or personal, in regard to the transfer of land in Palestine. It follows therefore that, in my opinion, the Regulations are not ultra vires paragraph 1 of Article 16D.

Mr. Salomon has further argued that as paragraph 1 offends against what he considers to be a fundamental principle of English Law and liberty, the intention, if it be the intention, to override this fundamental principle, must be clear and unambiguous. The fundamental principle, he says, is the right of every citizen freely to transfer his land and property. Now, while it is true that the English constitution affords to every citizen the right of individual liberty, and assures him protection from arbitrary confiscation of his property, there is no fundamental law which guarantees to an individual free and unfettered control over property which he may possess. Many states have made laws restricting the absolute free transfer of land between individuals. As regards England, I need only refer to various Agricultural Holding Acts, and to Town Planning Acts. There is, therefore, nothing inherently contrary to fundamental principles in legislation which restrict the free transfer of land between individuals. But even if there was, I cannot, as I have said, conceive language more all-embracing than that used in paragraph 1 of Article 16D which, in my view, is in no way modified by paragraph 2. It follows that on either ground this argument must fail.

I come now to the submission that the Land Transfers Regulations are ultra vires, in that they infringe the provisions of Article 15 of the Mandate. The Article is clear in its terms. It enjoins that the Mandatory shall not distinguish between the inhabitants of Palestine on the ground of race, religion or language. If, as it has been argued, the regulations do discriminate between the communities on the ground of race and religion, the question arises as to whether the Mandate is sacrosanct in the Municipal Courts. In my view, the Mandate is a document by which the Principal Allied Powers selected His Britannic Majesty as the Mandatory for Palestine. Once the Mandate has been accepted, the various provisions of this

document indubitably do constitute a covenant between His Majesty and the Principal Allied Powers, but it seems to me that the overwhelming weight of judicial authority is to the effect that the terms of such covenants are not enforceable in the Municipal Courts, save in so far as they are embodied in the Order-in-Council or in the laws made by the legislature of the territory in which the Municipal Courts function. At this point I turn to the Order-in-Council of 1922 and particularly to Article 17(1)(c) which enjoins that no Ordinance shall be promulgated which shall be in any way repugnant to or incosistent with the provisions of the Mandate. Here is an instance of legislation being enacted to give effect to the rights guaranteed by the Mandate. It follows that the Municipal Court could entertain an argument as to validity of an Ordinance alleged to be inconsistent with the provisions of Article 15 of the Mandate, and this in fact was the principle established in the decision of the Privy Council in the case of Jerusalem-Jaffa District Governor v. Suleiman Murra (Law Reports A.C. 1926). But the Land Transfers Regulations which the petitioner impeaches are not an Ordinance promulgated by the High Commissioner under the authority given to him by Article 17(1)(a) of the Order-in Council. They are Regulations made under Article 16D of the amendment made to the Order-in-Council in 1939. In regard to the making of those regulations, there is no such limitation as that imposed by Article 17(1)(c). Indeed it seems clear, as the Attorney General has submitted, that the object of enacting Article 16D was to shake off, in so far as the transfer of land at all events was concerned, the fetters imposed by Article 17(1)(c). The fact that the regulations might be inconsistent with Article 15 of the Mandate — and I refrain from deciding whether in fact they are so — would not invalidate them.

I will now consider the contention that both the Order-in-Council, 1922, and the Amendment Order-in-Council, 1939, are *ultra vires* the powers of His Majesty. The argument of Mr. Salomon on this point purports to be founded on the decision of the Privy Council in The Secretary of State for India v. Sardar Rustam Khan, 1941, Appeal Cases p. 356. The argument is that Palestine was handed over to the Mandatory, subject to certain restrictions, one of those restrictions being that there should be no discrimination on the ground of race or religion. These regulations are, argues counsel, discriminatory on the ground of race or religion, and in so far as the Order-in-Council purported to give power to make them, it was *ultra vires.*

Now, as stated in the preamble, the Order-in-Council of 1922 is made under the authority of the Foreign Jurisdiction

Act. Section 11 of that Act provides that an Order-in-Council made in purported exercise of the powers under the Foreign Jurisdiction Act shall have effect "as if it were enacted in this Act" which is a direction that it shall be applied by the Municipal Courts as if it were itself an Act of Parliament.

The principle enunciated in the King v. Earl of Crew, 1910, 2 K.B. 567, and Sobhuza II. v. Miller, A.C. 1926, p. 518, and in The Secretary of State for India v. Sardar Rustam Khan appears to me to be this: that the assumption of jurisdiction under the Foreign Jurisdiction Act creates a new source of title. From the date of the promulgation of an Order-in-Council based on the Foreign Jurisdiction Act, this new title begins. The Municipal Courts will not concern themselves with any negotiations that may have preceded the assumption of jurisdiction, or with any prior rights that may have existed, save in so far as they are preserved in the Order-in-Council issued under the authority of the Act. The main provision of the Act is that the rights assumed are vested in the Crown in as ample a manner as if they had been acquired by conquest or cession. If there has been a failure to preserve in the Order-in-Council or other appropriate legislation the rights claimed as previously existing, such failure may justify diplomatic pressure on behalf of the injured parties, but recourse cannot be had to the Municipal Courts for the enforcement of those rights. To quote the words of Lord Kingsdown in Secretary of State in Council of India v. Kamacher Boye Sahaba (7 Moo. J.A. 476): "It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal Court of Justice can afford a remedy". This principle was also established in the case of Cook v. Sprigg (Appeal Cases 1899) where it was held that if there is an express or well-understood bargain between the ceding authority and the Government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary cause of diplomatic pressure.

To conclude my consideration of this part of Mr. Salomon's argument it seems to me that there is as true an analogy between the principles established in the case of Sobhuza II and the issue raised here as one could well find in any two reported cases.

In the case of Sobhuza, it was argued that the Crown was limited in the acquisition and disposal of certain lands by a

convention which existed prior to the assumption of jurisdiction by the Crown. Here it is contended that the Crown is limited in its land legislation by the Mandate which preceded the assumption of jurisdiction under the Foreign Jurisdiction Act. The answer to both questions is the same, and it is, that in so far as the Municipal Courts are concerned the power of the Crown is exercised by virtue of the Foreign Jurisdiction Act which so far from placing any limitations upon the power of the Crown specifically states that its power is as ample as if it had been acquired by conquest or cession. Again, in the case of Vayjesingi v. Secretary of State for India (1924 L.R. 51 I.A. 357) Lord Dunedin in delivering the judgment of the Privy Conncil states: "Nay, more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the High Contracting parties".

Applying the argument mutatis mutandis to the rights claimed in Palestine by the petitioner as a Jew: If the Mandate, which here may be said to take the place of the treaty of cession in the case just quoted, stipulated that a particular community should enjoy certain rights, that does not give the community a title to enforce those rights in the Municipal Courts. The right to enforce remains only with the high contracting parties which are the Principal Allied Powers or their successors and the Mandatory.

Finally, there is the argument that the 1939 Amendment Order-in-Council was ultra vires the 1922 Order-in-Council, Mr. Salomon's contention was that by the 1922 Order-in-Council His Majesty had exhausted his powers to legislate in Palestine and he has referred to the case of Abeyesekera v. Yajatilake, 1932 A.C. 260, and Sammut v. Strickland, 1933, A.C. 702. This involves a consideration of Articles 88 and 89 of the 1922 Order-in-Council. The Articles are as follows:-

> "88. His Majesty, his heirs and successors in Council may at any time revoke, alter or amend this Order.
>
> 89. There shall be reserved to His Majesty, his heirs and successors, the right, with the advice of His or Their Privy Council, from time to time to make all such laws or ordinances as may appear to Him or Them necessary for the peace, order and good government of Palestine in accordance with the Mandate conferred on him."

One submission of counsel was that Article 88 did not give His Majesty power to add to the order, and that 16 D was an addition. As to this, it seems to me scarcely open to argument that the words "revoke, alter or amend" are wide

enough to cloak His Majesty-in-Council with jurisdiction to enact 16D.

Following up this argument, Mr. Salomon's second contention was that Article 88 of the Order-in-Council of 1922 was governed by the provisions of Article 89, and he draws attention to the fact that Article 89 specifically limited the power of His Majesty to make laws only in accordance with the Mandate conferred on him. Now, in my opinion, Articles 88 and 89 deal with two different sets of circumstances, and 88 is in no way influenced by the provisions of 89. Article 89 provides for the vesting of the usual residuary powers in His Majesty. A similar Article is to be found in most Orders-in-Council applicable to the Colonies and Mandated Territories. The object inter alia is to enable His Majesty to make laws to ensure that administration will not break down in cases of failure of the local legislature to function. It is not suprising, therefore, to find in Article 89 a limitation similar to the limitation imposed by Article 17(1)(b) on the promulgation of Ordinances. Article 88 deals with a totally different matter which is the power to amend the Order-in-Council. When any amendment is made it is incorporated in and becomes part of the Order-in-Council, and can no more be queried in the Municipal Courts than the Order-in-Council itself.

The order nisi is therefore discharged. As the issue raised a question of considerable public interest, we make no order as to costs.

Income Tax Appeal No 6 of 1946.

In the Supreme Court sitting under Section 53 (1) of the Income Tax Ordinance, 1941.

Before: Hubbard J.

PALESTINE DISCOUNT BANK, Ltd.
TEL-AVIV. . . . . *Appellant.*

v

ASSESSING OFFICER, TEL-AVIV. . . . *Respondent.*

Revenue — Income tax — Income accruing abroad to assessee on foreign securities and deposits in foreign banks — Whether such income subject to income tax — Income Tax Ordinance, 1941. Section 5.

1947
10th June

Hubbard J.

ITA 6/46
Palestine Discount Bank, Ltd., Tel-Aviv
v
Assessing Officer, Tel-Aviv

Certain sums of money by way of interest on foreign securities and deposits in foreign banks accrued abroad to the Palestine Discount Bank Ltd. These sums were not received by the bank in Palestine. The Assessing Officer considered these sums subject to income tax as they represented income derived from the business of banking carried on in Palestine. The assessee appealed. The issue was one of law, namely whether those sums constituted income derived from Palestine in respect of profits from the business of banking carried on by the assessee in Palestine.

In allowing the appeal, the Court,

HELD that the income in dispute, which accrued abroad, was not chargeable, because it had not been received in Palestine and was not derived from Palestine. In Section 5 of the Income Tax Ordinance, 1941, the words "accruing in" relate to moneys which become payable to and are actually paid or credited to a person in Palestine, the words "received in" to moneys actually received in Palestine, although they may have accrued abroad and been remitted to Palestine, and the words "derived from" to moneys received outside Palestine from inside Palestine.

Referred to: Commissioner of Taxation v. Kirk, (1900) A.C. 588.

ITA 9/42, 10 P.L.R. 255.

The arguments on both sides appear in the judgment.

M. Smoira and F. Rosenbluth for appellant.

A. Levin for respondent.

Judgment: This is an appeal against an assessment made by the Assessing Officer, Tel-Aviv. The only issue is one of law, namely, whether the appellant Bank is chargeable in respect of certain sums of interest, credited to it abroad and not received in Palestine, on foreign securities and deposits in foreign Banks.

Mr. Levin, for the Assessing Officer, admits that these sums did not accrue in Palestine and were not received in Palestine. They are clearly part of the income of the appellant Bank; and it remains to be decided whether they constitute income derived from Palestine in respect of profits from the business of banking within the meaning of Section 5(1)(a) of the Income Tax Ordinance.

Dr. Smoira contends that taxable income under this section is subject to two kinds of qualifications, which he named the material and the territorial qualifications. The material qualifications are those set out in Section 5(1)(a)-(h), that is to say, the income must be money gained in one of the ways specified by these paragraphs. The territorial qualification is that the place wherein the income accrues, wherefrom it

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is derived or wherein it is received, must be Palestine. He does not deny that the profits have been made by the banking business of the appellant, for it is part of the bank's business to invest its available funds, but he submits these profits are not derived from Palestine but from countries outside Palestine.

Mr. Levin's contention is that "derived from Palestine" means "derived from a source in Palestine", source being understood in the sense of one of the methods of making profits or acquiring money set out in Section 5(1)(a)-(h), e.g. trade, business, dividends, rents, etc.

No authority directly in point appears to be available. No enactment of any other territory has been produced in which the words "derived from" are used in conjunction with a political geographical area. Where the words do occur in other enactments, they are used either in conjunction with the word "sources" in the sense of methods or means of acquiring money, or in conjunction with a named source.

In the Indian Income Tax Ordinance of 1922 (s. 4(1)) the words "derived from" are used in conjunction with "sources" in this sense, and the sources themselves are specified in Section 6, the final one being "other sources" (s. 6(vi)). In the New South Wales Land and Income Tax Assessment Act of 1895, there occurs the phrase "derived from lands of the Crown held under lease" (s. 15(3)). "Derived from" here too has the same meaning: it indicates that the income is made by some use of these lands, in the case of Commissioners of Taxation v. Kirk, by extracting ore from them (1900 A.C. 588, at 591). I think it appropriate to mention here that, with respect, I do not think there is any substance in Dr. Smoira's contention based on this case, that "derived" means the same as "accruing". It is true that the Board in this case said, "Their Lordships attach no special meaning to the word "derived" which they treat as synonimous with accruing or arising." But that decision is on a statute which has in one sub-section the words "arising or accruing to any person" (s. 15(1)), and in another sub-section "derived from lands of the Crown." (s. 15(3)). The Board attached no special significance to the use of a different word in the later sub-section. But the case is different where these expressions, namely, "accruing in", "derived from", "received in", all occur in the same sub-section. It may be that these expressions overlap to some extent, but it is to be presumed that the words "derived from" were inserted to cover some cases which the other expressions do not cover. In my view, adopting the words of Gordon-Smith, C.J., in Horowitz v. Assessing Officer of Jerusalem (I.T.A. No. 9/42, 10 P.L.R. 255,

at 261) "the only safe rule is to look at the wording of our Ordinance, particularly sections 5 and 6, and see what is the intention expressed in the wording of these provisions."

My own first impression was that "accruing" in paragraph 5 relates to moneys which become payable to and are actually paid or credited to a person in Palestine; "received" to moneys actually received in Palestine, although they may have accrued abroad and been remitted to Palestine; and "derived from" to moneys received outside Palestine from inside Palestine. It is no doubt true that, generally speaking, moneys earned in Palestine may be said to have accrued there, to be received there, and to be derived from Palestine. But on the other hand, it is equally clear that in some cases money may be derived from Palestine although it does not accrue nor is it received there. For instance, under paragraph 35 of the Ordinance, if a borrower remits to a lender abroad a sum of money, being interest on a loan, the contractual place of payment of which is abroad, it appears to me that it is only by virtue of the words "derived from Palestine" that such sum of money can be said to be income chargeable under the Ordinance. It is not received in Palestine, nor, the contractual place of payment being outside Palestine, does it accrue in Palestine, but it is derived from Palestine. It appeared to me, therefore, that it was for cases where income was received outside Palestine that the words "derived from Palestine" were primarily intended.

On further consideration I have seen no reason to change this view, which I think is to some extent supported by a consideration of the connotations of the word "derived" as used in ordinary speech. When something has been derived from something else, it has usually been separated from, or taken out of the limits, phasical or metaphorical, of the thing from which it is derived. You derive wool from a sheep, you derive milk from a cow, and you derive food for thought from a given situation. When you have derived it, it ceases to be within the limits of that whence it was derived. And as the word is normally used, I think it implies also that the speaker is outside the limits of the place of derivation. A Londoner might say he derives his income from a business in London, but he would not naturally say he derives his income from London. He would say he earns his living in London. Sitting in a café at Tel-Aviv I might say, "Tel-Aviv derives its vegetables from the Kibbutzim." But a member of a Kibbutz, being in the Kibbutz, would not naturally say, "We derive vegetables from our Kibbutz." He would say, "Our Kibbutz produces vegetables" or "we grow vegetables in our Kibbutz", "grow" being

the etymological root also of the word "accrue". Put in a nutshell, I feel that one usually speaks of deriving things from abroad and not from home.

It might perhaps be argued that the order in which the words "accruing", "derived", "received" are placed is against this construction, and that if this construction were correct, then we should expect "accruing in" and "received in" to be placed together, as referring in both cases to money becoming available inside Palestine. It appears to me, however, that the words may quite well have been placed in their present order for another reason, namely, because both the expressions "accruing in" and "derived from" relate to money which comes in some way from inside Palestine, while "received in" may relate, and perhaps was intended primarily to relate, to money received from outside Palestine.

I have carefully considered Mr. Levin's contention previously referred to, but I do not think it can be maintained. I cannot read words into the Ordinance to support the case of Government. The only geographical limitation is in respect of the accrual, derivation or receipt of the income. The recipient is just "any person", wherever he may reside. The source is "any trade, business, profession or vocation", wherever it may be carried on. Mr. Levin wishes me to read "derived from Palestine" as meaning derived from a source in Palestine, which would lead to the result that while as regards income received in Palestine it might be in respect of a source inside or outside Palestine, yet as regards income derived from Palestine it must be from a source in Palestine. I can see no reason for adopting such a construction.

It follows, therefore, that the income in dispute, which accrued abroad, has not been received in Palestine, and is not derived from Palestine, is not chargeable.

The appeal is therefore allowed. I fix an inclusive sum of LP. 60 costs. Parties will agree assessment figure and lodge formal order.

Privy Council Appeal No. 69 of 1944.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

Before: Lord Uthwatt, Sir Madhavan Nair and Sir John Beaumont.

1947
12th June

Lord Uthwatt
Sir
Madhavan Nair
and
Sir
John Beaumont

PCA 69/44
Ahmad
and another
v
Ali
and others

MUHAMMAD ISSA EL SHEIKH AHMAD,
and another . . . . . *Appellants.*

v

ALI,
and others . . . . . *Respondents.*

Contracts — Damages — Contract indemnifying a party thereto for damages which may result from action by a third party — Amount of indemnity limited to a certain figure — Failure by indemnifying party to satisfy judgment obtained by third party against indemnified party — Party indemnified suffered loss by reason of sale in execution of his immovable property in satisfaction of third party's judgment — Action for unliquidated damages against indemnifying party — Admission by indemnified party that full consideration money received from indemnifying party — Whether such admission exhausts all the other terms of the contract of indemnity — Whether Article 112 of the Ottoman Civil Procedure Code applicable to the assessment of damages under such a contract — Whether amount of damages by reason of breach of indemnifying party limited to amount of guarantee.

By an agreement dated 12.11.33 the owners of certain lands undertook to sell a plot of land of theirs of about 5793 sq. pics to one Yacoub Haski. The agreed price was at the rate of 400 mils a square pic. Out of the purchase price which amounted to LP. 2317.200 mils Haski paid the sum of LP. 675. He also paid LP. 75 in respect of taxes on the land and LP. 300 by way of commission. The land was not transferred in pursuance of the agreement, and on 20.12.36 the owners entered into a further agreement with two persons to sell and transfer the same land to them at the same price of 400 mils a square pic less than what had been paid by Haski. By this latter agreement the owners were indemnified against any liabilities they might incur towards Haski under the agreement with him. (The relevant clauses of the agreement dealing with the obligations of the new purchasers are quoted in the judgment of the Privy Council reported hereinbelow). On 31.12.36 a petition signed by the vendors was presented to the Land Registry asking the consent of the Director of Land Registration to the sale, and the deed of sale of the same date witnessed that in consideration of the sum of LP. 3328.530 mils paid by the purchasers to the vendors, the receipt of which the said vendors on behalf of themselves and as agents acknowledged, the vendors asked for the transfer of the land to the purchasers. This deed concluded as follows:— "And the said vendors and purchasers declare that the consideration money expressed to have been paid is the true and full consideration money paid in respect of the sale." On that same date, i.e., 31.12.36, the land was duly transferred to the new purchasers. Haski then took proceedings against his vendors for breach of the contract,

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and on 28.3.38 obtained judgment for all amounts he had paid thereunder together with the sum of LP. 1000 found to be a genuine pre-estimate of damages fixed under the contract. Haski also took proceedings for the recovery of the amount of LP. 300 paid as commission. The judgment obtained was put in execution and a valuable property belonging to the vendors was sold in satisfaction by public auction. On 25.3.41 the vendors instituted proceedings in the District Court of Jerusalem (Civil Case No. 27/41) on the agreement of sale and indemnity with the new purchasers. The plaintiffs claimed LP. 1997, being the LP. 2017 mentioned in clause 3 of the agreement less LP. 20 allegedly paid by the defendants towards the judgment obtained by Haski, plus LP. 3000 stated in clause 10 to be previously fixed as liquidated damages. The claim was based on the allegation of breach of the agreement by failure to pay the amounts promised by the defendants to save plaintiffs from the results of the transaction entered into with the defendants through the action of Haski. The defendants denied that there was any such breach of the agreement and averred that all sums and the whole consideration mentioned in the agreement were paid to the plaintiffs. In their evidence the plaintiffs said that the sum of LP. 1642.200 mils, being the balance of the purchase price (the purchase price being LP. 2317.200 mils less LP. 675 the amount paid by Haski) was paid over to them when the deed of sale was made and not the sum of LP. 3328.530 mils. The defence, relying on C.A. 168/41, 8 P.L.R. 563, contended that the written admission by the plaintiffs in the deed of sale, in the absence of any allegation of fraud, could only be nullified by written evidence or an admission by the defendants. The District Court, constituted of the Relieving President thereof (Judge Bourke), distinguished C.A. 168/41 (supra) and held that in the circumstances it was not precluded from investigating the matter on the evidence before it, and having seen and heard the witnesses in the box, the Court held that the plaintiffs who gave evidence were speaking the truth and that it could not rely upon the testimony of the defendants. The Court then found the plaintiffs to be entitled to the sum of LP. 1997. With regard to the claim for LP. 3000 as genuine damages fixed in advance in clause 10 of the agreement, the Court held that that sum was a penalty and irrecoverable as such. The Court then proceeded to assess the damages suffered by the plaintiffs. On behalf of the defendants it was submitted that if damages were payable they could only be assessed on the basis of interest under Article 112 of the Ottoman Civil Procedure Code. The District Court refused that submission because the contract was one of indemnity and the defendants were obliged to save the plaintiffs from all harm. The Court accepted the figure LP. 6543 as a fair estimate of the property of the plaintiffs sold at LP. 3660 in execution in satisfaction of Haski's judgment. The Court found that the actual damages suffered by the plaintiffs amounted to LP. 3145.642, made up of LP. 2883, the difference between the value of the land as estimated, LP. 6543, and the price it fetched by public auction, LP. 3660, and of LP. 262.642 the difference between the sum Haski received, LP. 2279.642, and the LP. 2017 fixed in the agreement, but as the plaintiffs had waived their claim to LP. 145.642, the damages were assessed at LP. 3000. In the result the Court gave judgment against the defendants for LP. 4997. The defendants appealed to the Supreme Court (Civil Appeal No. 214/42). The Supreme Court sitting as a Court of Civil Appeal, constituted of Copland J. sitting alone, held that the District Court should have held that the sum of LP. 3328.530 set out in the deed of sale had in fact been received by the vendors, and deducting from this sum LP. 1642.200 which the vendors admitted in their evidence having received from the purchasers there remained a sum of LP. 1686.330 mils which the Court held should be set off against the contingent liabilities of the purchasers,

and as the purchasers had undertaken to indemnify the vendors up to a total of LP. 2017, there remained a balance of LP. 330.670 unpaid, and making an allowance of LP. 20 already paid to Haski by the purchasers as alleged by the vendors, the purchasers remained liable to the vendors in the sum of LP. 310.670 mils which was substituted for LP. 1997. As to the loss suffered by the vendors by reason of the forced sale of their property the Supreme Court held that the sum of LP. 262.642, the difference between the LP. 2279.642 paid to Haski in satisfaction of his judgment and the LP. 2017 which is the limit of the purchasers' liability under the indemnity clause should not be taken into consideration, and it found that the loss suffered by the vendors amounted to LP. 2883. In the result it varied the judgment of the District Court by entering judgment for the vendors for LP. 310.670 mils and for LP. 2883. The purchasers appealed to the Privy Council and the vendors cross-appealed. Before the Judicial Committee of the Privy Council the purchasers contended, firstly, that the agreement for sale could not by reason of the admissions in the Petition for Sale and the Deed of Transfer be proved, which contention they based on Articles 79 and 1588 of the Mejelle, and, secondly, that assuming the Agreement for Sale could be proved, no damages other than interest assessed under Article 112 of the Ottoman Civil Procedure Code were recoverable and if they were wrong on that, that the damages claimed in respect of the loss on the execution sale were too remote. The vendors disputed those two contentions.

In humbly advising His Majesty that the appeal be dismissed and the cross-appeal be allowed, the Judicial Committee of the Privy Council,

HELD (1) that the admission contained in the Deed of Transfer (the Judicial Committee disregarded the Petition for Sale since it was neither pleaded nor relied on in the lower Courts as an admission by the vendors in favour of the purchasers and were not prepared to allow the point to be taken at that stage), which was that the land was conveyed in consideration of LP. 3328.530 mils received by the vendors and followed by a statement that the "consideration money" expressed to be paid is the true and "full consideration money" paid in respect of the sale, could not be read as containing an admission that all the terms of the contract of sale had been satisfied and that admission, in view of the last sentence of the Deed of Transfer which made it acidly clear that only the money consideration paid in respect of the sale was included in the sum of LP. 3328.530 mils, was therefore impotent to put the contract out of consideration and the receipt clause related on its face only to what payment was made in respect of the transfer, not to the complete consideration receivable or received under the contract. The transfer was complete undoubtedly, but the consideration received or receivable on the occasion of the transfer did not as a matter of law necessarily exhaust the whole consideration received or receivable in respect of the sale. Therefore in this case the guarantees given by the purchasers to the vendors were on foot from the moment of the making of the contract for sale and did not arise by reason of the transfer. The transfer of the land was obviously not a complete performance of the contract, and the purchasers who breached the terms thereof were liable to the vendors in damages.

(2) that the contract between the parties was in substance a contract to indemnify and the damages arising from a breach thereof could not be assessed under Article 112 of the Ottoman Civil Procedure

Code, since a contract to indemnify, which on breach gives rise to a claim for unliquidated damages, is not an undertaking which amounts to a payment of money within the meaning of Article 112.

(3) that the damages claimed by way of loss suffered by the vendors from the forced sale through the Execution Office of their property in satisfaction of Haski's judgment, having regard to the terms of the contract and its implications, were not too remote as they were in the contemplation of the parties as likely to flow from breach of the obligation undertaken by the vendors to Haski.

(4) that the limit on the amount payable under the guarantee was irrelevant in measuring the damages for breach of it, because whether the contract between the purchasers and the vendors be read as a contract to indemnify the vendors at all stages or as a contract to indemify the vendors against the amounts due to Haski with a right in the vendors to fight Haski to such extent as they chose, the result was the same, inasmuch as on the first basis the damages claimed fell within the terms of the contract on its true construction and on the second they were damages which, on the facts found by the trial Judge, might reasonably be expected to have been in the contemplation of the parties.

The judgment of the Board was delivered by Lord Uthwatt.

Judgment: These are appeals from the judgment dated the 29th January, 1943, of the Supreme Court of Palestine sitting as a Court of Appeal, varying the judgment dated the 2nd October, 1942, of the District Court of Jerusalem. The action was an action for damages for breach of contract. The District Court awarded to the plaintiffs the sum of LP. 4997 by way of damages. The Supreme Court reduced the damages to LP. 3193.670 mils. The questions at issue under the appeal and cross-appeal relate to the existence of liability under the contract in suit and the damages proper to be awarded. The plaintiffs seek to have the judgment of the District Court restored. The defendants deny liability and contend further that, if they are liable, both Palestinian Courts assessed damages on a wrong principle.

The questions arise out of a contract for sale of land. The appellants (defendants in the action) were the purchasers under the contract and will be referred to as "the purchasers". The respondents (plaintiffs in the action) are as to some of them the vendors under the contract and, as to the rest, heirs of deceased original vendors. Nothing turns on the succession of interest and the original vendors and the respondents will be referred to as "the vendors".

The material facts are as follow:—

It appears that in 1933 the vendors agreed to sell certain land to one, Haski, who paid in LP. 675 in part payment of the

purchase price. By the contract they undertook to pay Haski LP. 1000 by way of liquidated damages if they breached the agreement. In addition to paying the LP. 675, Haski paid LP. 75 in respect of taxes on the land and commission of LP. 300 to one of the original vendors and Yousef, a son of an original vendor.

The land was not transferred to Haski and, on the 20th December, 1936, the vendors entered into the agreement to sell the same land to the purchasers.

The sale agreement (in which the purchasers are the party of the first part and the vendors are the party of the second part) first recites the area of the property (5,793 sq. pics 25c.), the transaction with Haski and an agreement to sell in consideration of 400 mils per sq. pic, by the LP. 675 paid to Haski.

It then recites as part of the consideration the following intended obligation of the purchasers:—

"2. To guarantee to Yacoub Haski or any person in his stead the liquidated damages, namely LP. 1000 together with the sum of LP. 675 paid by Yacoub to the second part out of the purchase price, which was accounted for the second part, and the sum of LP. 75 which was paid by the said Yacoub for Werko on behalf of the second part, and LP. 300 which was received by Mohd. Ali, one of the persons constituting the second part, and by Yousef Mohd., the son of Fatmeh, one of the persons constituting the second part, for their intervention in the sale of the same land to Yacoub Haski as aforementioned, in case Mr. Haski claimed the said sum from both of them and was legally proved, and to guarantee all the rights and damages which may be incurred by the second part in respect of the said agreement and what followed."

Clauses 1, 2, 3, 7 and 8 of the Agreement are as follow:—

"1. The second part undertakes to sell and transfer to the name of the first part at the Land Registry the above whole plot of land known as Kitat el Satel, provided that its area be not less than 5,793 square pics according to the plan which is at the Tabu, for the price of 400 mils each square pic and for the consideration mentioned in the preamble provided that the transfer takes place within a week after the removal of all the attachments and encumbrances existing on the land or which may arise or at any time the first part requires this after the removal of all the said encumbrances.

2. The first part undertakes to accept the transfer and to pay the second part immediately when the transfer of the land into his name is effected, the sum of LP. 1642.200 being the remainder of the purchase price of the whole plot of land taking into consideration the amount of LP. 675 paid by Haski out of the purchase price and received by the second part and which sum the first part guaranteed unto him together with other guarantees imposed on him and referred to in the preamble.

3. In the event Yacoub Haski or his representative claims from the second part and from the said Yousef a son of one of them, the

amount which they received as aforesaid and the said liquidated damages, the first part undertakes to guarantee and to pay all these amounts on behalf of the second part on condition that they will not exceed the amount of LP. 2017 excepting the expenses, costs and advocate's fees and provided that the first part will have no right of recourse against the second part and Yousef the son of one of them for any part of the amounts as they form part of the consideration in accordance with their agreement from now.

7. The second part undertakes not to sign any papers or undertakings to Mr. Yacoub Haski or anyone else which may affect this plot and undertakes in the event of being sued as aforementioned to notify the first part of it and he is not entitled to appoint any advocate in the circumstances in which it is deemed necessary without the consent and will of the first part on condition that all expenses and fees and advocate's fees required to oppose the claim and action arising therefrom in case the action is brought before the Courts, must be paid by the first part.

8. In order to secure the enforcement of the conditions of this agreement the first part undertakes not to let anyone be acquainted with the conditions of the agreement, nor to assign it to any one, nor to give a copy of same especially to the persons having connection with the second part, in respect of the land".

Clause 11 contained a stipulation for the payment of LP. 3000 by way of liquidated damages in the event of any breach by the purchasers of their obligations under the agreement.

Following on the Agreement a Petition signed by the vendors was presented by them to the Land Registry asking the consent of the Administration to the sale therein described.

The material clauses are as follow:—

"The aforesaid (i.e. the vendors) have agreed to sell the said property for the sum of LP. 3328 and 530 mils to Messrs. Mohamad Issa El Sheikh Ahmad and Stawri Slaheet, of Jerusalem, in equal shares.

We hereby apply for the consent of the Administration to the sale and we request that the said property be registered in their names in accordance with a deed of sale to be executed by us.

And the said purchasers have agreed to purchase the said property for the sum above-mentioned and we hereby request that the said property be registered in the names of Mohamad Issa el Sheikh Ahmad and Stawri Slaheet in equal shares.

And we the signatories to this document declare that all the above statements are true, that the consideration is truly and fully stated, and that, except as disclosed above, we are acting for ourselves alone and for no other person."

On the 31st December, 1936, the land was transferred to the purchasers. The transfer deed witnesses that "in consideration of the sum of LP. 3328.530 mils paid by" the purchasers, to the vendors "the receipt of which sum the said vendors on behalf of themselves and as agents hereby acknowledge" the

vendors transfer the land to the purchasers. It concludes with the following declaration:— "And the said vendors and purchasers declare that the consideration money expressed to have been paid is the true and full consideration money paid in respect of the sale."

In January, 1937, Haski sued the vendors for damages for breach of the contract for sale with him. In accordance with clause 7 of the contract the vendors reported the matter to the purchasers who appointed lawyers for the defence. The fees of the advocates were paid by the purchasers. Haski obtained judgment for LP.830 (stated by the Judge to be the amount proved to have been paid by him in respect of the land) and LP.1000 liquidated damages. The judgment is dated the 28th March, 1938.

Following on the judgment Haski obtained an order for payment of the debt by instalments. One instalment only was paid. That amounted to LP.20 and was paid by the purchasers. Evidence given on behalf of plaintiffs was to the effect that they did not pay because that was the purchasers' affair and in any event they had no money with which to pay.

Haski then took steps to enforce his judgment against the vendors and, in due course, obtained an order for sale of land belonging to them. The land was sold in the execution proceedings and realized LP.3660. Out of the proceeds Haski's judgment debt and interest were satisfied. The land was sold after the commencement of these proceedings brought by the vendors against the purchasers but before the case was heard.

In March, 1941, the vendors instituted the proceedings with which their Lordships are concerned. The vendors pleaded the contract, the failure to pay Haski and Haski's judgment, and alleged that by reason of the execution proceedings taken by Haski damage was thereby being caused to them. Their claim for damages was quantified as follows:—

(A) LP.1997 (i.e. LP.2017 less LP.20 paid to Haski under the judgment by the purchasers).

(B) LP.3000 as agreed and liquidated damages.

The amount claimed was, therefore, LP.4997. The purchasers by their defence joined issue on the allegation contained in the Statement of Claim, and pleaded that they had paid full consideration for the land. The claim for LP.3000 they submitted was a penalty.

Their Lordships find it unnecessary to deal in detail with the proceedings at the trial. The purchasers set up a substantive case (which they had not pleaded) to the effect that there had been an oral variation of the contract under which an additional sum was agreed to be paid to the vendors in lieu of the indemnity against Haski's claims. That additional sum, according to the evidence, was paid, and the difference between the contract price and the money consideration mentioned in the Deed of Transfer was part of the total sum paid. That total sum, in the course of the evidence of Stawri Slaheet, one of the purchasers, varied. From time to time different elements entered into its composition and occasionally the rules of arithmetic had to be neglected to produce the desired result. The Judge rightly refused to accept the story and faced with the purchasers' substantive case found as a fact that only LP.1642 was paid on the occasion of the sale.

The Judge further found that the value of the property of the vendors sold in execution for LP.3660 was for LP.6543. He accepted the evidence that in a Court sale by public auction in execution proceedings the full value was very seldom realized. That was, he held, common knowledge. The purchasers doubtless were aware of this, for one of them in association with a third party thought the circumstance of a Court sale warranted his making an opening bid of LP.960. The loss, the Judge held, was a direct result of the breach of contract.

The Judge took the view that he was not precluded by the terms of the Deed of Sale from deciding the case on the effect of the evidence. He further held that the sum of LP.3000 mentioned in Clause 11 of the Sale Contract was a penalty and no one doubts that he was right in so holding. He assessed damages as follows. He first awarded the vendors the maximum amount of the indemnity LP.1997 (i.e. LP.2017 less LP.20 paid by the purchasers to Haski). He then proceeded to assess the other damages as follows:—

Value of property sold in execution			LP.6,543
Deduct sum received on sale...		LP.3660	
Less amount paid to Haski ...	LP.2279.642		
After subtracting amount of indemity otherwise awarded	2017		
	262.642	262.642	
		3,497.358	3497.351
			3,145.64

Of this sum of LP.3145.64 the vendors waived LP.145.64 so as to reduce the damages under this head to the figure of LP.3000 mentioned in the Statement of Claim.

In the whole, therefore, the vendors recovered LP.4997.

From this decision the purchasers appealed to the Supreme Court. The points argued appear to have been confined to the question whether oral evidence was admissible to rebut the admission contained in the Deed of Transfer and to the question of damages. The Court was of the opinion that the trial judge erred in admitting evidence to contradict the terms of the Deed of Transfer and that the vendors were estopped from denying that they had received LP.3328 in cash. The Court further held that the vendors were not estopped from suing on the indemnity clauses contained in the contract.

The Court, however, took the view that the vendors must be taken to have received on account of the indemnity the difference between LP.3328 and LP.1642 the contract price for the land. That difference amounted to LP.1686.30. They could therefore recover only LP.2017 (the amont of the indemnity) less the set off of LP.1686.30 and the LP.20 paid by the purchasers. The result was that the purchasers on this head were awarded LP.310.620 in place of the LP.1997 awarded by the trial judge. In respect of the breach of the contract for indemnity the vendors were held to be entitled to damages assessed as follows:—

Value of property sold in execution	LP.6543
Less price obtained at sale	LP.3660
	LP.2883

The total sum awarded therefore amounted to LP.3193.

The appeals before their Lordships were argued on lines which appear to be in some respects different from those pursued in the Courts below though addressed to the same end. The purchasers contend that the sale agreement cannot by reason of the admissions in the Sale Petition and the Deed of Transfer be proved. The vendors dispute the conclusive effect in law of those admissions and further contend that in light of the substantive case put forward at the hearing by the purchasers those admissions cannot be relied upon by the vendors. Second the purchasers contend that, assuming the agreement can be proved, no damages other than interest are recoverable and if they are wrong on that, that the damages claimed in respect of the loss on the execution sale are too remote. Both these contentions are disputed by the vendors. The vendors and purchasers are agreed on the point that the LP.3000 provided for in clause 11 of the Sale Agreement is a penalty and not recoverable.

Their Lordships now turn to consider the contentions put before them.

The first contention of the purchasers is based on Articles 79 and 1588 of the Mejelle. They contend that the Petition of Sale and the Deed of Transfer contain admissions which bind the vendors and negative a sale on terms which contradict the terms of sale as gathered from those documents. Proof of the contract containing the stipulation sued upon was therefore precluded. In their Lordships' opinion the Petition for Sale and Deed of Transfer must be considered separately.

The Petition for Sale contains a statement that the vendors had agreed to sell the property for the sum of LP.3328.530 and a declaration made by all the signatories, who included both the vendors and purchasers, that the consideration was truly and fully stated. It may be that on its true construction the Petition for Sale, like the deed of transfer founded upon it, refers only to the cash consideration and not to the guarantees. But, however that may be, the Petition for Sale was neither pleaded nor relied on in the lower Courts as an admission by the vendors in favour of the purchasers, and their Lordships are not prepared to allow the point to be taken at this stage. The Petition may therefore be disregarded for all purposes.

As respects the Deed of Transfer the admission contained in it is that the land was conveyed in consideration of LP.3328.530 received by the vendors. This is followed by a statement that the "consideration money" expressed to be paid is the true and "full consideration money" paid in respect of the sale. Their Lordships are content to proceed on the footing that the vendors cannot deny that the sum specified in the receipt clause was received by them, but they do not read the conveyance as containing an admission that all the terms of the contract of sale had been satisfied. The transfer was complete undoubtedly; but the consideration received or receivable on the occasion of a transfer does not as a matter of law necessarily exhaust the whole consideration received or receivable in respect of the sale. In this case the guarantees were on foot from the moment of the making of the contract and did not arise by reason of the conveyance. The receipt clause relates on its face only to what payment was made in respect of the transfer, not to the complete consideration receivable or received under the contract. The last sentence of the Deed makes it acidly clear that only the money consideration paid in respect of the sale is included in the sum of LP.3328.530. This admission therefore is impotent to put the contract out of consideration.

It is convenient here to consider the effect of the admission contained in the Deed.

The Supreme Court took the view that the vendors should be treated as having in their hands the difference between the sum of LP. 3328.530 and LP. 1642 200 and that this difference should be treated as available as a set off against the contingent liabilities of the purchasers under the contract. Their Lordships are, as they have already stated, prepared to assume — they do not decide the point — that the first proposition is correct but they do not accept the second proposition. An obligation to apply overpaid monies in a particular way can only arise from an agreement express or implied. Here the terms of the contract are clear that the vendors are not to concern themselves with Haski's claims, and there are no circumstances from which a variation of that bargain can be inferred. The difference between the two sums, on the assumption made, stands nakedly as excess purchase money and for that matter money admitted by the purchasers to be paid in consideration of the transfer.

Their Lordships would add that the logical consequences of the Supreme Court's view would be that the execution sale was just as much the result of the failure of the vendors to apply money in discharge of Haski's claim as of the failure of the purchasers so to do.

The contract therefore is admissible in evidence as showing the transaction between the parties. The transfer of the land was obviously not a complete performance of the contract. The breach is obvious and the only remaining question is as to damages.

At the outset their Lordships would observe that the action is in truth only an action for unliquidated damages for breach of contract. The amount payable under the guarantee and the amount paid out of the vendors' assets to Haski is immaterial in assessing the damages. The limit of the guarantee is relevant only in considering whether or not there has been a breach by the purchasers of their obligations. The amount paid to Haski out of the vendors' assets would be properly considered as a separate item in an action for money paid to the use of another but in assessing damages for the breach of contract neither the upward limit of the guarantee nor the amount of the vendors' assets applied to the purchasers' purposes is relevant. The only question is: What damage — not being too remote — has been suffered by reason of the breach alleged and proved?

The first contention of the purchasers was that the damages should be assessed under Article 112 of the Ottoman Code of Civil Procedure.

That Article runs as follows:—

> "The damages awarded for failure to carry out the undertaking which amount to payment of money, is a judgment for the interest at the rate of 1 per cent. per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damage. If there is no agreement in the document (Sanad) regarding the interest and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim."

This contention of the purchasers found no favour either with the trial judge or the Supreme Court. Their Lordships agree with the view expressed by the Courts below that the contract is in substance a contract to indemnify. That contract might well be performed by satisfaction of Haski otherwise than by payment of money, despite the dissent of the vendors from that method of performance. A contract to indemnify such as is here present which on breach gives rise to a claim for unliquidated damages is not, in their Lordships' view, an undertaking which amounts to a payment of money within the meaning of Article 112. Their Lordships therefore find it unnecessary to express an opinion on the general question whether Article 112 applies only when the claim is a claim for damages arising from non-payment of a sum due as a debt.

The remaining question is whether the loss resulting from the execution sale is too remote to be taken into account in assessing the damages recoverable. Both the trial judge and the Supreme Court, taking the view that the contract was a contract of indemnity, held that the loss on the sale was a direct result of the failure to perform that contract. Their Lordships are in some doubt whether by the phrase "direct result" the Courts below meant to express the view that the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken. But their Lordships considering the matter from this aspect have come to the conclusion that the damages claimed are not too remote. The terms of the contract and its implications have to be weighed. Litigation by Haski against the vendors arising out of failure to pay Haski's claim was contemplated by the contract. Specific provisions directed to that litigation and its consequences are contained in clause 7. The purchasers were to play a definite part in it. Advocates for the vendors were to be selected and paid by the purchasers, not merely to oppose the claim, but also in respect of "action arising thereupon". The vendors' impecuniosity was not a separate and concurrent cause of the land being sold in execution, and the trial judge held, as has been stated, that it was

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common knowledge that on a forced sale full value was seldom realised. Whether the contract be read as a contract to indemnify the vendors at all stages or as a contract to indemnify the vendors against the amounts due to Haski with a right in the vendors to fight Haski to such extent as they chose, the result is, in their Lordships' opinion, the same. In any event the limit on the amount payable under the guarantee is irrelevant in measuring the damages for breach of it. On the first basis the damages claimed fall within the terms of the contract on its true construction and on the second they are damages which, on the facts found by the trial judge, might reasonably be expected to be in the contemplation of the parties.

Their Lordships quantify the damages as follows. The value of the land sold was LP.6543. Out of that sum the vendors have been paid, after meeting Haski's claims, the sum of LP.1065.869, and there remains in the Execution Office to their credit (subject to certain possible claims by Haski) LP.314.5. The loss they have suffered is therefore LP.5162.631.

The vendors' claim was, however, in the Statement of Claim limited to LP.4997.0 and that sum only can be recovered. Their Lordships would add that it was not contended by the purchasers that the damages recoverable were limited by the penalty clause and that the question of the interest, if any, carried by a judgment for unliquidated damages was not debated before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed and the cross-appeal be allowed, and that judgment be entered for the vendors for LP.4997 together with interest at such rate from the date of the judgment of the trial judge as is allowed by the Law of Palestine in respect of a judgment for unliquidated damages for breach of a contract to indemnify, and that the appellants pay the costs of the proceedings in the Supreme Court.

The appellants will pay the costs of the appeal and the cross-appeal.

Civil Appeal No. 5 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Curry Ag. J.

MOSHE NATHANIEL. . . . . *Appellant.*

Respondents.

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Contract — tenant com- he is not a by reason of n asked for.

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strict Court of constituted of the action in efendants had of the notarial 6.43, and that mises (Cinema ie defendants, housing it and on the ground, be tentamount on case before he injunction, oods or things building as a right to use ntory followed

HELD (1) that the facts and circumstances of the case were such that it would be more satisfactory and more proper to have specific claims formulated and determined, and therefore there was no reason why the discretion to grant the declaration asked for should have been exercised in plaintiff's favour, since if the declaration asked for were granted it would mean that the Magistrate's Court which is invested by law with the jurisdiction to entertain actions for eviction would simply have to order eviction and would have no real opportunity of exercising its jurisdiction.

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common knowledge that on a forced sale full value was seldom realised. Whether the contract be read as a contract to indemnify the vendors at all stages or as a contract to indemnify the vendors against the amounts due to Haski with a right in the vendors to fight Haski to such extent as they chose, the result is, in their Lordships' opinion, the same. In any event the limit on the amount payable under the guarantee is irrelevant in measuring the damages for breach of it. On the first basis the damages claimed fall within the terms of the contract on its true construction and on the second they are damages which, on the facts found by the trial judge, might reasonably be expected to be in the contemplation of the parties.

Their Lordships quantify the damages as follows. The value of the land sold was LP. 6543. Out of that sum the vendors have been paid, after meeting Haski's claims, the sum of LP. 1065.869, and there remains in the Execution Office to their credit (subject to certain possible claims by Haski) LP. 314.5. The loss they have suffered is therefore LP. 5162.631.

The vendors' claim was, however, in the Statement of Claim limited to LP. 4997.0 and that sum only can be recovered. Their Lordships would add that it was not contended by the purchasers that the damages recoverable were limited by the penalty clause and that the question of the interest, if any, carried by a judgment for unliquidated damages was not debated before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed and the cross-appeal be allowed, and that judgment be entered for the vendors for LP. 4997 together with interest at such rate from the date of the judgment of the trial judge as is allowed by the Law of Palestine in respect of a judgment for unliquidated damages for breach of a contract to indemnify, and that the appellants pay the costs of the proceedings in the Supreme Court.

The appellants will pay the costs of the appeal and the cross-appeal.

Civil Appeal No. 5 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Curry Ag. J.

MOSHE NATHANIEL. . . . . *Appellant.*

v

1. JOSEPH COHEN,
2. ABRAHAM CASPI,
3. JACOB BALABANI,
4. BENZION BORNSTEIN. . . . . *Respondents.*

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de Comarmond J.
and
Curry Ag. J.

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Declaratory judgment — Landlord and tenant — Contract — Action in District Court for judgment declaring that tenant committed a breach of the tenancy agreement and that he is not a statutory tenant — Dealings between parties complicated by reason of several agreements — Whether proper to grant declaration asked for.

Injunction — Action for injuction in respect of certain objects — Objects in question had previously been subject to a revocable licence — Whether proper to grant prayer — What must applicant for injunction do with regard to his demand.

In this appeal which was from the judgment of the District Court of Tel-Aviv given in Civil Case No. 117/45 whereby that Court, constituted of the Relieving President thereof (Judge Windham), dismissed the action in which the plaintiff prayed (1) for a declaration that the defendants had committed breaches of the main agreement of lease and/or of the notarial lease and/or of an agreement made between the parties on 28.6.43, and that the defendants were no longer statutory tenants of his premises (Cinema Esther at Tel-Aviv), and (2) for an injunction restraining the defendants, their servants, etc., from using the cooling plant and cellar housing it and from using any of the goods or things listed in the Inventory, on the ground, with regard to the declaration, that any such declaration would be tentamount to a declaration of the plaintiff's right to succeed in an eviction case before the Magistrate's Court, and on the ground, with regard to the injunction, that the cooling plant and the cellar housing it and the goods or things listed in the Inventory were essential for the operation of the building as a cinema and that therefore it was an implied condition that the right to use the cooling plant and the goods or things listed in the Inventory followed the lease, the Court of Civil Appeal,

HELD (1) that the facts and circumstances of the case were such that it would be more satisfactory and more proper to have specific claims formulated and determined, and therefore there was no reason why the discretion to grant the declaration asked for should have been exercised in plaintiff's favour, since if the declaration asked for were granted it would mean that the Magistrate's Court which is invested by law with the jurisdiction to entertain actions for eviction would simply have to order eviction and would have no real opportunity of exercising its jurisdiction.

(2) that an applicant for an injunction should formulate his demand clearly and without ambiguity, and a Court does not grant an injunction where it is not certain that such injunction can be successfully carried out or enforced. In this present case the appellant was entitled to an injunction with regard to the cooling plant and the cellar housing it, but not with regard to the goods or things listed in the Inventory because an injunction in respect thereof was not essential and because there was no sufficient data to sort out the welter of articles mentioned in the Inventory and to discover which could be moved out of the premises.

Referred to: Barraclough v. Brown & others (1897) A.C. 623.

Grand Junction Waterworks v. Hampton, U.D.C. (1898) 2 Ch. 331.

Hanson v. Radcliffe U.C. (1922) 2 Ch. at p. 507.

Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd. (1921) 2 A.C. 438.

Discussed: Guaranty Trust Company of New York and Hannay & Co. (1915) 2 K.B. 536.

The history of the dispute between the parties appears from the judgment.

E. D. Goitein for appellant.

M. Eliash and M. Scharf for respondents.

de Comarmond J: This is an appeal from a judgment of the Tel-Aviv District Court delivered on the 12th December, 1945, in an action brought by the present appellant against the present respondents. The action was dismissed by the learned Relieving President (now President) of the said Court.

There are nineteen grounds of appeal, the seventh and eighteenth being identical, and several others being redundant or unnecessarily prolix. I do not propose to deal separately with each ground of appeal and it will be sufficient to mention that they may be grouped under three main heads, namely the refusal of the Court below to grant two injunctions, the refusal to grant certain declarations, or in the alternative to order the payment of a sum of LP. 8500 alleged to be due to the plaintiff-appellant.

It would be impossible to deal with this appeal without first stating the main facts which gave rise to the litigation.

The starting point is an Agreement executed on the 18th December, 1940, between the plaintiff-appellant of the one part and the four respondents of the other part. That document

(marked P/1) shows that the present appellant agreed to lease to the respondents the premises known as the Esther Cinema for a period of 3 years expiring on the 31st December, 1943, at a rent of LP. 200 per month. It was specified in that Agreement (hereinafter referred to as "the main Agreement") that certain portions of the premises, notably the cellar in which the cooling plant (i.e. the air-conditioning plant) was housed, were not to be included in the lease. It was also specified that the cooling plant and numerous other articles (including the chairs and other furniture) mentioned in a list called "the Inventory" were the property of the appellant and that the respondents had no rights whatever in these articles except the right to use them according to the provisions of the main Agreement. Then the main Agreement sets out the undertaking given by the present respondents that they would execute a deed of lease (hereinafter referred to as the "notarial lease") and also a special Agreement concerning the use of the Inventory and cooling plant by way of loan. That special Agreement was to contain the condition that the lessor (i.e. the present appellant) would be entitled to resume possession of the Inventory and of the aforesaid plant should there be a breach of any of the conditions of the main Agreement: no specific consideration was mentioned in respect of the use of the Inventory, etc.

The notarial lease (marked P/2) was duly executed. The special Agreement concerning the Inventory was never executed but the lessees (i.e. the respondents) nevertheless enjoyed the use of the furniture and appliances listed in the Inventory.

I should here mention the fact that prior to 1944 the Rent Restrictions (Business Premises) Ordinance, 1941, did not apply to premises leased for a period of three years or more.

In 1943, it would seem that the respondents began negotiations in order to secure the continuation of their lease which, it will be remembered, was to expire at the end of December, 1943. Also, in June 1943, the present appellant (i.e. the lessor) notified the respondents that he had decided to withdraw the licence for the use of the furniture, machines, and other movables which were on the premises. The outcome was that on the 28th June, 1943, a memorandum (P/7) was signed by the four respondents and initialled by the appellant to the effect that agreement had been reached for the purchase by the respondents for the sum of LP. 8500 of all the furniture, machines and all movables in the Esther Cinema; it was further agreed that an eight year lease would be granted and would run as from 1st January, 1944, at a monthly rent of LP. 250. The lease was to contain conditions specified in a draft to be sub-

mitted by the appellant. Document P/7 also made reference to the participation of one Mr. Messa (a relative of the appellant's) in the business. As will appear later, this reference meant that the appellant had stipulated that the respondents should form a company, of which Mr. Messa was to be a member. I should perhaps mention that the description of P/7 set out above is not to be taken as expressing my interpretation of the contents thereof; the defendants-respondents have put forward several arguments regarding the validity and true meaning of P/7 and have, *inter alia*, stressed the fact that the so-called agreement purported to be made by the Cinema Esther company (or group) whereas the company had not yet come into being.

The respondents did form a company which was registered in December, 1943.

The notarial lease expired on the 31st December, 1943, and on the 2nd January, 1944, the appellant (i.e. the lessor) requested the respondents to vacate the premises. On the same day, the appellant was served with a notarial notice sent at the request of the four present respondents (but not at the request of the new company). That notice (D/3) is important. It recited that a company had been formed at the appellant's request for the purpose of the execution of the proposed contracts, lease and other documents; that the documents had been prepared prior to the formation of the company and that the appellant had agreed to execute them subject to alterations of the wording thereof; that the appellant was however attempting to change the conditions of the proposed lease; that the respondents were prepared to perfect the agreement arrived at. The said notice called upon the appellant to fix within four days the date on which the documents would be executed, failing which the agreement would be considered as broken; but it also contained the intimation that the appellant could not oppose the use of the premises by the respondents, and the latter forwarded with the notice a cheque of LP. 250 for the rent in respect of January, 1944.

At this juncture it is advisable to assess the position of the parties between the 1st and the 6th January, 1944: the latter date being of importance because by reason of a Defence Regulation which came into force on the 6th January the operation of the Rent Restrictions (Business Premises) Ordinance was extended to premises leased for three years or more.

At the expiry of the notarial lease the appellant was entitled to resume possession of his premises. There was, it is

true, the rather incohate agreement embodied in P/7 which had not, however, been implemented and it was for the respondents to take steps to enforce their rights, if any. No steps were taken by the respondents because they jumped to the conclusion after the 6th January, 1944, that the new Defence Regulations had made them statutory tenants. It would seem that the appellant had not been at all anxious to implement P/7 prior to the expiration of the notarial lease, and, in fact, he endeavoured to secure the eviction of the respondents on the ground that the lease had come to an end. In this endeavour, the appellant at first succeeded after obtaining from the High Court an order to the effect that the Defence (Amendment of Rent Restrictions (Business Premises) Ordinance, 1941) Regulations, 1944, published on 6.1.44 had no retrospective effect and did not affect leases which had expired prior to that date. Unfortunately for the appellant, the decision of the High Court was given on the 8th August, 1944 (H.C. 41/1944, 11 P.L.R. 438) and on that very same date a further Defence Regulation was published (Gazette Extraordinary No. 1350, Supplement No. 2, page 753) declaring that the previous Regulations applied even to tenancy agreements which had expired prior to the preceding 6th January. On the strength of the last mentioned Regulations, the respondents went to the High Court (H.C. 105/44) and obtained an order to the effect that eviction could not be carried out in view of the new legislation (11 P.L.R. 437). I would mention that the question whether these Defence Regulations were *intra vires* is no longer of interest inasmuch as section 5 of the Ordinance No. 20 of 1946 has validated them.

To conclude my review of the salient features of the case I will mention a notarial notice served in November, 1944, on the four respondents and on the Cinema Esther Company by the appellant. In that notice (copy of which marked D was annexed to the statement of claim) the present appellant averred that the parties named in the notice had purchased the furniture, machines etc. in June 1943 for LP. 8500 (this is obviously a reference to document P/7); then the notice referred to the fact that prior to June, 1943, there had been a breach of the original main Agreement because the present four respondents had not entered into a special agreement for the use of the said furniture, machines etc. and of the cooling plant. The notice then proceeded to assert that as a result the original main Agreement had been violated and also the respondents were indebted in the sum of LP. 8500 to the present appellant. The notice also brought up that the respondents had agreed to pay LP. 250 rent as from January, 1944, and had failed to do so except in respect of January. The notice wound up with

a demand for payment of LP.8500, in default of which the original main Agreement would be treated as having been broken and eviction would be sought. The same threat was made if the key of the cellar housing the cooling plant was not handed back. Lastly, the notice required the respondents to pay rent at the rate of LP.250 per month, in default of which recovery of possession would be applied for.

It would, I believe, be advisable to point out at this stage that the appellant evinced in the notarial notice D a very confused state of mind. He was mixing up the original main Agreement and notarial lease with the proposed new arrangement outlined in P/7 which had not been implemented when he took steps in January, 1944, to secure eviction on the ground that the original lease had lapsed by effluxion of time. It must, in this connection, be borne in mind that the respondents had by notarial notice D/3 served on the 2nd January, 1944, called upon the appellant to honour the engagements mentioned in memorandum P/7: this forceful invitation was not subsequently pressed because the respondents felt quite safe after the 6th January, 1944.

After this rather lengthy, but necessary, review of the main features of the case, I will now turn to the Statement of Claim which cited as defendants the four present respondents both in their personal capacity and as representing the Esther Cinema Company. As to the latter capacity, I need only say that the defendants denied that they were to be identified with the Company; so far as I am concerned there the matter rests, and as no one seems to have been concerned with the point whether the Company was involved in the litigation it is not for me to labour it.

The plaintiff's prayers in his Statement of Claim were that the defendants, their servants etc. be restrained from:

(a) using the cooling plant and the cellar housing it;

(b) using any of the goods or things listed in the Inventory.

Then the plaintiff prayed the Court to declare that the defendants had committed breaches of the main Agreement and/or of the notarial lease and/or of the agreement made on the 28th June, 1943 (i.e. the agreement set out in P/7). Furthermore, the plaintiff also prayed for a declaration that the defendants were no longer the statutory tenants of the Cinema Esther.

In the alternative, there was a prayer for judgment in the sum of LP.8500 being the purchase price of the furniture, movables, etc. which the plaintiff alleged had been acquired from him by the defendants.

I propose to deal first with the declarations. The learned President in the Court below relied on the case of Barraclough v. Brown & ors. (1897) A.C. 623 for the proposition that a party should not come to a higher Court for a declaration of his right to recover where such party is compelled by statute to resort to a lower Court. The learned President also relied on Grand Junction Waterworks v. Hampton U.D.C. (1898) 2 Ch. 331 where Stirling J. expressed the view that where a Court is asked to make a declaration without giving any consequential relief, the Court ought to be extremely careful not to make a declaration in the absence of very special circumstances. On the strength of these two cases the President refused to make any of the declarations prayed for on the ground that any such declaration would be tantamount to a declaration of the plaintiff's right to succeed in an eviction case before the Magistrate's Court; the learned Judge had also present in his mind the possibility that one result of any such declaration would be to strengthen plaintiff's hand in bringing pressure to bear on the defendants.

Mr. Goitein has cited the case of the Guaranty Trust Company of New York and Hannay & Co. (1915) 2 K.B. 536 on this question of declaratory judgment in support of his submission that the decisions quoted by the learned President had been superseded by later decisions. It is true that the Guaranty Trust case widened the field for the making of declarations, but I do not understand it as overruling the aforementioned principle established by the Barraclough case. Thus I find at p. 567 of the report that Pickford L.J. mentions the Barraclough case as being one in which there was a true want of jurisdiction to make the declaration because the right to decide the dispute as to the particular subject matter had been taken away by statute from the High Court as a Court of first instance and given to a lower tribunal. The Guaranty Trust Company case is most interesting inasmuch as Bankes L.J. held that relief may be granted by way of declaration although a legal cause of action is not established, and also stated that "relief" is not confined to relief in a cause of action. In the same case, however, Buckley L.J. held that a declaration could not be made unless founded on facts which, if true, show a cause of action, but Pickford L.J. followed the same line of reasoning as Bankes L.J. In the case of Hanson v. Radcliffe U.C. (1922) 2 Ch. at page 507 Lord Sterndale expressed the opinion that the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is only limited by its own discretion, which, of course, should be exercised judicially. I might mention one more English decision on the

subject of declaratory judgments because it bears some resemblance to the present case. It is the case of Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd. (1921) 2 A.C. 438. The facts were that the English bank had obtained a loan from a Russian bank on the security of certain bonds. The difficulty that arose was whether the loan was repayable in sterling or in roubles. Instead of proceeding for redemption in Chancery (in which case it would have had to offer to pay the sum found due by the Court), the English bank sought a declaration in the King's Bench Division in order to ascertain whether it had to pay roubles or sterling. Without going into all the intricacies of that case, I need only say that the House of Lords clearly expressed the view that it was to be regretted that the prayer for a declaration had been entertained by the King's Bench Division.

In the present case, there is no doubt that the local law has invested the Magistrates' Courts with jurisdiction to entertain actions for eviction, and such actions are in fact very common. There is also no doubt that the resorting to the District Court for the declaration or declarations prayed for by the plaintiff-appellant would, if any such declaration were granted, mean that the Magistrate would simply have to order eviction and would have no real opportunity of exercising his jurisdiction. I am therefore not prepared to agree that in the present case there is any reason why the discretion to grant a declaration should have been exercised in plaintiff's favour; in fact I doubt whether it would have been proper to do so. I consider that the facts and circumstances of the present case are such that it would be more satisfactory and more proper to have specific claims formulated and determined. The circumstances I have in mind are those I have already described in connection with the attitude and manoeuvring of both sides from June, 1943 to January, 1944. I would mention that I have not lost sight of the fact that after the 6th January, 1944, the respondents were no longer anxious to have a new lease etc., but on the other hand, I bear in mind that the appellant showed no inclination whatever to sign the documents implementing the memorandum P/7 and that he waited until November, 1944, before he thought of invoking breaches of the main Agreement. I therefore am not prepared to reverse the refusal of the Court below to make any or all of the declarations asked for although my reasons are not quite the same as those stated by the learned President in paragraphs 3, 4 and 5 of his judgment.

I will now deal with the grounds of appeal relating to the refusal of the Court below to grant the injunctions prayed for.

In this connection, there has arisen a difficulty due to the fact that the case was begun before the Acting Relieving President (Judge Hill) who proceeded to try one separate issue, namely, the prayer for an injunction restraining the defendants (now respondents) from using the cooling plant and the cellar in which it is housed. The respondents' advocate, Mr. Eliash, has submitted that the decision on that issue having been given in July, 1945, the time for appealing had lapsed. Mr. Goitein, on the other hand, has drawn attention to the fact that he had asked Judge Hill to grant an interlocutory injunction because the case was going to be adjourned until after the long vacation. I need only say that it is regrettable that the course of isolating and determining one of many issues should have been resorted to so light-heartedly. The result has been to cause a certain amount of confusion. However, I accept Mr. Goitein's submission that no decision from which he could appeal as of right was in fact given by Judge Hill. This latter reserved the question of costs until final conclusion of the case and Mr. Goitein has rightly pointed out that no "decree" could have been drawn up after Judge Hill's decision. I therefore hold that the appeal may be heard on all the grounds put forward.

Judge Hill refused to grant an injunction with regard to the cooling plant and the cellar, and I understand that his reason for doing so was that the cooling plant was essential for the operation of the building as a cinema and that therefore it was an implied condition that the right to use the plant followed the lease. I do not see any justification for such a finding. It is not at all clear from the evidence that the cinema cannot be used without the cooling plant. On the contrary, the owner of the Eden Cinema (Mr. Visser) has testified that when he was manager of the Esther Cinema he sometimes ran it without using the cooling plant whenever neighours complained of the noise or when business was bad. But the decisive factor on this point is that the parties made it as clear as possible in the main Agreement that the cellar and the cooling plant were not to be included in the lease and that the use thereof and of the so-called Inventory would have to be provided for in a special and separate agreement. I am of opinion that the appellant is entitled to succeed on this part of the case because the right granted to the respondents to use the cellar and the cooling plant was nothing more than a licence which lapsed, at the latest, when the contractual tenancy came to an end. The remedy applied for is a proper one in the circumstances of the case.

With regard to the injunction prayed for in respect of the so-called Inventory, the learned President adopted the views

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already expressed by Judge Hill. For the reason I have already given, I do not agree with the reasoning of the learned President because I do not consider that a statutory tenant is entitled to have included in the statutory tenancy objects which had previously been the subject of a revocable licence. This does not necessarily mean that an injunction should have been granted. Attention must be given to the nature and situation of the articles and goods mentioned in the Inventory. On behalf of the respondents it has been submitted that the grant of such an injunction would be unreasonable because it would make it impossible for the respondents to use the premises unless the articles were moved out. For example, if the use of the chairs in the auditorium were prohibited, no cinema performance could be given. Mr. Goitein, for the appellant, has obviously felt the force of this argument and he countered it by saying that the chairs are not fixtures and that a court may always modify the terms of an application for an injunction. I have however reached the conclusion that the present case is not a proper one for the exercise of our powers under rule 350 of the Civil Procedure Rules, 1938: firstly because I do not consider that an injunction is essential and secondly because we have no sufficient data to sort out the welter of articles mentioned in the Inventory and to discover which could be moved out. I would add that the applicant for an injunction should formulate his demand clearly and without ambiguity, and also that a court does not grant an injunction where it is not certain that such injunction can be successfully carried out or enforced.

The only grounds of appeal which remain to be considered are those concerning the claim of LP.8500 for the furniture, machines etc. (i.e. the articles mentioned in the Inventory). The learned President dealt with this part of the case in paragraphs 6 and 7 of his judgment. In para. 7 he gives three reasons for rejecting the claim. The first reason is that P/7 is not a contract but an "aide memoire". With respect, I fail to appreciate the magic of this distinction. The second reason is that it was not the respondents as individuals who undertook to buy the furniture etc., but it was the proposed company which did so. I agree that there is lack of certainty as to the status of the parties who purported to become purchasers but I do not find it necessary to try and unravel the tangle. The third reason is the one which I consider very material, namely that the buying of the furniture was linked with the granting to the company of an eight years' lease (which never materialised). Leaving aside the imperfections of P/7, I agree with the learned Relieving President's interpretation that the buying of the furniture and the grant of the lease were linked up and cannot be separated. I therefore uphold the decision of the lower Court on this point also.

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In conclusion, the appellant succeeds on one point, namely the grant of an injunction prohibiting the respondents from using the cooling plant (i.e. the air-conditioning plant) and the cellar containing it situate on the premises known as the Cinema Esther, at Tel-Aviv.

The decision of the Court below is accordingly set aside and the appellant is hereby granted the injunction prayed for in respect of the cellar and of the cooling plant as more fully set out above. The appellant is granted costs of this appeal to the following extent: a sum equal to one-half the costs on the lower scale together with LP.15 advocate's attendance fee.

Curry Ag. J: I concur.

Civil Appeal No. 134 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Hubbard J.

GEORGE QAISAR HABIB GHULMIYEH. . *Appellant.*

v

KEREN KAYEMETH LEISRAEL Ltd. . . *Respondent.*

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Immovable property — Awlawiyeh — Whether a claimant of right of awlawiyeh bound to prove satisfactorily the value of the land at the time of the claim — Ottoman Land Code, Article 41.

In Land Case No. 11/44 of the Land Court of Haifa, Ghulmiyeh claimed certain shares in certain lands by awlawiyeh. The plaintiff gave evidence on his own behalf as to the value of the shares claimed by awlawiyeh and called as witness a licensed land valuer. The Land Court, constituted of the President thereof (Judge Bourke), dismissed the action on the ground that the evidence adduced by the plaintiff did not enable it to arrive at the value of the shares claimed with anything approximating certainty. The plaintiff appealed.

In allowing the appeal and remitting the case to the Land Court with directions to determine the value of the shares at the time of the claim and to give judgment after giving both parties the opportunity of calling witnesses and submitting arguments, the Court of Civil Appeal,

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HELD *(per de Comarmond J.)* that the essential ingredients of Article 41 of the Ottoman Land Code having been proved, the Land Court was not right in dismissing the action for awlawiyeh on the ground that it was not satisfied that the plaintiff had not established sufficient data to enable it to fix the value of the shares at the time of claim, because the law does not lay down that the plaintiff must establish the correct valuation or fail. The Court had been supplied by the plaintiff with certain data as to value, and, in the absence of any data supplied by the defendant, it should have fixed the value on the available data, or should, at least, have indicated that it wanted further enlightenment.

(per Hubbard J.) that the Land Court was correct in holding that it was for the plaintiff to show the value of the land, if, by that, it meant that the plaintiff must prove a value which the Court, acting on the principle of a mere preponderance of probability, could accept as the value of the land, since without proof of value the Court could not order the restitution of the land.

Hanna Atalla for appellant.

J. Feiglin for respondent.

de Comarmond J: This is an appeal from a judgment of the Land Court of Haifa in Land Case 11/44, whereby an action brought by the appellant was dismissed.

The action was for the enforcement of the right of prior purchase established by Article 41 of the Ottoman Land Code.

The learned President held that the plaintiff-appellant had proved that he was co-owner of a certain property, that the defendant had bought shares in the said property from another co-owner without the plaintiff-appellant's consent, and, finally, that the plaintiff-appellant had brought the action within time. Judgment was not, however, given in plaintiff's favour because the learned President considered that the evidence adduced by the plaintiff did not enable him to arrive at the value of the shares "with anything approximating to certainty".

Article 41 lays down that where an owner of an undivided share in miri land transfers his share by way of gift or for consideration without the leave of the persons jointly interested, the latter have the right within one year to claim from the transferee restitution of the share on paying to such transferee the value at the time of the claim.

The plaintiff gave evidence as to the value at the material time, but admitted that he did not know all the property. His valuation was LP.7 or LP.8 per dunam. The learned Judge stated that he could attach no weight to that evidence.

The plaintiff also called a licensed land valuer who gave his estimate as being LP.8 per dunam except for one parcel

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which he valued at LP.12 per dunam. The learned President attached no weight to the land valuer's evidence and even expressed a doubt as to whether he had ever visited the land. The learned Judge's strictures are, to a certain extent, justified because the witness admitted that he had valued the land itself without paying much attention (if any) to trees growing thereon and even to buildings.

The extraordinary feature in this case is that the defendant called no evidence.

The question to be decided is whether the Court below was right in dismissing the action.

Put shortly, the appellant's submission is that his right of prior purchase having been duly established, he cannot be deprived of it because the Court considers that he has not proved satisfactorily the value of the land at the time of the claim. The learned advocate for the appellant pointed out that he could not foresee that the Judge would find the evidence insufficient.

Is it incumbent on the plaintiff to prove how much he has to pay to the defendant to compensate the latter? Put like this, the question seems illogical, because it is obvious that it is in the plaintiff's interest to set the value as low as possible. As a matter of fact, Article 41 does not in any way warrant the view that the plaintiff must establish the correct value or fail; had it done so, it would have expected too much of the generosity and fairness of human nature.

The correct view, in my opinion, is that once the essential ingredients of Article 41 have been proved, as they were in the present case, the question of value is ancillary. It is obvious that it is in the interest of the plaintiff to help the Court, because until he knows what he has to pay, he cannot exercise his right. But it is very important for the defendant to see to it that a proper value be fixed.

I must now decide whether the learned President was right to take the step of dismissing the action on the ground that he was not satisfied that the plaintiff had established sufficient data to enable the Court to fix the value of the shares at the time of claim. In my opinion, the learned Judge was not justified in dismissing the action. He had been supplied by the plaintiff with certain data as to value, and in the absence of any data supplied by the defendant he should have fixed the value on the available data or should, at least, have indicated that he wanted further enlightenment. The crux of this case

is that the law does not lay down that the plaintiff must establish the correct valuation or fail. Furthermore, there is the principle that a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision in civil proceedings (see Best on Evidence, 12th Edition, pages 82 and 95).

For the foregoing reasons I am of opinion that the finding of the Court below to the effect that the plaintiff had failed to prove the element of value cannot stand and the decision must therefore be set aside and the case remitted back to the Court below with directions to determine the value of the shares at the time of claim and to give judgment after giving both parties the opportunity of calling witnesses and submitting arguments. I order accordingly and allow the appellant costs of this appeal on the lower scale and LP.10 advocate's attendance fee.

Hubbard J: I concur in the result, but I have two comments to add. In the first place, I am of opinion that the learned trial Judge was correct in holding that it was for the plaintiff to show the value of the land, if, by that, he meant that the plaintiff must prove a value which the Court, acting on the principle of a mere preponderance of probability, could accept as the value of the land. Without proof of value the Court cannot order the restitution of the land; the defendant has no desire to sell his land and if he thinks that the plaintiff has failed to tender evidence of value on which the Court can act, there is no reason why he should himself call evidence. It is, therefore, in my view, incumbent on the plaintiff to prove the element of value as part of his case.

Secondly, I wish clearly to reserve my opinion on the question whether the plaintiff must prove the value of the land claimed as a whole and not merely a rate per dunam. The learned Judge referred to this matter in his judgment, but he merely said: "I leave aside the rough and ready method employed of attempting to give a value merely per dunam". He did not base his judgment on this point, nor did Mr. Feiglin, who appeared for the respondent, support the judgment on this ground. I would point out, however, that there are two separate sales involved in appellant's claim under Article 41: one on 1st April, 1943, the other on 28th April, 1943. In each of those two sales the respondent company purchased from co-sharers of the appellant shares expressed in fractions whose numerators run into hundreds and whose denominators run into tens of thousands. These shares are shares in seven different parcels lying in four different blocks. The shares and

the areas of the parcels are shown in Exhibits A.1-A.4. No doubt it is possible from these particulars to calculate the area in dunams purchased out of these seven parcels on each of the two occasions, to add those areas together, and then, a rate per dunam having been accepted, to calculate the total value of all the land. But it seems to me a matter for argument, if it is still the tendency of this Court to give the law a strict and narrow construction, whether a plaintiff who merely proves a price per dunam in such circumstances can be said to have proved the value of the land. A "badl il misl" is the value of a whole thing and not a value per unit of that thing.

This ground, however, as I have said, was not relied on by the trial Judge, nor was it argued by the respondent before us. I therefore concur in the judgment just delivered.

Civil Appeal No. 119 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.
Before: de Comarmond J. and Hubbard J.

1. GUISEPPE VINCENTI,
2. RAHME VINCENTI. . . . . *Appellants.*

v

1. JOHN (HANNA) ASFOUR,
2. MICHEL ABU FADEL,
3. ADIB MICHEL ABU FADEL,
4. MAJID MICHEL ABU FADEL,
5. REGISTRAR OF LANDS, HAIFA. . . . *Respondents.*

Action, Cause of — Jurisdiction — Dismissal — Action in Land Court for cancellation of registration alleged to be void — Application for dismissal of action — Verbal request at hearing of application to amend statement of claim — Dismissal of action on grounds, inter alia, that Court not satisfied that it had jurisdiction and that the cause of action not properly set out — Whether Court correct in dismissing action — Civil Procedure Rules, 1938, Rules 21 and 21A.

Guiseppe and Rahme Vincenti owned in Haifa (1) a house comprising six shops and two staircases in the first floor, fifteen rooms and accessories in the second floor, and sixteen rooms and accessories in the third floor and (2) a plot of land adjacent to the above building. These properties were mortgaged a first and a second mortgage to two different persons. At the outbreak of war with Italy in June, 1940, the owners of the above properties

were interned, they being of Italian nationality. Soon thereafter the mortgagees applied for the sale of the mortgaged properties. On 25.7.40, Hanna Asfour was appointed receiver of the above properties until 5.5.43. Sale proceedings took their course and on 9.10.42 Michel Abu Fadel made a bid of LP. 10000 on behalf of an undisclosed principal which he on 14.10.42 raised to LP. 11000, and on 15.10.42 the President of the District Court ordered registration. On the application of Michel Abu Fadel, the properties were registered in the name of Hanna Asfour as to one-half and in the names of Michel Abu Fadel, Adib Michel Abu Fadel and Majid Michel Abu Fadel as to the other half in equal shares. After their release from internment, Guiseppe and Rahme Vincenti brought an action in the Land Court of Haifa (Land Case No. 9/45) against the purchasers and against the Registrar of Lands, Haifa, in which they asked for the rectification of the entries made in the Land Registry of Haifa. As against the purchasers they asked for the cancellation of their registration on the ground that the registration was void because a receiver is not allowed to purchase property which he is appointed to administer, either by himself or through a nominee, and that the consent of the Custodian of Enemy Property to the transfer was not obtained as required by paragraph 6 of the Trading with the Enemy (Custodian) Order, 1939. As against the Registrar of Lands, they prayed for an order requiring him to rectify the Land Register of Haifa by striking out the registration of the purchasers-defendants and by reinstating plaintiffs on the Register as owners of the properties. A defence was filed and sometime ater a motion was made to the Court for the dismissal of the action on the grounds that the Court had no jurisdiction to try the action, that the action was barred in that it had been brought after the registration in the name of defendants, that the formalities prescribed by the Crown Actions Ordinance had not been complied with and that the plaintiffs had not alleged the facts necessary to support the reliefs claimed by them or any relief at all. At the hearing of the motion counsel for plaintiffs submitted that if it was necessary the pleadings would be amended to allow justice between the parties to be done. The Land Court, constituted of the Acting Relieving President thereof (Acting Judge Ross), dismissed the action because (1) it was not satisfied that it had jurisdiction to try the case, (2) the cause of action was not properly made out, and (3) the provisions of the Crown Actions Ordinance had not been complied with. The plaintiffs appealed.

In allowing the appeal and remitting the case to the Land Court with the direction that an amended statement of claim may be filed, the Court of Civil Appeal,

HELD that the Land Court was wrong in dismissing the plaintiffs' action on the defendants' application for its dismissal on the grounds: (1) that it was not satisfied that it had jurisdiction to try the case; (2) that the cause of action was not properly set out; and (3) that the provisions of the Crown Actions Ordinance had not been complied with; because as to the first ground, the Court did not clearly hold that the case was outside its jurisdiction and when a Court in such a case says that it is not satisfied it does imply that it is not quite certain, and it is difficult to accept that where a plaintiff avers that the sale and transfer of his property is void, he is not raising the issue of ownership; and because, as to the second ground, the plaintiffs did disclose a cause of action and opportunity should have been afforded to the plaintiffs to amend the statement of claim, which they asked for, in order to bring out more clearly what remedy they were praying for and against whom.

Approved: CA 237/43.
Netz v. Ede, 174 L.T.R. at p. 365.

Referred to: Nugent v. Nugent, (1908) 1 Ch. D. 546.

M. Smoira and F. Rosenblueth for appellants.

First respondent in person.

A. Wittkowski for 2nd, 3rd and 4th respondents.

Ne appearance by fifth respondent.

Judgment: This is an appeal from a decision of the Acting Relieving President of the Haifa Land Court, in Land Case No. 9/45, whereby he dismissed an action brought by the present appellants. A motion for dismissal was made by four defendants to the action on four grounds, namely, that the Court had no jurisdiction, that the action was barred because it had been brought too late, that the formalities prescribed by the Crown Actions Ordinance had not been complied with, and lastly that the plaintiffs "had not alleged the facts necessary to support the relief claimed by them or any relief at all."

There were five defendants. The first four moved the Court praying for dismissal. The fifth defendant (the Registrar of Lands, Haifa) took no part in the proceedings before the lower Court or before us.

The first remark I wish to make is that there is a difference between Rules 21 and 21A of the Civil Procedure Rules, 1938. The former provides for the striking out of a statement of claim on certain specified grounds, one of which being that the statement of claim does not disclose a cause of action; the latter provides for the dismissal of a case on the ground of res judicata, lack of jurisdiction, and other grounds. It is obvious that the difference between striking out of a statement of claim and the dismissal of an action is a very important one, and I am not sure that the learned Judge in the Court below did pay sufficient attention to that difference. As the action was dismissed, I must assume that the order was made under Rule 21A.

The three grounds upon which the order was made were stated by the learned Judge as follows:—

"(i) I am not satisfied that this Court has jurisdiction to try the case;

(ii) The cause of action is not properly made out; and

(iii) The provisions of the Crown Actions Ordinauce have not been complied with."

The wording of the first ground is rather vague and therefore unsatisfactory, because it does not state definitely whether the finding was that the Court had no jurisdiction.

The second ground does not go so far as to declare that no cause of action was disclosed.

The statement of claim sets out that the appellants were the registered owners of a certain immovable property which was mortgaged. In 1940 they were interned because they were Italian nationals, and the mortgagees applied to the Court for an order for the sale of the property. The first four respondents became the purchasers, and an order was made directing the Registrar of Lands, Haifa, to register the property in their names. The plaintiffs-appellants aver in their statement of claim that one of the purchasers had been appointed receiver under Section 14 of Chapter 81, as amended by Section 2 of Ordinance 39 of 1939, and could not in the circumstances be a purchaser without leave of the Court (Nugent v. Nugent, 1908, 1 Ch. D. 546). The plaintiffs also averred that the consent of the Custodian of Enemy Property had not been obtained for the transfer, as required by Article 6 of the Trading with the Enemy (Custodian) Order, 1939. These averments do, in my view, disclose a cause of action, but I must concede that some difficulty does arise when one is faced with the prayers at the end of the statement of claim, which were that the 5th defendant, i.e. the Registrar of Lands, be ordered to rectify the Land Register by striking out the registration of defendants 1 to 4, and by reinstating the plaintiffs on the register as owners of the property. The plaintiffs also prayed for such other relief as the Court might deem fit. Before the lower Court the plaintiffs' advocate seems to have realised that an amendment of the statement of claim was necessary.

I feel I must refrain from indicating what, if any, change should be made. I must confine myself to decide whether the learned Judge below was right in dismissing the action.

As already mentioned, the Court below did not clearly hold that the case was outside its jurisdiction. When a Judge in such a case says that he is not satisfied, it does imply that he is not quite certain.

I find it difficult to accept that where a plaintiff avers that the sale and transfer of his property is void, he is not raising the issue of ownership, and I therefore consider that the first ground given by the learned Judge cannot be sustained. I would here mention that in Civil Appeal 237/43, the Supreme

Court allowed an appeal from a dismissal of a claim by the same learned Judge (then Chief Magistrate) in circumstances somewhat similar to the present case.

With regard to the cause of action, I have already indicated that, in my opinion, a cause of action was disclosed, and I have mentioned that the plaintiffs' advocate himself asked for leave to amend the statement of claim in order, no doubt, to bring out more clearly what remedy he was praying for and against whom. Was it reasonable to refuse him the opportunity of doing so? I am of opinion that the opportunity should have been afforded him. Rules 21 and 21A of the Civil Procedure Rules are no doubt very necessary and useful, but on the other hand, great care must be taken when exercising the powers given by these rules. In this connection I would invite reference to the remarks of Wynn-Parry J. in Netz v. Ede, L.T.R., Vol. 174, at page 365.

It is not without interest to note that the defendants 1 to 4 did not move to have the statement of claim dismissed or struck out when they were served with it; they filed a statement of defence, and only had recourse to the aforesaid rules at a later stage. Their move resulted in an application by the plaintiffs to amend the statement of claim, and in the circumstances I consider that the application to amend should have been granted. In the case of Netz v. Ede already cited, the learned Judge at the end of his decision stated that he had no doubt that the action could not possibly succeed and that he would strike out the statement of claim, subject to any application which plaintiff's counsel might make for leave to amend.

It remains to mention the third ground given by the learned Judge below for dismissing the action, namely, that the provisions of the Crown Actions Ordinance had not been complied with. This obviously refers to the fact that the Registrar of Lands at Haifa had been cited as one of the defendants. I consider that it is not desirable at this stage to give a ruling on the question whether the procedure traced out by the Crown Actions Ordinance need be followed in the circumstances of this case, because the application for leave to amend was, I gather, made with the object, inter alia, of clarifying the position of the fifth defendant in the case.

I therefore conclude that the proper decision in this case would have been to grant leave to amend. I need hardly add that the defendants will be fully entitled to file a new statement of defence or to take such other steps as they may deem fit when the amended statement of claim is served on them.

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The decision of the Court below is set aside, and the case remitted back with the direction that an amended statement of claim may be filed not later than ten days from the date of this judgment, if delivered in presence of the appellants, or within five days from the notification of this judgment, if delivered in their absence.

As regard costs, if the appellants succeed ultimately, they will have one set of costs here on the lower scale, with an advocate's attendance fee of LP.10 against respondents 1 to 4 jointly and severally. If the respondents 1 to 4 ultimately succeed, then respondent No. 1 will have costs on the lower scale, and respondents 2 to 4 will have one set of costs on the lower scale and LP.10 advocate's attendance fee.

Income Tax Appeal No. 24 of 1946.

In the Supreme Court sitting under Section 53(1) of the Income Tax Ordinance, 1941.

Before: Curry Ag. J.

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20th June

Curry Ag. J.

ITA 24/46
Nagler
v
Assessing Officer,
Lydda District

WOLF NAGLER. . . . . *Appellant.*

v

ASSESSING OFFICER, LYDDA DISTRICT. *Respondent.*

Revenue — Income tax — Purchase of shares in a company cum dividend — Whether assessee entitled to set off extra price paid for the shares cum dividend against the actual dividend received.

By virtue of an agreement dated the 19th November, 1941, Nagler purchased from Hegmoni all the shares, investments and rights of the latter in the Shamir Diamond Enterprise Ltd. He paid Hegmoni LP. 1000 for the goodwill; LP. 679.436 a loan by Hegmoni to the company; LP. 750 for the shares and LP. 750 on account of the profits made by the company which represented the dividends which had accrued to Hegmoni as shareholder. On the 4th October, 1942, the company declared in respect of the shares bought by Nagler a dividend of some LP. 2500. The Assessing Officer held this sum to be chargeable income. The assessee contended that LP. 750 of the amount of LP. 2500 should be chargeable to Hegmoni as dividend paid to him under the agreement. The Assessing Officer did not agree with Nagler's contention. Nagler appealed.

In dismissing the appeal, the Court,

HELD that under the Income Tax Ordinance, 1941, which contains no special provisions concerning the sale of shares cum dividend, the appellant, who purchased cum dividend Hegmoni's shares in the Shamir Diamond Enterprise Ltd., could not set off the extra price he paid for the shares

cum dividend against the actual dividend received, and the particular wording of the agreement between Nagler and Hegmoni did not matter, for Nagler could not contract out of the Ordinance. Nor could the vendor, Hegmoni, be asked to pay tax on the amount he received in respect of interest accrued due, although he showed the LP. 750 as income, because in fact the LP. 750 was not income but part of the considerations for the purchase of the shares.

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Approved: Commissioners of Inland Revenue v. Forest, 28 Digest, 111 C.

Wigmore v. Thomas Summerson & Sons Ltd. (1926) 1 K.B. 131.

S. Wolf for appellant.

A. Wittkowski for respondent.

Judgment: This is an appeal from the assessment of the Assessing Officer of Tel-Aviv.

The appellant entered into an agreement dated 19.11.41 with a Mr. Hegmoni to buy the shares of the latter in Shamir Diamond Enterprise Ltd. The purchase price for those shares was stated to be as follows:

(a) LP. 750 for the shares
(b) LP. 1000 for the goodwill
(c) LP. 679.436 — a sum loaned to the Co. by Hegmoni
(d) LP. 750 on account of the profits.

Clause 4 provided that in consideration of the above Hegmoni would transfer the shares. On 4.10.1942 the Co. declared a dividend of some LP. 2,500 which the Assessing Officer held to be chargeable income. The appellant's contention is that LP. 750 of that amount should be chargeable to Hegmoni as dividend paid to him under their agreement.

It is true that the Income Tax Ordinance contains no special provisions concerning the sale of shares cum dividend but there cannot be any argument that a dividend is chargeable income and if one buys shares in the ordinary way on the Stock Exchange one naturally pays more for those shares cum dividend than ex dividend, and there is nothing in the Ordinance which enables one to set off the extra price one is naturally paying when buying cum dividend against the actual dividend received. That clearly is the general principle. The next thing is to consider whether in view of the terms of the agreement between the parties this case can be distinguished therefrom. Prior to 1927 the English Income Tax Law, like ours, had no special provision regarding the purchase of shares cum dividend. One is therefore, in my opinion, fully justified in looking at the

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English Cases on this point. In the Commissioners of Inland Revenue v. Forest 1924 (28 Digest 111C), "A" purchased shares for a sum exceeding their par value by £.50 — the excess in the contract to be paid "to cover the portion of the dividend accrued to date". "A" contended that of the dividend so receivable on his shares £.50 should be treated as capital in view of the terms of the contract of purchase and should not be included in the computation of his income. The facts there are almost identical with our case.

Again in Wigmore v. Thomas Summerson & Sons Ltd. 1926 1 K.B. 131, it was contended by the Revenue Authorities that when a security passes by sale during the currency of an interest period, an apportionment must be taken of the income, the seller being assessed on the income accrued up to the date of sale. In other words it was the reverse side of our case for there it was contended that part of the purchase price received by the seller should be chargeable for tax as it included interest rights. It was held that the increase in price received by the seller by reason of the interest accruing is not "interest" within the meaning of the Act and therefore not liable to tax. I do not think it is necessary for me to repeat the arguments to be found in those cases but they merely support my view and the general principle that if you receive the dividend, that is a receipt of taxable income and you cannot set off the extra amount you paid for the share on account of the accrued interest. It matters not what is the particular wording of the agreement into which you have entered with the vendor, you cannot contract out and the dividend remains chargeable income and until some amendment is made in the law, as was done in England in 1927, the appellant cannot claim that the vendor shall pay tax on the amount he has received in respect of interest accrued due. I cannot agree with the appellant that there is a gap in the law. It may be that as the law stands at present cases such as these may arise which result in hardship to the purchaser. That is capable of adjustment by the legislator as in England, but it would be wrong for me to try to take this case out of the law and treat it as an exception.

As Mr. Wittkowski quite rightly argued, the law as it stands, would not permit of their claiming the tax from Hegmoni although he shows the LP. 750 as income because in fact it is not income but part of the consideration for the purchase of the shares.

For the foregoing reasons this appeal must be dismissed with costs fixed at LP. 10.

Civil Appeal No. 371 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal

Before: The Chief Justice and Abdulhadi J.

JOSEPH GOLDZWEIG. . . . . *Appellant.*

v

1. ISAAC TRUBOVITZ,
2. SARAH TRUBOVITZ. . . . . *Respondents.*

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and
Abdulhadi J.

CA 371/46
Goldzweig
v
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and another

Landlord and tenant — Eviction — Action for eviction of tenant on ground that premises reasonably required by the landlord for the occupation of himself — Whether trial Court, even if satisfied of reasonable requirement of premises by landlord and of availability of alternative accommodation, entitled to refuse eviction — Rent Restrictions (Dwelling Houses) Ordinance, 1940, Section 8.

A landlord commenced proceedings in the Magistrate's Court of Tel-Aviv (Civil Case No. 1041/45) for the eviction of his tenants on the ground that he reasonably required the premises for the occupation of himself. The flat in which defendants lived consisted of five rooms and conveniences together with a store room on the roof, while the flat occupied by plaintiff and which was offered as alternative accommodation consisted of four rooms and conveniences. The Magistrate found that the case was being fought by the two families who live on a high level and struggle hard to keep their standard of living, that an order given or not given for eviction would not cause a fundamental difficulty as to necessaries, and that the case was being fought as regards the question who was to forego certain conveniences. He then went on to hold that the premises were reasonably required by the landlord, but that the alternative accommodation offered would reduce the defendants' standard of living by moving from a flat of a medium size of category "A" to a flat of a medium size of category "B". The Magistrate then put to himself the question: To whom the greatest damage would be caused if eviction was or was not ordered. He answered that question in favour of the tenants and refused to ordered eviction; his reason for the refusal being that if the defendants were ordered to leave the flat occupied by them, the result would be the abolishing of the cabinet room and many superb articles of furniture of defendans' cabinet, as well as the bunch of other articles would have to be stored. The landlord appealed to the District Court of Tel-Aviv (Civil Appeal No. 11/46) and that Court (Judge Cheshin and Acting Judge Kantrovitch) dismissed his appeal. He appealed to the Supreme Court by leave. The principal point in the appeal was whether according to Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, a Magistrate, although he may be satisfied that premises are reasonably required by their landlord and there is alternative accommodation available, has still a discretion to refuse to order eviction by considering the question of balance of inconvenience.

In dismissing the appeal, the Court of Civil Appeal,

HELD that according to Section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, a Magistrate, although he may be satisfied

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that the premises are reasonably required by a landlord for the occupation of himself and that there is alternative accommodation available, has a latitude to decline to make an order for eviction if he comes to the conclusion that in all the circumstances such an order would not be reasonable.

Followed: Chiverton v. Ede, (1921) 2 K.B. 30.

Explained: CA 140/46, 14 P.L.R. 207.

E. D. Goitein for appellant.

M. Scharf for respondents.

Judgment: This is an appeal from the District Court of Tel-Aviv which sitting in its appellate capacity dismissed an appeal from the Magistrate, Tel-Aviv, refusing to issue an eviction order under the Rent Restrictions (Dwelling Houses) Ordinance against the respondent.

The case has been fought out in three Courts with all the tensity which those eviction cases evoke. In regard to the persons who should be considered as constituting the respective families for the purposes of this action, and in regard to the details of furniture and division of living space in each of the flats, we accept the finding of the lower Courts. Only one issue therefore remains for this Court to consider. Indeed, Mr. Goitein quite rightly confined his main appeal to this issue; it was whether the Magistrate was entitled to take into consideration the elements which he did in arriving at his conclusion. Mr. Goitein's contention is that the Magistrate was influenced throughout by a consideration of the principles embodied in the "Greater Hardship Clause" which appears in English legislation and which, he alleges, has no part in the Palestine Rent Restrictions (Dwelling Houses) Ordinance. He referred us to C.A. 140/46. Now it is true that if one sentence of this judgment were taken away from its context it would appear to be an authority for Mr. Goitein's proposition. But a careful perusal of the learned Judge's judgment does not permit us to attach the same interpretation to the sentence as Mr. Goitein does. It is quite clear that in that case the Appeal Court reversed the Magistrate's Court's judgment because they were unable to find that there was any justification for its conclusion that the person applying for eviction had acted capriciously. We think that the purport of the decision in C.A. 140/46 was that on the facts of that case no question of balance of inconvenience did arise. It seems to us that s. 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance gives such a wide discretion to the Magistrate as would entitle him to give consideration to

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the balance of inconvenience between the parties. In the case of Chiverton v. Ede, 2 K.B. 1921, it was argued that a County Court Judge was wrong because he took into account the fact that the order for possession if made would oblige the defendant to get rid of some of her furniture. On appeal it was held that if the County Court Judge, in the exercise of his general discretion under the Clause, considered that it would not be reasonable to make the order asked for, he was entitled to look upon all the circumstances including the fact that the defendant had this furniture. According to the section 8(1)(c) the Judge, although he may be satisfied that the premises are reasonably required and that there is alternative accommodation available, has still a latitude to decline to make an order for eviction if he comes to the conclusion that in all the circumstances such an order would not be reasonable. As in the case of Chiverton v. Ede it seems to us that in this case both the Magistrate's and the District Courts had materials upon which to act and we cannot see that they decided inconsistently with any principle of law.

For these reasons the appeal must be dismissed. Costs at the lower scale to include LP.10 advocate's attendance fee.

Civil Appeal No. 153 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Hubbard J.

MAHMUD NADIM HABBAB,
and others. . . . . *Appellants.*

v

GOVERNMENT OF PALESTINE,
and others. . . . . *Respondents.*

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de Comarmond J.
and
Hubbard J.

CA 153/46
Habbab
and others
v
Government of
Palestine
and others

Immovable property — Mewat land — Quickening of mewat land — Facts to be taken into consideration when dealing with the question of issuing a kushan for such land — Ottoman Land Code, Articles 6 and 103 — Mejelle, Articles 1051, 1270, 1275 and 1276.

In this appeal from the decision of the Land Settlement Officer, Jaffa Settlement Area, in Case No. 20/Jaffa Sand Dunes, which turned mainly on the question of quickening of the sand dunes south of Jaffa, the Court of Civil Appeal, in setting aside so much of the Land Settlement Officer's decision as affected the claims of the appellants to land in blocks 7122, 7123 and block 7125, and remitting the case back for further investigation and

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fresh determination in the light of the views expressed in its judgment on the question of what amounts to revival,

HELD that when the grant of a kushan for revived land is considered by Government, credit should not be given to a state of things which has ceased to exist, in other words, a right to a kushan does not become indefeasible as soon as mewat land has been reclaimed; the principle is that the cultivation or other mode of vivification of mewat land must be kept up or be in existence at the time when a claim for a kushan is made, and any revival, or momentary revival, of mewat land, unaccompanied by any claim or request for a title-deed, does not automatically alter the category of that land to miri. When considering such questions of revival of mewat land, the methods of which are laid down in Articles 1275 and 1276 of the Mejelle, the nature of the so-called revival is of great importance.

Approved: CA 226/42, 10 P.L.R. 302.

Explained: Kyriako v. The Principal Forest Officer, 3 Cyprus Law Reports, p. 87.

The relevant facts and submissions appear from the judgment.

B. Joseph and M. Caspi for appellants.

M. Doukhan for the Government of Palestine.

E. Georges Elia for three of respondents — rest did not appear.

Judgment: This is an appeal from a decision given by the Land Settlement Officer on the 27th February, 1946, in Case No. 20/Jaffa Sand Dunes.

The settlement proceedings began in 1936, and the appellants together with numerous other persons presented claims in respect of Blocks 7122, 7123 and 7125. The appellants and a man named Yusuf Abdallah Sulk were grouped together as the fourth group of plaintiffs; Yusuf Abdallah has been named as respondent in the present appeal. The defendant in the settlement proceedings was the Government of Palestine. There was also a "third party", but his interests do not affect the lands claimed by the present appellants.

At the hearing of this appeal respondents Nos. 7, 8 and 56 chose to be represented, and their advocate sided with the appellants, except on a certain matter of res judicata in connection with a judgment of Judge Ongley, to which further reference will be made later.

The plaintiffs in Group IV put in a claim for the whole of parcels 1 to 8 and parcel 11 in Block 7122, parcels 1 to 9 in Block 7123, and plaintiffs 9 to 12 (i.e. appellants 1 to 3 and

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respondent No. 84) claimed one-half of parcels 1, 2, 3, 5, 10, of Block 7125. The Settlement Officer rejected their claims in so far as Block 7125 is concerned, but granted them —

45	dunums	in	parcel	5	of Block	7122
8	,,	,,	,,	3	,, ,,	7123
25	,,	,,	,,	4	,, ,,	7123
30	,,	,,	,,	5	,, ,,	7123
108	dunums					

It should be explained that the land in dispute forms part of the sand dunes south of Jaffa.

From certain documents produced to the Settlement Officer it would appear that on or about 1912 the Turkish Administration had given some attention to the advisability of reclaiming the sand dunes and stopping the sand drifts which threatened cultivated lands. To that end, inhabitants of the neighbouring town of Jaffa and of certain villages were encouraged to revive the land, and it would seem that efforts were made to plant the sand dunes with fruit trees and eucalyptus. For the purpose of this appeal, however, I deem it unnecessary to go back further than 1921, because no title deed had by that time been issued in respect of the land in dispute, nor had the land been assigned ab antiquo to the use of the inhabitants of any town or village.

A great part of the controversy in the present appeal may be summarised in the following question: "When does 'mewat' land cease to be so?" I propose dealing with this question at the very outset, and thus dispose of one of the important grounds of appeal.

Mewat (dead) land is defined in Articles 6 and 103 of the Ottoman Land Code, and also in Article 1270 of the Mejelle. It is not disputed in the present case that sand dunes, in their original state, fall within the definition in so far as the nature of the ground is concerned. In the Land Code and Mejelle there are several provisions concerning the "revival" or "vivification of dead land. According to Article 1051 of the Mejelle, to revive land is to render it arable. According to Articles 1275 and 1276 of the Mejelle, this can be effected in the following different ways: (a) by sowing seed; (b) by planting trees; (c) by ploughing the land; (d) by irrigating it or establishing on it irrigation canals and channels; (e) by building a wall round the land, or by raising its level; and (f) by digging ditches so as to protect it from flooding (vide Nejib Chiha's "Traite de la Proprieté Immobiliere en Droit Ottoman", 1906 Edition, page 115).

Broadly put, the position under the Ottoman law was that a person could apply to the Sovereign or his representative for

permission to revive land, and when he did obtain permission and then revived the land, he would obtain a title to it as mulk land or miri land, according to the terms of the permission granted (vide Chiha, pages 113-114). The Settlement Officer, in paragraph 25 of his decision, has stated that the plaintiffs admitted that the land was mewat and that they were prepared to pay Badl Misl. Therefore we need only consider whether the land became miri land, i.e. we are mainly concerned with the Ottoman Land Code. Article 103 of that Code, as it originally stood, was to the effect that a person who has broken up and cultivated mewat without leave of the Official (meaning an official of the Land Registry Office) had to pay the tapu value of the land before receiving a title-deed (kushan). The Land (Mewat) Ordinance, which was enacted in 1921, altered the last paragraph of Article 103 and provided that a person who breaks up or cultivates mewat without permission cannot obtain a title-deed and is liable to prosecution for trespass. That same Ordinance, however, enacted that a person who had already cultivated mewat without obtaining authorisation "shall notify the Registrar of the Land Registry within two months of the publication of this Ordinance, and apply for a title-deed".

As will soon become apparent, an interesting question raised in this appeal is whether a person who has revived mewat is entitled to a kushan as from the time of such revival, whether or not he has allowed the land to return to waste before a kushan is in fact issued. I understand the relevant provisions of the Land Code and of the Mejelle to be that the fact of revival must be established in order to justify the issue of a kushan, the effect of which is to lift up the land into the category of state land (i.e. miri). Dr. Bernard Joseph, for the appellants, has submitted to us that the Settlement Officer misdirected himself by interpreting too slavishly a pronouncement of Judge Blake-Reed's, quoted in the case of Krikorian v. Attorney-General and others, 10 P.L.R., 302, 304, which reads as follows:—

> "Cultivation, in my opinion, must be effective ... and maintained. Operations must be carried out which result in a permanent and definite change in the quality of the land. ... The question whether cultivation has been in fact achieved must be decided with some sense of proportion. Obviously, a man cannot claim that he has revived a large tract of land by the planting of a single tree, or a tree at each corner."

I am prepared to agree with Dr. Joseph that the Settlement Officer went too far when he stated in paragraph 34(3) of his decision that he would not consider the cultivation of

cereals and vegetables in pockets of good land within the sand dunes to be effective revival, unless it was accompanied by real reclamation work to fix the sand and render such pockets permanently cultivable. I hasten to add, however, that the Settlement Officer was expressing his views objectively, and probably intended to convey that in the particular claim he was investigating, it was not sufficient for the claimant to rely on the fact that at one time the land had been planted with short-term crops, which leave no trace behind and have no lasting effect. I would say that the correct view is that the nature of the so-called revival is of great importance: if revival is claimed on the strength of permanent or at least durable works, such as irrigation channels, it is obvious that the claimant may rely on his achievement for obtaining a kushan, although he may have carried out the work months or even years ago. Where, however, the claim is based on the cultivation of land, such cultivation must be kept up and be in existence in order to justify the grant of a kushan. When the cultivation consists of short-term crops, it seems to me that the person who asks for a kushan cannot rely on the fact that in days gone by he did succeed in raising one or two crops, and then allowed the land to revert to its original uncultivated state. It seems to me that the general scheme of the law in Turkish times was that a piece of land became registered as miri when there was a strong likelihood that it was going to be productive and yield tithes; if subsequently such land was allowed to remain unproductive, it became subject to the right of tapu, and if not claimed by the former possessor it was put up to auction (Article 68 of the Ottoman Land Code).

I am therefore of opinion that where the Settlement Officer was not confronted with the averment that short-term crops had been consistently raised on the land, he was justified in holding the view that such past effort was not sufficient unless accompanied by durable reclamation works. Where, however, the land had been successfully planted with trees which were still in existence, or had been kept regularly planted with crops, I consider that it was not justifiable to insist on the existence of special works destined to stop sand drift (provided, of course, that the trees constituted a reasonably dense plantation). Where, for example, a man successfully raises crops on land that is liable to flooding, I am not prepared to agree that the fact of revival would be deniable because protective works against flooding have not been constructed. I would also mention that the Settlement Officer should have borne in mind the provisions of Article 1273 of the Mejelle regarding pockets of mewat surrounded by revived land, and should also have endeavoured to

ascertain whether young trees had in fact been planted to replace those which had died since 1921 (i.e. whether such young trees were or were not part of a scheme of revival which had been begun prior to 1921).

To sum up this first part of my judgment, I will say that I cannot uphold the contention that when the grant of a kushan is considered by Government, credit must be given to a state of things which has ceased to exist, or in other words, I do not take the view that as soon as mewat has been reclaimed, a right to a kushan becomes indefeasible.

I am not unmindful of the very interesting views contained in the judgment of the Supreme Court of Cyprus in the case of Kyriako v. The Principal Forest Officer (Vol. III, page 87) where the distinction is made between mewat reclaimed with or without permission. In the latter case the Cyprus Court held that the Government was not bound to grant a kushan; in the former case the Cyrpus Court took the view that where mewat land was cultivated with permission, the regulations applicable to other cultivated land are to be applied to it (see page 98 of the report). Even if one accepts such a view, I do not understand the Cyprus case to go so far as to upset the principle that the cultivation or other mode of vivification must be kept up or be in existence at the time when a claim for a kushan is made. Anyhow, the decision which I must respect is that in Civil Appeal 226/42 (already quoted) where this Court rejected the submission that any revival, or momentary revival, of mewat unaccompanied by any claim or request for a title-deed automatically alters the category of that land to miri.

I will now refer to certain happenings of importance which took place from 1921 onwards.

In 1921 an Ordinance known as the Land (Mewat) Ordinance was enacted, and was published on the 1st March, 1921. Section 2 of that Ordinance substituted a new paragraph in lieu of the last paragraph of Article 103 of the Ottoman Land Law. The effect of the new provision was that a person breaking up and cultivating waste land without the consent of Government would obtain no right to such land, and would be liable to prosecution for trespass. Section 3 of the Ordinance provided that any person who had already cultivated waste land without authorisation had to notify the Registrar of the Land Registry within two months of the publication of the Ordinance, and apply for a title deed. Then in the Official Gazette of the 25th August, 1921, there appeared a notice directing applications to be made to the Director of Lands for kushans obtainable on

payment of Badl Misl within two months from the 25th August, 1921, after proving that the land was planted. Lastly, in a notice published in the Official Gazette No. 56 of the 1st December, 1921, there was a notice to the effect that an Inspector of the Land Department would be a member of each Demarcation Commission appointed to demarcate mewat lands, mahlul lands, etc., and that persons who had cultivated mewat lands would be issued with a kushan for the cultivated area on payment of Badl Misl in accordance with the Mewat Land Ordinance. On the 12th January, 1922, the Habbabs and Dajanis lodged their application for kushans (see Exhibit IV/9/21, folio 2). No query seems to have been made regarding the date of lodging of the application, and I need not therefore devote attention to that point.

On the 23rd April, 1923, one Yusuf Thabit, an Inspector of Lands, reported that he had inspected the land and found that approximately three-quarters of it had trees on it, and that the trees had been planted prior to 1921. That report, says the Settlement Officer, made no mention of the density of the plantation. The report is folio 5 of exhibit IV/9/21. I might here mention that one of the appellants, Selim Dajani, went further than Yusuf Thabit and deposed to the effect that all the land was under plantation in 1921.

In 1922 Mr. Ongley, who was Director of Lands, became President of the Land Court at Jaffa, and it would seem that he transferred the applications lodged in the Land Registry to the Land Court and adjudicated upon them, although the Government was not made a party. The lands with which we are concerned were dealt with in Land Case 149/22, and on the 25th October, 1922, the Land Court, composed of Mr. Ongley and another member, decided that the land claimed should be registered in the name of the applicants. (It seems clear that Judge Ongley purported to decide the case even before Inspector Thabit had made his report). On the 14th of February, 1923, the Government entered an opposition to the so-called judgment, and applied for the registration to be stayed and also asked that the Department of Lands be made a party to the action. The hearing of the opposition was commenced on the 6th of April, 1923, when it was adjourned to 30.6.23, and no further proceedings took place subsequently. In another similar case the Government took the matter to the Supreme Court, where it was held that the matter was an administrative one and the so-called judgment of the Land Court was quashed (Supreme Court Case No. 161/23). In 1924 Mr. Doukhan, on behalf of the Government, submitted an application addressed to the

President of the Land Court of Jaffa for case No. 149/22 to be struck out. Judge Tute decided that the case had not been presented according to law, and in view of the judgment of the Supreme Court above referred to, he struck out the case with leave for the parties who had applied for a kushan to raise a fresh action by following the proper procedure. Unfortunately, Judge Daoudi, who sat with Judge Tute, did not sign the judgment owing to an oversight, and it was only in March, 1930, that he appended his signature to the judgment with a note explaining what had happened. In the meantime, in 1925, the applicants started a new action in which they explained all that had happened before, but as they failed to comply with an order of the Court to produce a plan of the land showing what part of it had been planted, the new action was struck out. They were, however, given the right to renew the action within three months, but they never did. The next move for the granting of kushans in respect of the land was made in 1936 when settlement proceedings began.

It was part of the case submitted on behalf of the present appellants to the Settlement Officer that the judgment given by Judge Ongley still held good and entitled them to registration. The Settlement Officer rejected that submission. Mr. Joseph has submitted to us that the Ongley judgment in Land Case 149/22 had never been quashed by the Supreme Court and that the decision of the Supreme Court in a similar case did not entitle Judge Tute to strike out the said Land Case 149/22. The view I take is that the Supreme Court in 1923 did rule that the proceedings before Judge Ongley were not judicial proceedings, and I see no reason why such a pronouncement should not affect all similar cases. I should perhaps mention, at this stage, that no issue has been raised regarding the propriety of the Settlement Officer (and not the Director of Lands, as prescribed by the Gazette Notice of 1921) deciding that land has been revived, and I need not therefore consider the problem, if problem there be, the more so as the Government has not raised the question. Anyhow, again quoting Civil Appeal No. 226 of 1942, I would mention that the Supreme Court there said the following:-

> "It appears that the appellants, or at least some of them, applied for such a title deed, but that as a result of incorrect procedure, for which the appellants themselves may not have been to blame, no such title deed was in fact granted. It seems to us, therefore, that although the appellants may have been unfortunate in that incorrect procedure was followed, the legal position is that no change was made in the category of this land as a result of the finding of this Commission. It seems to us to be idle to suggest that a title deed not having been issued, the Settlement Officer is bound in proceedings which were instituted in 1936 by these findings of the Commission in 1921, upon which findings, as we have already said, no effective action was taken."

It is my opinion that the Settlement Officer had to decide what part, if any, of the land claimed was revived land in 1936. In this connection it is important to mention that the Settlement Officer in paragraph 36 of his decision said that he had found it impossible to make a finding as to the land which had been effectively revived before March, 1921, and which had been kept up in that revived condition until 1936. The Settlement Officer added, however, that in order to be fair to the plaintiffs concerned he would deem that whatever was under effective revival in 1936 had been effectively revived prior to 1921 and for the reasons already stated by me, I consider that the Settlement Officer was right. I would however add that I have experienced some difficulty in not pushing this reasoning to what would appear to be its logical conclusion, namely, that in 1946, when giving his decision, the Settlement Officer should have based those findings on the state of the land in 1946. However, Mr. Doukhan, who appeared for the respondents before us (i.e. the Government) did not take the line that the Settlement Officer should have based his findings on the position in 1946, and I take the view that it would not be fair in the circumstances of this case to pay attention to what happened after 1936, because the appellants might point out with some reason that there were numerous claimants and that they could not be expected to go on spending money to keep up land which might be allotted to other claimants.

The question that arises is whether Dr. Joseph for the appellant is justified in submitting that the Settlement Officer was unduly influenced by what he saw on the land in 1946. This is not entirely a question of fact which would fall exclusively within the province of the Settlement Officer, because if the Settlement Officer has departed from the line which he himself had traced out, this Court would be justified in interfering.

In 1935 or 1936 preliminary survey and inspections were made in view of the pending settlement proceedings, and the appellants rely on certain lists, field sheets and an official map which tend to show that about three-quarters of the land was then planted. Stress has been laid by Dr. Joseph on the importance of the evidence given by witnesses Konteas and Sayegh. The former was, in 1935, an officer of the Department of Surveys, and as such was in charge of the party of surveyors who surveyed the Jaffa sand dunes. The demarcation of Blocks 7122 and 7123 was done under his supervision. In 1942 Mr. Konteas

became an Assistant Land Settlement Officer. He stated in his evidence that he had differentiated between pieces of cultivable land, sand dunes, and land planted with trees and vines, when estimating the areas under cultivation. He made croquis and compiled schedules of reputed owners. Witness Sayegh worked under Konteas. There is one feature about the evidence given by Konteas which may perhaps be misleading: he sometimes mentions cultivable land, and I gather that this expression does not mean cultivated land. Mr. Konteas stated that he did not include trees buried under the sand when reckoning the extent of the planted area: this is a point which might be further investigated on behalf of the appellants, because if the trees were alive they would in fact, as mentioned by witness de Leon, play a useful part in checking sand drifts.

Stress was also laid by Dr. Joseph on the importance of the Rural Property Tax records which, according to his submission, afford data of the cultivated land in 1935 in respect of which tax was paid by the appellants. The Settlement Officer, in paragraph 37 of his decision, dealt with the surveyors' evidence and with the Tax records.

Being given that it is important to pay particular attention to the position in 1936, I will go so far as to say that it would be fair to assess the evidence of the surveyors in the light of the opinion already expressed in this judgment regarding the proper tests to be applied when ascertaining whether revival has taken place. As to the Tax records, I consider that although they do not constitute complete and irrebuttable proof in favour of the appellants, yet it should be borne in mind that they supplied the basis on which tax has been paid by the appellants and must be given due consideration unless it is clear that they are absolutely unreliable or fraudulent.

With regard to appellants' claims to land in Blooks 7122 and 7123, I have reached the conclusion that the submissions made on behalf of the appellants fail except in one respect, namely, that the Settlement Officer went too far in considering that revival necessarily includes the existence of works, devices or methods designed to stop or control sand drift. I have already stated my views in this respect and need not reiterate them. Whether or not the final decisions arrived at by the Settlement Officer were in fact affected by the too strict view he took is a matter which it is impossible for me to decide. It may be that a review of the facts in the light of the rulings given would enure to the benefit of the appellants, and in the circumstances I consider that it is fair to remit the case back in order to ensure that justice is fully meted out.

I must now make it clear that I have up to now been considering exclusively the appeal against Part I. of the Settlement Officer's decision. I must now devote attention to Part II.

For the same reasons as I have already given with regard to the claims in Blocks 7122 and 7123, I consider that it is advisable to remit the case back to the Settlement Officer, because he may have been unduly influenced by the view he had taken of what amounts to revival.

In conclusion, therefore, I decide to set aside so much of the Settlement Officer's decision as affects the claims of the appellants to land in Blocks 7122, 7123, and in Block 7125, and I remit the case back for further investigation and fresh determination in the light of the views expressed in the foregoing part of this judgment on the question of what amounts to revival. I direct that the parties interested, including Yusuf Abdallah Sulk, be given the opportunity of being heard or of further examining witnesses who have already given evidence (but no new witnesses are to be called).

I wish to mention that I was greatly impressed by the very capable way in which the Settlement Officer has handled this most complicated case, and I also wish to make it quite clear that my decision to remit the case does not at all indicate that I take the view that the appellants must necessarily be allotted more land. I have stated, and I repeat, that my decision to remit the case is to make quite certain that the Settlement Officer would not have arrived at a different finding if he had directed his mind to the problem of revival in what I have held to be the correct way.

It remains to decide whether the appellants should be granted costs payable by the Government. I direct that the appellants should have the costs of this appeal only if they succeed in obtaining an increased allotment of land. Should this happen, the appellants will be entitled to one set of costs on the lower scale, with LP. 25 advocate's fee, such costs to become due and claimable only when Badl Misl is paid by the appellants.

Criminal Appeal No. 2 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Shaw J. and Curry Ag. J.

TAASIYA CHEMIT TEL-AVIV Ltd. . . . *Appellants.*

v

1. KUPAT CHOLIM SHEL HAHISTADRUTH HAKLALIT SHEL GAOVDIM HAIVRIM

2. HARRY HELLER. . . . . *Respondents.*

Contempt of Court — Contempt of Court Ordinance, Section 6 — Interpretation of Section in question — Criminal Code Ordinance, 1936, Section 41 — Inapplicable to fines imposed under Section 6 of the Contempt of Court Ordinance.

In Civil Case No. 221/43 of the District Court of Tel-Aviv an injunction was given preventing a company from sending forth malodorous gases from its factory for the manufacture of super-phosphates. The company failed to comply with the terms of the injunction, and on being prosecuted, it was fined LP.300 for contempt of Court. The company still failed to comply and it was again prosecuted and was fined LP.5000. The company appealed. The point raised on appeal was that the fine imposed could not legally exceed LP.200 in accordance with the provisions of Section 41 of the Criminal Code Ordinance, 1936.

In reducing the penalty to the sum of LP.1000, the Court of Criminal Appeal,

HELD that the provision contained in Section 41 of the Criminal Code Ordinance, 1936, does not apply to Section 6 of the Contempt of Court Ordinance. Section 6 of the Contempt of Court Ordinance was enacted for the purpose of enforcing by fine obedience to an order issued. The object of the section in question is not to impose a penalty in respect of an offence committed as is contemplated by Section 21 of the Criminal Code Ordinance, 1936, but to give authority to impose a fine which would be sufficient to enforce obedience.

M. Weissman for appellants.

M. Ishai for first respondent.

S. Bernstein for second respondent.

Judgment: This is an appeal from the judgment of the District Court, Tel-Aviv, whereby the appellant company was found guilty of contempt of Court and was sentenced to pay a fine of LP.5,000.

The facts were that the respondents succeeded in obtaining an injunction against the appellants to prevent them from sending forth malodorous gases from their factory for the manufacture of super-phosphates, situated at Kiryat Aryeh. They failed to comply with the terms of the injunction, and,

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on prosecution, they were fined LP.300 for contempt of Court. They still failed. They were again prosecuted for contempt of Court, and they were fined LP.5,000. This later prosecution is the subject matter of the present appeal.

Various points were raised by the appellants in regard to the alleged transfer of the Company. As to these we accept the findings of the District Court that any purported transfer was merely a camouflage, and consequently that the Company are still liable to carry out the terms of the injunction.

The first point raised on behalf of the appellant company was that the fine imposed could not legally exceed the sum of LP.200. Counsel's argument in this respect is based on the provision of Section 41 of the Criminal Code Ordinance which states that:

> "Where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed shall not exceed two hundred pounds."

This provision, argues counsel, applies to section 6 of the Contempt of Court Ordinance. We are unable to agree. Section 6 of the Contempt of Court Ordinance was enacted for the purpose of enforcing by fine obedience to an order issued. The object of the Section is not to impose a penalty in respect of an offence committed, as is contemplated by Section 21 of the Criminal Code Ordinance, but to give authority to impose a fine which would be sufficient to enforce obedience. It will be quite obvious that there are many cases where LP.200 would be quite inadequate to enforce obedience. In our opinion Section 6 of the Contempt of Court Ordinance gives a complete discretion to the Judge to impose a fine of sufficient magnitude as to ensure obedience to his order.

There remains only the question of the severity of the penalty of LP.5,000. We fully appreciate the motives which actuated the Judge in assessing this fine. A more blatant contempt of Court it would be difficult to imagine. At the same time, we would stress again that the object of Section 6 of the Contempt of Court Ordinance is more to ensure the carrying out the order, than to impose a penalty for a past offence. We now are aware of facts which were not before the Judge when he imposed this penalty. These facts are that the factory has ceased to operate the offensive trade, and the contempt has been purged. We think that in the circumstances we are justified in reducing the fine from the sum of LP.5,000 to a sum of LP.1,000. In doing so we bear in mind the fact that if this Company, or indeed its successor in title, attempted again to carry on this offensive trade, they could again be brought before a Court which, in considering a further fine, would no doubt give due regard to the reasons why we have reduced this penalty.

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Criminal Appeal No. 52 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Hubbard J. and Abdulhadi J.

1. ABDUL GHANI QUASIM,
2. ABED IBRAHIM AWADALLAH. . . . . *Appellants.*

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ATTORNEY GENERAL. . . . . *Respondent.*

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Criminal law — Information — Bringing of accused for preliminary enquiry before Magistrate on one count — At close of preliminary enquiry Magistrate asked to commit on additional charges — Committal by Magistrate on charge contained in charge sheet but not on the additional charges — Filing of information containing the charge on which Magistrate committed and the additional charges on which the Magistrate refused to commit — Whether information in order — Criminal Procedure (Trial Upon Information) Ordinance, Section 28.

Three accused were brought before the Magistrate at Jerusalem for preliminary enquiry into the offence of making counterfeit coins contrary to Section 356 of the Criminal Code Ordinance, 1936. At the close of the preliminary enquiry the prosecution invited the Magistrate, under Section 18 of the Criminal Procedure (Trial Upon Information) Ordinance, in view of the evidence adduced, to commit the accused for trial on the additional charges of being in possession of tools for making counterfeit coins contrary to Section 357 and of possession of counterfeit coins contrary to Section 360. The Magistrate committed the accused for trial on the count contained in the charge sheet, but refused to commit on the two additional charges on the ground that they had not been included in the charge sheet. An information was filed by an Assistant Government Advocate containing the count on which the accused were committed by the Magistrate for trial and also the two additional counts on which the Magistrate refused to commit. One of the accused who was on bail absconded and the trial was conducted against the remaining two accused. At the trial of the accused before the District Court of Jerusalem (Criminal Case No. 182/46) the point was taken that as the Magistrate had refused to commit for trial on the two additional charges, the accused could not subsequently be so committed for trial on those two charges without a specific order by the Attorney-General being made to that effect under Section 28(5) of the Criminal Procedure (Trial Upon Information) Ordinance. The District Court, constituted of the Relieving President thereof (Judge Rigby), held that the reply to the objection raised was to be found in Section 28(6)(c) of the Criminal Procedure (Trial Upon Information) Ordinance, which authorises the Attorney-General or his representative to include in the information any charge or charges arising out of the evidence taken at the committal proceedings. The trial proceeded on the three charges, the result of which was that the two accused were convicted on the three counts and each was sentenced to four years imprisonment for each of the first and second counts and to three years imprisonment for the third count. The two accused appealed. The main point in the appeal was that the information was defective by reason of adding, after committal, the two charges on which the Magistrate refused to commit.

In dismissing the appeal, the Court of Criminal Appeal,

HELD that the information which contained two charges on which the Magistrate refused to commit the accused for trial was in order, because under Section 28(6) of the Criminal Procedure (Trial Upon Information) Ordinance it is abundantly clear that where a Magistrate has committed an accused person for trial, the Attorney-General's representative may file an information containing other charges than the charge upon which the accused was committed.

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Referred to: CRA 130/46, 13 P.L.R. 644.

A. Levitsky and S. T. Cohen for first appellant.

Anwar Nuseibeh for second appellant.

Legal Assistant (L. Weston) for respondent.

Judgment: This appeal falls to be considered under two heads. The first deals with technical legal aspects arising out of an objection to the information. The second deals with the facts and the inferences drawn by the learned trial Judge.

Now both counsel for the appellants have argued with great force and persuasiveness that the information was defective in that the Attorney-General's representative, after committal, added a charge on which the committing Magistrate refused to commit. Mr. Levitsky's argument, with which Mr. Nuseibeh and Mr. Cohen associated themselves, was that where a Magistrate refused to commit, the Prosecutor must inevitably fall back on Section 28(5) of the Criminal Procedure (Trial Upon Information) Ordinance, because Section 28(6)(c) has no application.

We have come to the conclusion that when this argument, advanced so vehemently, is analysed, it serves but to illustrate the capacity of a nimble mind to create a smoke-screen over a clear perspective. Now the first canon of construction, and it is the simplest canon of construction, is that the law must be interpreted according to the clear English meaning of the language in which it is couched. If there is no ambiguity, the Court will not go behind the wording to give it a different meaning, even if enquiries indicate that the legislator intended it to have a different meaning. Analyzing Section 28(6) in accordance with these principles, it is abundantly clear that where a Magistrate has committed an accused person for trial the Attorney-General's representative may file an information containing other charges than the charge upon which he was committed. Mr. Levitsky's argument is that if in fact the Magistrate has been asked to commit on those other charges and he has refused, the Attorney-General's representative's power

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under Section 28(6) is exhausted. He has referred us to Criminal Appeal 130/46. Now Criminal Appeal 130/46 dealt with the taking of further evidence, and in the course of their judgment, the learned Judges committed themselves to the opinion that Section 28(5) of the Trial Upon Information Ordinance may be used not only if the Magistrate has refused to commit, but also where he has refused to commit on one charge out of a number of charges. In this case we do not say that the Attorney-General is precluded from resorting to Section 28(5) if he chooses to do so, in order to achieve the aim which can be achieved by his representative under Section 28(6), although we might find it difficult to appreciate the reasons which induced him to resort to a more restrictive section which was designed to deal with a different situation, when in fact the circumstances are such that he is empowered to fall back on less onerous provisions. Nor indeed is there any real conflict, as learned counsel would appear to argue, between Section 28(5) and Section 28(6). Similar provisions appear in most British legislation dealing with the procedure in the trial of criminal cases. Action under Section 28(5) is confined to the Attorney-General, most probably for the reason advanced by Mr. Weston, that where a subject has not been put on his trial at all by a Magistrate, it is only reasonable to insist that an officer of the rank of the Attorney-General should himself exercise what in fact amounts to the exercise of judicial powers. Apart altogether from those special powers of the Attorney-General, the law has long since allowed a wide latitude to the representative of the Director of Public Prosecutions to add to an information based on a committal by a Magistrate, before it is presented to the Jury. The object of Section 28(6) of the Criminal Procedure (Trial Upon Information) Ordinance was to endow the prosecution in Palestine with those, generally recognised as essential powers. For these reasons we are of opinion that the Attorney-General's representative was entitled to proceed under Section 28(6), and the first ground of appeal therefore fails.

Turning now to the merits of the case. These again can be considered under two heads. The first deals with certain discrepancies. Now the Judge has dealt exhaustively with the alleged discrepancies. His mind was attuned to the fact that there were discrepancies, but nevertheless he came to certain findings of fact which we cannot say are unreasonable. Mr. Levitsky has argued further that the learned Judge, while admittedly dealing with the discrepancies before him, failed to appreciate that in the case of Cpl. Tamimi's evidence at all events there was a discrepancy between the evidence which

he gave before the Magistrate and the evidence he gave at the trial. Although the learned Judge has not dealt specifically with this point in his judgment, we have no grounds for believing that he did not take it into account. But apart from this fact, we cannot resist the conclusion that the discrepancies, if indeed there were any, have been grossly exaggerated. They appear to us to consist of nothing more than those deviations of detail one would expect in a witness giving on different occasions an account of events that he had witnessed.

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The other point raised by both counsel was that mere presence is not sufficient to associate a person, criminally at all events, with the crime. We entirely agree that mere presence does not necessarily connect a person criminally, but to a great extent this depends upon the circumstances and the nature of the crime. Here there was overwhelming evidence before the Judge that in this room illegal coining was taking place. The very nature of this crime raises a presumption that all the persons present are connected with it.

For these reasons we are unable to find any fault in the reasoning of the learned Judge, and the inferences he drew from the facts which were adduced.

The appeal must therefore be dismissed, and the conviction and sentence are confirmed.

Income Tax Appeal No. 10 of 1946.

In the Supreme Court sitting under Section 53(1) of the Income Tax Ordinance, 1941.

Before: Hubbard J.

ARON BIBERMAN. . . . . *Appellant.*

v

ASSESSING OFFICER, HAIFA. . . . . *Respondent.*

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Haifa

Revenue — Income tax — Evidence — Trade secrets — Assessee giving evidence in support of his appeal — Question put to assessee in cross-examination as to further details besides those given by him to Assessing Officer — Objection by assessee to the giving of those further details on the ground that they were trade secrets — Whether assessee entitled not to answer on ground of privilege.

Biberman supplied certain quantities of bricks to the Palestine Railways. The profits from the supply of those bricks the Assessing Officer arrived at by deducting the cost price charged by Biberman's supplier from the sale price he charged to the Railways. Biberman claimed other expenses besides

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his supplier's cost price, namely the cost of certain chemicals with which he sprayed the bricks. The Assessing Officer asked for details of these chemicals, and Biberman supplied him with two sets of chemicals. Apparently the chemicals of one set could not by themselves be made into a liquid. The Assessing Officer did not change his assessment. Biberman appealed. In his cross-examination a question was put to appellant as to how the set of chemicals which could not be made into a liquid could be sprayed on the bricks, and the assessee replied that certain other things had to be added to make a liquid which could be sprayed, which other things were not mentioned in the list submitted to the Assessing Officer nor were their prices given, and he refused giving further details of those other things on the allegation that they were a trade secret.

In ruling that the assessee had no privilege to refuse to answer the question put to him, the Court,

HELD that no witness has an unqualified privilege to refuse to answer questions put to him, the answers to which will reveal his own trade secret, and such witness can only be allowed to refuse to answer if it is unnecessary in the interests of justice that he should answer. In this present case since the interests of justice were that evidence should be furnished so that it might be decided whether or not the appellant had incurred the costs he alleged in the preparation of the bricks he supplied to the Palestine Railways, the question as to what were the other things which appellant added to the chemicals and which other things he did not submit to the Assessing Officer, was lawfully put to him, that the appellant had no privilege to refuse to answer, and that it was his duty to answer.

Referred to: Hennessy v. wright, (1888) Q.B.D. 509.

M. Eliash for appellant.

A. Wittkownski for respondent.

Ruling: Mr. Biberman, the appellant in this appeal, who has a paint and chemical factory in Haifa, supplied the Palestine Railways in the financial year 1943/44 with two quantities of fire bricks, one of 24,000 bricks and one of 50,000. The appellant himself, who does not keep proper accounts, estimates his profit in all his business transactions at an average of 16%. The Assessing Officer, Haifa, in his revised assessment dated 21st February, 1946, arrived at a figure for the profit on the sale of the 24,000 bricks by deducting the cost price charged by the appellant's supplier, the Steinburg Brick and Tile Factory Ltd., from the sale price charged by the appellant to the Railways. The appellant, thereupon, alleged that he had other expenses besides Steinburg's cost price. He stated that he sprayed the bricks with chemicals made in his own factory in order to bring them up to the required standard of fire resistance. (He has subsequently amplified this during the hearing of the appeal by stating that the greater part of the chemicals were mixed with the clay before the bricks were baked, while the remainder only was sprayed on them after they were baked).

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The Assessing Officer having required details of these chemicals, the appellant without objection supplied details of two sets of chemicals, one used for the 24,000 bricks, the other for the 50,000. The details included the quantity of each chemical used per brick and the price of those quantities. The second set of chemicals contained oil and could be sprayed. The first set, according to the instructions of Mr. Wittkowski, who appeared for the respondent, cannot by themselves be made into a liquid. On this being put to the appellant in cross-examination on the hearing of this appeal, he said that other things had to be added to make a liquid which could be sprayed. They are not mentioned in the list he submitted to the Assessing Officer, nor are their prices given. The appellant objected to giving these further details at the hearing of the appeal as he alleged they were a trade secret.

Mr. Eliash, for the appellant, argued in support of his objection. He was unable to refer me to any authority to the effect that a witness has an unqualified privilege to refuse to answer questions put to him, the answers to which will reveal his own trade secret, and indeed I think it is clear that a witness has no such privilege. I apprehend that the general and fundamental rule is that set out in paragraph 1468 on page 937 of the second volume of Taylor on Evidence (12th Edition) "that a witness cannot object to answer any question, merely because it relates to private matters or because it is immaterial, unless the answer can be withheld on some specific ground of privilege". The privilege may be either that of the witness himself or of another person between whom and the witness there exist fiduciary or other special relations. A well-known example of the first kind of privilege is that of a witness to refuse to answer criminating questions. An example of the second is the rule that a legal adviser will not be allowed, without the express consent of his client, to disclose communications received from his client in professional confidence. This privilege is that of the client and may be waived by him, but not by the adviser. Of such absolute privilege in relation to trade secrets there is no trace in the books.

Mr. Eliash, however, as I understand his argument, bases himself principally on two propositions to be found in Phipson on the Law of Evidence (7th Edition). The first proposition he finds on page 204. This is in a section dealing solely with the production of documents, and the main principle of this section is that a party cannot be compelled to produce his title deeds or any other documentary evidence of his case provided he is prepared to swear an affidavit that the documents relate solely to his own case, and not to that of the other side, and

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that they do not tend to support the case of the other side. This rule has no connection with the question before me which has nothing to do with the production of documents.

Secondly, Mr. Eliash relies on the following passage on page 197 of Phipson: "In the case of Trade Secrets and the like, discovery will only be ordered when, and to the extent that, the Court considers their disclosure strictly necessary for the purposes of justice, i.e. when not oppressive". The reference given immediately after this passage is to Order 31, Rule 6, which deals with discovery by interrogatories prior to trial. The principles applicable to discovery prior to trial and those applicable to testimony in the witness box are substantially the same (Phipson ibid p. 195). In the case of Hennessy v. Wright (1888 Q.B.D. 509 at 521) Wills J. said: "It is obvious that whatever difference may exist between the case of evidence asked for or tendered at the trial and that of an application for discovery or inspection, is altogether in favour of a refusal to order discovery in the earlier stages of the case". It may, therefore, happen that a witness is ordered to answer a question as to which an interrogatory has been disallowed. The case of Hennessy v. Wright dealt with the production before trial of state papers, but one of the reasons given by Wills J. is that the judge at the trial is in a better position to make a proper ruling on the matter, and this, I think, applies to other cases too. Hennessy v. Wright, of course, dealt not with a case of privilege, but with that of the exclusion of evidence on the grounds of public policy. I cite it merely as an authority to show that the rules applicable to testimony in the witness box are, if anything, more in favour of the person putting questions than the rules as to discovery before trial. This being so, the highest that can be said on the basis of the passage on page 197 of Phipson is that the witness can only be allowed to refuse to answer if it is unnecessary in the interests of justice that he should answer.

This is an appeal against an income tax assessment, and the interests of justice are that evidence should be furnished so that it may be decided whether or not the appellant has incurred the costs he alleges in the preparation of these bricks. The appellant says he has sprayed a mixture on the bricks. The respondent says that the chemicals mentioned cannot make a liquid. The appellant admits this, but says he added other chemicals. Mr. Eliash contends that the respondent should be satisfied with the appellant's refusal to answer. Since the chemicals cannot be sprayed and the appellant refuses to say what was added to them, the respondent can comment on these facts and ask the Court to draw the inference that the bricks were

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never sprayed at all, which is, in fact, the respondent's case. This sounds very plausible, but it has one fatal defect, namely that I could hardly draw any such inference if he is by law privileged not to answer.

On a consideration of all the facts as known to me at present, it appears to me that the respondent is entitled to an answer to his question so that he may have the advice of his experts on whether or not there is any truth in the appellant's allegation of costs. This appeal is being heard "in camera". The appellant has the protection of this Court, and any disclosure by any person present will constitute a contempt of Court. The answer or answers if given will be taken on a separate sheet of paper and kept by me. The question or questions will be limited to the chemicals added to the mixture and to their cost. No question will be allowed, without further application, as to any process of preparation or mixture.

In the event, therefore, I rule that Mr. Wittkowski's question as to what were the other things which the appellant added to the chemicals for spraying on the 24,000 bricks was lawfully put to him, that he has no privilege to refuse to answer, and that it is his duty to answer. In the event of his refusing to answer, it appears to me that it is unnecessary and would be improper in the circumstances of this case to use the powers which I have under Section 5 of the Contempt of Court Ordinance. The damage which the appellant will do to his own case and a consideration of the inference which I must inevitably draw from his continued refusal to answer a question lawfully put to him, should be a sufficient incentive to give the evidence required.

Privy Council Leave Application No. 5 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.
Before: de Comarmond J. and Curry Ag. J.

1. AMIN BEIDAS
2. ISSA BEIDAS. . . . . *Applicants.*

v

DAVID MOYAL. . . . . *Respondent.*

Privy Council — Attempts by appellant to Privy Council to have included in record two documents which were not before the Courts — Whether such attempts constitute failure to show

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due diligence in taking all necessary steps for the purpose of procuring the despatch of the record to England — Palestine [Appeal to Privy Council] Order-in-Council, 1924, Articles 6(b) and 24.

Conditional leave to appeal to the Privy Council from the judgment of the Supreme Court given in Civil Appeal No. 278/45, 13 P.L.R. 65, was granted on 1.4.46. The appellant furnished a guarantee and filed an index of the record. Final leave to appeal was granted on 3.6.46, and on 8.7.46 the record was settled. On 17.7.46 appellant moved the Court to allow him to add two documents to the record which came into existence after the delivery of the judgment by the Supreme Court. On 3.10.46 the Supreme Court held that the application was misconceived. On 25.10.46 appellant applied to the Chief Registrar to allow him to add these two documents to the record and this application was refused on 20.11.46. On 12 and 15.1.47 appellant sent copies of the record to the Chief Registrar and asked that they be certified as true copies. On 26.4.47 two respondents proceeded under Article 24 of the Palestine (Appeal to Privy Council) Order-in-Council and asked the Court for a certificate that the appeal had not been effectually prosecuted by the appellant. An affidavit in opposition to the grant of the application was filed.

In dismissing the application for the special reasons given in the order reported hereinafter, the Court of Civil Appeal,

HELD that waste of time brought about by gross mistakes made by an appellant to an appeal to the Privy Council is equivalent to lack of diligence.

Remarks by the Court with regard to the intention of Article 6(b) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924.

G. Berouti for applicants.

S. Yifrach for respondent.

Order: On the first day of April, 1946, Mr. David Moyal obtained conditional leave to appeal to the Privy Council from a judgment of the Supreme Court sitting as a Court of Civil Appeal given in favour of Amin Beidas, Issa Beidas and the Official Receiver.

The conditions imposed by the Court were that security would have to be furnished within 6 weeks and that the appellant would have to take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England within 6 weeks of the date of the order. Security was duly furnished and on the 3rd of January 1946 the Court was moved for final leave to appeal. In the affidavit accompanying the notice of motion the applicant mentioned that he was attaching the index of the record.

It appears that the practice in Palestine has been that the filing of an index of the record is equivalent to the preparation of the record. I propose later on to offer certain remarks in this connection.

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After order for final leave to appeal had been given on the 3rd of June, 1946, both sides appeared before the Assistant Chief Registrar to settle the record. On the 8th July, 1946, the Assistant Chief Registrar gave his order settling the record. On the 17th of the same month the appellant moved the Supreme Court to allow him to add two documents to the record. These two documents did not form part of the record, and in fact came into existence after delivery of the judgment sought to be appealed from. The Supreme Court on the 3rd October, 1946, ruled that the application was misconceived. On the 25th of the same month the appellant applied to the Chief Registrar to allow him to add the same two documents to the record. This application was refused on the 20th of November, 1946. On the 12th and 15th of January, 1947, the appellant forwarded copies of the record to the Chief Registrar and asked that they be certified as true copies. Nothing further happened until the 26th of April, 1947, when two of the respondents namely Amin Beidas and Issa Beidas gave notice of a motion to be made under Article 24 of the Palestine (Appeal to Privy Council) Order-in-Council 1924, asking this Court for a certificate that the appeal has not been effectually prosecuted by the appellant.

The main facts relied upon by the present applicants are set out in Mr. Berouti's affidavit dated the 26th of April, 1947. Mr. Yifrach who represents Mr. Moyal (the appellant) swore an affidavit on the 5th of May, 1947. In his affidavit Mr. Yifrach denies that the Assistant Registrar dismissed the application made in October 1946 for the addition of the two new documents; Mr. Yifrach's point is that the Registrar ordered that the documents should be shown in the index of papers with a remark that they have been objected to by the respondents. Mr. Yifrach's affidavit then goes on to set out that on the 12th January, 1947, he forwarded the record of proceedings to the Chief Registrar with a letter praying him to certify it as a true copy and that no answer was ever received. According to Mr. Yifrach, on the 15th of April, 1947, he made inquiries at the Registry of the Supreme Court and asked the clerk in charge of the certification of records to fix a date for checking the record, and he was then told that the record had to wait its turn.

I would like to point out that the appellant has wasted much time in his attempt to include in the record documents which do not form part thereof. In my view articles 9 and 10 of the Order-in-Council refer only to documents which have been produced in the course of the proceedings which finally result in the judgment against which the appeal is lodged.

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The question which arises is whether the appellant's unwarranted attempt to add new documents to the record does constitute failure to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the record to England. I would have little hesitation to hold that waste of time brought about by gross mistakes made by the appellant is equivalent to lack of diligence. There are, however, two facts which preclude me from granting the certificate applied for by the present applicants. One fact is that sufficient attention was not paid to the fact that the application for adding new documents could not possibly be entertained and the appellant was allowed to persist in his fruitless attempts. The second fact is that, in my view, the practice which has hitherto been followed in Palestine is to a certain extent responsible for the delay in this case. Article 6(b) of the Order-in-Council reads as follows:-

> "Upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose".

I am of opinion that the intention of article 6(b) is that the record must be finally in shape and ready to be despatched to England before application is made to the Court for final leave to appeal. The form of order when granting conditional leave should fix the time within which the record is to be got ready with liberty for the appellant to pray for extension of time on good cause shown. It seems obvious that if such a procedure be correctly followed the appellant would not have the opportunity of wasting time and of inventing excuses for his lack of diligence. It is important to mention that article 24 of the Order-in-Council refers only to the despatch of the record to England, which shows clearly that when final leave is given the record is ready.

I wish to say that the views I have just expressed as to what I consider to be the correct procedure are not the result of arguments heard in this case. My views must therefore be looked upon as a mere expression of opinion which, if accepted should lead to a revision of the practice.

For the reasons given above I must dismiss this application, but I would add that I do so regretfully. The appellant would be well advised to take the necessary steps to secure the despatch of the record to England as speedily as possible.

I do not consider that the respondent to this present application is entitled to costs.

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THE LAW REPORTS OF PALESTINE

PALESTINE GOVERNMENT · LAW COURTS · JERUSALEM

Volume 14

1947

JULY

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate,
and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.

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KEMP COURT

High Court No. 41 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and Abdulhadi J.

HUSNI ANEBTAWI. . . . . *Petitioner.*

v

1. CHIEF EXECUTION OFFICER, NABLUS
2. HAMDI ANEBTAWI. . . . . *Respondents.*

High Court — Instances in which it may set aside its own orders nisi which have been heard and made absolute — Civil Procedure Rules, 1938, Rule 358.

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1st July

FitzGerald C. J.
and
Abdulhadi J.

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and another

On the application of Hamdi Anebtawi, a son of Husni Anebtawi, an order nisi was issued to the Chief Execution Officer of Nablus calling upon him to show cause why his order ordering the execution of a judgment of the Sharia Court for maintenance should not be set aside (High Court Case No. 23/45). That order nisi was made absolute by reason of respondent's failure to file an affidavit in reply. The father applied to the High Court (High Court Case No. 68/46) for the setting aside of the order nisi issued in High Court Case No. 23/45. The High Court refused the application on the ground that it was misconceived. The father then applied for and obtained an order nisi calling upon the Chief Execution Officer of Nablus and Hamdi Anebtawi to show cause why the order of the Chief Execution Officer in Execution File of Nablus No. 61/44 should not be set aside and why the judgment of the Sharia Court against the second respondent should not be executed.

In discharging the rule nisi, the High Court,

HELD that when a return to an order nisi has been heard and the order made absolute, an application, except possibly the type of application contemplated in rule 358 of the Civil Procedure Rules, 1938, to have the order nisi set aside merely for the purpose of escaping the consequences of the order absolute is misconceived.

Petitioner in person.

Anton Atalla for second respondent.

Order: This is a unique application. The petitioner's prayer is that an order nisi issued by the High Court on the 22nd February, 1945, should be set aside. The return to that order nisi was duly heard and determined, and the order was made absolute on the 3rd day of May, 1945. An application was made to the High Court in High Court Case No. 68/46 in which the prayer was also that the order nisi of the 22nd February, 1945, be set aside. That application was refused on the ground that it was misconceived. It seems clear that the

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same answer must be given to this application. In my opinion, when a return to an order nisi has been heard, and the order made absolute, an application, except possibly the type of application contemplated in rule 358 of the Civil Procedure Rules, to have the order nisi set aside merely for the purpose of escaping the consequences of the order absolute is misconceived.

The rule is therefore discharged with LP.10 costs.

Criminal Appeal No. 45 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Shaw J. and Abdulhadi J.

1947
2nd July

FitzGerald C. J.
Shaw J.
and
Abdulhadi J.

CRA 45/47
Jarrar
and another
v
Attorney General

1. HAFEZ MUHAMMAD JARRAR,
2. TAHER AHMAD SHIHAB DIBRI. . . . *Appellants.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

Criminal law — Abduction — Seduction — Charge of abduction against accused contrary to Sections 253 and 255 of the Criminal Code Ordinance, 1936 — Trial Court not satisfied that abducted girl under sixteen years of age — Conviction under Sections 254 and 255 of the Criminal Code Ordinance, 1936 — Whether conviction correctly made under said sections — Seduction not a crime — Criminal Code Ordinance, 1936, Sections 158, 252, 253 and 255.

Two accused, Taher Dibri and Hafez Jarrar, were charged before the District Court of Nablus (Criminal Case No. 4/47) with abducting a girl under the age of sixteen years from lawful guardianship contrary to Sections 253 and 255 of the Criminal Code Ordinance, 1936, and with stealing from a dwelling house contrary to Section 273(b) of the abovementioned Ordinance. There was a third charge against Taher, namely unlawful sexual intercourse with a girl under the age of sixteen years. From the evidence tendered it appeared that Taher worked in the victim's parents' house as a servant for some seven years next before the incident, that about three years prior to the incident he started talking to the girl about love by telling her that men fall in love with women and marry one another thereafter, as a result of which talks he finally, with the victim's consent, had sexual intercourse with the girl. The District Court (Judge Katib) was not satisfied from the evidence that the girl was under sixteen years of age. The Court, on the evidence before it, held that Section 253 was inapplicable and convicted them both under Sections 254 and 255. As regards stealing the Court also found both accused guilty of an offence contrary to Sections 340 and 273 of the Criminal Code. Concerning the offence of unlawful sexual intercourse against Taher, having regard to the finding that the girl was not under sixteen years of age, the Court found that Section 158 of the Criminal Code Ordinance was applicable and proceeded to convict Taher of an offence against that section on the ground that he obtained the consent of the girl by deception as to the nature of the act. The Court then sentenced both accused to four years imprisonment on the charge of abduction, to two years imprisonment on the charge of stealing and sentenced Taher to three years imprisonment on the charge of indecent act — the sentences to run concurrently. The accused appealed.

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2nd July

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In allowing the appeal of both appellants with regard to abduction, and the appeal of the first appellant with regard to receiving property fraudulently obtained, and the appeal of the second appellant with regard to committing an indecent act, and dismissing the second appellant's appeal with regard to receiving property fraudulently obtained, the Court of Criminal Appeal,

HELD (1) that Section 255 of the Criminal Code Ordinance, 1936, cannot be applied without going back to the definition Sections 252 and 253, and in order to warrant a conviction for abduction of a female based on taking away from lawful guardianship, it must be proved that the abducted female was under sixteen years of age.

(2) that in the absence of evidence that the girl did not understand the nature of the act, namely the sexual intercourse, the conduct of the accused over some years in encouraging the girl in an infatuation which she had for him amounted to no more than seduction, and seduction is not a crime.

Henry Cattan for first appellant.

Ali Zu'bi for second appellant.

Crown Counsel (J. Wicks) for respondent.

Judgment: In this case two accused were convicted of abduction and the second accused was also convicted of an offence against Section 158 of the Criminal Code Ordinance. Both the accused were further convicted of having stolen property or of being in possession of stolen property. In regard to the charge of abduction, the learned Judge found as a fact that he could not be satisfied that the girl complainant, who was alleged to have been abducted, was under the age of 16. The charge clearly then did not come under Section 253 of the Criminal Code. Having arrived at that finding of fact in regard to age, the learned Judge proceeded to convict under Section 255 of the Criminal Code Ordinance. In regard to this Mr. Cattan has argued that you cannot apply Section 255 without going back to the definition sections which are 252 and 253. It follows that to warrant a conviction for abduction based on taking away from lawful guardianship, which was abduction alleged in this case, it must first be proved that the girl was under 16 years. We think the argument is a sound one, and it follows that the conviction of abduction against both the accused must be quashed.

There is a further conviction against the second appellant under Section 158 of the Criminal Code Ordinance. The par-

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ticulars of the case as found by the Judge were that he committed an indecent act to which he obtained the consent of the girl by deception. The deception in this case is alleged to have been a course of conduct over some years in encouraging this girl in an infatuation which she had for him. Now the accused may have encouraged this girl, who certainly was herself not lacking in advances, over a number of years, but if he did, this amounted to no more than seduction, and seduction is not a crime. There is no evidence that the girl did not understand the nature of the act. Indeed her own evidence proved clearly that she fully understood what she was doing. In these circumstances, we are of opinion that the conviction under this section cannot be sustained.

There remains the charge of possession of the money which was stolen. In regard to the first appellant, the evidence incriminating him with this action was that of the girl herself. This, of course, required corroboration. The only corroboration alleged was that of the Police man, who said he challenged the woman with whom a part of the money was alleged to have been lodged, and that she first denied having the money but later LP. 60 was found on her. We are of opinion that this fell far short of the corroboration which would have been adequate in law to enable the Court to convict on the evidence of the girl. As to the first appellant, therefore, this conviction must be quashed.

Now in regard to the second appellant, there is no doubt from the evidence of the girl that he had conspired with her to steal this money; that he did, in fact, steal it from the room of his employer. Her evidence was amply corroborated, not alone by his own statement but by his action in going to the place where part of the money was buried and digging it out. We think, therefore, that he was rightly convicted on this count. We see no reason to interfere with the sentence of two years imprisonment awarded in respect of this count.

Privy Council Appeal No. 23 of 1945.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

Before: Lord Simonds, Lord Uthwatt and Sir John Beaumont.

YEHOSHUA HANKIN (deceased) represented by MORDECAI ELIASH. . . . . *Appellant.*

v

ZAKI RASHID ESH SHANTI, and others. . . . . *Respondents.*

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Immovable property — Registered title — Land Settlement Officer — Established rule as to registered title and how it can be set aside — General discretion of a Land Settlement Officer under Section 10(3) of the Land (Settlement of Title) Ordinance unimpaired by the established rule as to registered title.

In humbly advising His Majesty that this appeal from the judgment of the Supreme Court given in Civil Appeal No. 230/42, 10 P.L.R. 383 *(q.v.)*, should be allowed and that the decision of the Land Settlement Officer given on the 30th April, 1937, should be restored, the Judicial Committee of the Privy Council,

HELD (1) that the well-established rule is that a registered title is not to be set aside except by some evidence in writing sufficient to support an adverse title or corroborate evidence in support of such adverse title. The latest tapu register is competent evidence as to the character of the land and the strictest proof should be required before holding that on such a matter the subsisting entries are incorrect.

(2) that the general discretion of a Land Settlement Officer under Section 10(3) of the Land (Settlement of Title) Ordinance is unimpaired by the well-established rule as to the manner by which a registered title can be set aside and it is only in exceptional circumstances that he should depart from that rule.

Followed: PCA 56/38, 7 P.L.R. 105.

The relevant facts appear from the judgment of the Board.

The judgment of the Board was delivered by Lord Simonds.

Judgment: This is formally an appeal from a judgment dated the 16th July, 1943, of the Supreme Court of Palestine (Gordon-Smith, C.J., and Rose, J.) affirming an order of the Settlement Officer, Gaza Area, dated the 10th October, 1942. But, as will presently appear, in substance it raises the question whether the same Supreme Court (then consisting of Trusted, C.J., and Copland and Khayat, JJ.) on the 24th November, 1938, rightly affirmed an order made by the Land

Court of Nablus on the 2nd March, 1938, referring back to the Settlement Officer, for his determination upon the lines indicated by that Court, the question whether the appellant or the respondents were entitled to be registered as the owners of a parcel of land in Qalqiliya village in the sub-district of Tulkarm.

The respondents, thirty-four in number, claim to be entitled to the land in question, which is an orange grove with an area of about 116 dunams, as heirs of Rashid esh Shanti, who died in February, 1925.

The appellant claims to be entitled to the same land as purchaser thereof at public auction from two of the respondents, Husein Rashid esh Shanti and Kamil Rashid esh Shanti, who will for brevity be called Husein and Kamil.

The following facts appear to be no longer in dispute.

On the 10th November, 1926, after the necessary enquiries had been made and the appropriate formalities complied with, Husein and Kamil, two of Rashid's sons, were registered in the Land Registry, Tulkarm (that is, in the old Tapu Register), as owners of the said land in equal shares. Their Lordships have had the advantage of perusing the Mukhtars' Certificate given upon the application for registration and a copy of the relevant extract from the Register of Deeds. From the certificate which is subscribed by a number of Mukhtars and Notables of Qalqiliya village it would appear that Husein and Kamil had been in possession of the property for 13 years and that the land had never previously been registered in the Registers of the Land Registry. The extract from the Register shows that they were registered by virtue of a possessory title.

It further appears from the Register that on the 10th November, 1926, Husein and Kamil mortgaged their respective shares of the property to a Dr. Salah for LP.920, that thereafter Kamil mortgaged his share to one Dalal for a further LP.1,500 and Husein his share to one Sa'id ez Zeini for LP.750, and that in 1928 Husein further mortgaged his share to Sa'id ez Zeini for LP.1,300 and at the same time both Husein and Kamil mortgaged their shares to the appellant for LP.6391.

It is noteworthy that, though Rashid had died in February, 1925, section 13(1) of the Land Transfer Ordinance was disregarded and no step was taken by any of his heirs to assert title to the property nor did any of the mortgagees question the title of Husein and Kamil.

In 1929 the mortgagee Sa'id ez Zeini sought to realise his security and on the 29th January, 1930, an order was made for

the sale of Husein's share of the land. Before this sale was concluded, Farid Shanti, a brother of Husein and Kamil, on the 8th June, 1930, commenced an action against them in the Land Court at Nablus for cancellation of the registration of the property in their names in the Land Registry and for its registration in the names of all the heirs of Rashid.

Various attempts were made by Farid to get a postponement of the sale, but, upon a guarantee being given for all damages in connection therewith, the sale was ordered to proceed and Husein's share was bought by the appellant for LP.3,000.

So also Kamil's share, after similar efforts to postpone the sale by Farid, was bought by the appellant for LP.3,000.

It is clear, and it is a fact relied on by the respondents, that the appellant concluded the purchase of the property with knowledge of the adverse claim.

The appellant was at an early stage cited as a party in Farid's action, and, though these proceedings having dragged on for some years ultimately came to nothing, it is necessary to refer to a single event in the course of them which has assumed outstanding importance.

Husein and Kamil appeared in the proceedings in person and at a hearing on the 28th April, 1932, made unsworn statements which in the translation from the record in Arabic run as follows:—

> "Husein: originally the land was bought by my father Rashid esh Shanti, he dug a well and planted part on the eastern side, about one-half; afterwards he erected a shed; then he died. Then my brothers came to divide the estate, because he left lands and cash money; I and my brother Kamil took as our share the orange grove, and my other brothers took as their share the arable land and the cash money, and so we registered the orange grove in the name of myself and that of my brother Kamil, in 1926. My father died in 1925.
>
> Kamil: I repeat what my brother Husein said. I settled with my brothers. When my father died a settlement was reached between me and my brothers viz.: Aref, Husein, Rushdi and Muhammad who were majors. I have a deed of settlement I will produce it at the next hearing. The Plaintiff Farid is my brother from the same father and mother, he was not one of the brothers who made the settlement, because at the time he was in Egypt."

Before the conclusion of these proceedings the area in which the property in dispute is situate became a Land Settlement Area within the Land (Settlement of Title) Ordinance and on the 28th January, 1935, the case was referred to the Settlement Officer by an agreement between the parties in the following terms:—

"As the case will have to be started *de novo* and as the land in question is now within a Land Settlement Area both parties apply under section 6 of the Land Settlement Ordinance for leave of the Court that the action may be withdrawn and the dispute between the parties decided by the Land Settlement Officer."

In fact both parties had already formulated their claims before the Settlement Officer as early as August, 1933, and it may be noted that the rival claimants were on the one hand the appellant claiming as proprietor by virtue of an acquisition by way of purchase through public auction and as the person registered in the Land Registry (i.e., the old Tapu Register) and on the other hand Muhammad Amin esh Shanti claiming on behalf of all the heirs of Rashid, including Husein and Kamil, and alleging that those two had taken advantage of the absence of some of the heirs and the minority of others of them to get the property registered in their names alone.

Again there was considerable delay and it was not until September, 1937, that the case was heard by the Settlement Officer, the heirs of Rashid being treated as plaintiffs and the appellant as defendant. A perusal of the proceedings shows that the main effort of the plaintiffs was directed to proving that the land in question had been registered in the names of Ahmad el Hasan and Ibrahim el Hasan before it had been registered in the names of Husein and Kamil. Thus the validity of the original registration in the names of the latter would have been displaced and the appellant's title defeated. This question was carefully investigated by the Settlement Officer and the conclusion to which he came, viz., that the land had not been previously registered, cannot in their Lordships' opinion be challenged. It does not appear that at this stage of the proceedings the plaintiffs relied on the so-called admissions made by Husein and Kamil in the original action in the Land Court, to which reference has been made. No mention is made of them in the decision of the Settlement Officer, who after an exhaustive examination of the attack made on the appellant's registered title concluded that it could not be successfully impeached. He declined to hear "verbal evidence in support of a claim by purchase by the plaintiffs' father who did not register the transaction against documents of registration produced by the defence in the obtaining of which all the requirements of the law have been fulfilled."

From this decision certain of the plaintiffs appealed to the Land Court. A subsidiary question has arisen whether, if the view taken by the appellate Courts of Palestine is upheld, their judgment should enure for the benefit of all the heirs of Rashid or only of those who appealed. But in the view which their

Lordships take of the case that question is no longer relevant and their opinion proceeds upon the footing that all the same parties have been interested throughout.

Before the Land Court, as appears from the written Statement of Appeal, the plaintiffs, then appellants, while maintaining their original plea, relied also on the admissions of Husein and Kamil as evidence in support of their case, and they prayed that the judgment of the Settlement Officer might be set aside and that the case might be remitted to him for hearing verbal evidence in order that they might prove that the land was the property of Rashid, that he bought and planted and built upon it and that Husein and Kamil registered it into their names while it belonged to all the heirs. The Statement of Appeal read as a whole makes it plain that this claim for the admission of verbal evidence is linked up with the plea that the land was not for the first time registered in the names of Husein and Kamil but had been previously registered in the name of Hasan.

On the 2nd March, 1938, the Land Court gave judgment and it seems that the learned Judges of that Court were decisively influenced by the so-called admissions of Husein and Kamil. Thus they say "The Settlement Officer relies on the point in his judgment that 'registration had been legally carried out in 1926'. The plaintiffs against this allege that the property originally belonged to Rashid esh Shanti and that in 1928 it was illegally registered in the name of two heirs only. The other heirs, as it is clear from their admission in the Land Court, do not seem to deny this. Yet they have not given sufficient account of the allegation that it devolved on them to the exclusion of the plaintiffs. With this admission and the evidence of the plaintiffs that they have not parted with their interest, the plaintiffs have given *prima facie* proof that the registration was obtained in defraud of their rights." The matter was accordingly referred back to the Settlement Officer for him "to determine on the lines suggested".

The present appellant appealed from this decision to the Supreme Court sitting as a Court of Appeal in Jerusalem and on the 24th November, 1938, that Court dismissed his appeal.[1] The most material passage in the judgment of Copland, J., who delivered the judgment of the Court was as follows: "... I think that the Land Court was right. The admissions by Husein and Kamil during the hearing of the previous Land case that their father had purchased the land before his death, coupled with their statements that they had obtained this parcel as their

(1) CA 215/38, 5 P.L.R. 553.

share of the inheritance by reason of a settlement with the other heirs, the Respondents, undoubtedly shifted the burden of proof, and since the Appellant was claiming through the title of Husein and Kamil, his immediate predecessors, the onus of proving that Husein's and Kamil's title was a valid one was on him". But later he said "The alleged settlement by Husein and Kamil with the Respondents must be proved by the Appellant."

Before considering the correctness of these observations their Lordships will pursue the case to the end.

The appellant applied for leave to appeal from the judgment of the Supreme Court to His Majesty in Council but was refused it on the ground that the judgment was not a final judgment.

The case, having been thus remitted to the Settlement Officer, was reheard by him. The proceedings were protracted and it was not until the 21st February, 1942, that he gave his decision, in which he re-affirmed his judgment in favour of the appellant. Their Lordships do not think it necessary to determine whether in doing so he followed the directions of the Supreme Court. It is possible that he did not, for his observation that it seemed to him that "it would be the acme of inequity now to bind the defendant by what I must construe as an allegation made by parties who have all through settlement operations been entered as opposing him" is not consistent with the view of the Appellate Court that the burden of proof had shifted to the appellant. But, however this may be, the rehearing had at least this value, that the Settlement Officer once again examined the title and thus expressed himself: "If I did not make it plain in my first judgment, I do so now, that the registration in the names of Husein and Kamil was a first registration and was entirely unconnected with any other Tapu record".

From this decision appeal was brought to the Supreme Court, the intermediate appeal to the Land Court being no longer necessary. On the 4th June, 1942, the appeal was allowed and the matter referred back once more to the Settlement Officer for determination in accordance with the terms of the original judgment of the Court.[1] This time it came before a different Settlement Officer who after a second rehearing on the 10th October, 1942, decided in favour of the respondents and directed that they (with the exception of Husein and Kamil) should be registered as the owners of shares of the land in dispute according to their inheritance from Rashid

(1) CA 59/42.

esh Shanti as shown in the Certificate of Inheritance and that the shares of Husein and Kamil according to that certificate should be registered in the name of the appellant. He took the view that, as the appellant's advocate had stated that he could not call evidence to prove the alleged settlement between Husein and Kamil on the one hand and their co-heirs on the other, it was clear from the judgment of the Supreme Court that no other decision was possible.

It was the turn of the appellant to appeal from this decision to the Supreme Court. He did so and that Court dismissed his appeal in a long and careful judgment in which decisive effect was properly given to the earlier judgment of the Court.[1] At last the appellant has preferred his appeal to His Majesty in Council and it is necessary for their Lordships now to consider after so long an interval whether the views expressed in 1938 by the Land Court and Supreme Court should be upheld. In particular, since upon this everything that happened afterwards turned, it must be determined whether those Courts were right in holding that the burden of proving that Husein and Kamil had been lawfully registered as owners of the land in dispute had been cast on the appellant.

The duty of a Settlement Officer in deciding disputes as to the ownership of land is thus defined in section 10(3) of the Land Settlement Ordinance:- "A Settlement Officer shall apply the Land Law in force at the date of the hearing of the action, provided that he shall have regard to equitable as well as legal rights to land and shall not be bound by any rule of the Ottoman Law or by any enactment issued by the British Military Administration prohibiting the Courts from hearing actions based on unregistered documents or by the rules of evidence contained in the Code of Civil Procedure or the Civil Code."

This provision which is an echo of section 8 of the Land Courts Ordinance appears to leave the Settlement Officer a free hand in dealing with a dispute, and it was contended by counsel for the respondents that "within the basic rules of natural justice" he could do what he thought fit in regard to evidence. But their Lordships would repeat what was said by them in the case of *Mamur Awqaf of Jaffa* v. *Government of Palestine*, 1940, A.C. 503 at 511[2], "... the latest tapu register is competent evidence as to the character of the land in question and ... the strictest proof should be required before holding that on such a matter the subsisting entries are incorrect: otherwise

(1) CA 236/42, 10 P.L.R. 383.
(2) PCA 56/38, 7 P.L.R. 105.

the provisions for a new register would be made to unsettle titles in disregard of the land law."

Therefore, while the general discretion of the Settlement Officer must remain unimpaired, their Lordships would express the opinion that it is only in exceptional circumstances that he should depart from the well established rule that a registered title is not to be set aside except by some evidence in writing sufficient to support an adverse title or corroborate evidence in support of such adverse title: see *Goadby* and *Doukhan*, "The Land Law of Palestine", pp. 309-10 and cases there cited.

In the present case the view originally expressed by the Appellate Court, which determined the whole subsequent course of the proceedings, was in effect that the registered title of Husein and Kamil was displaced by their so-called admissions in the action by Farid in the Land Court. For no less than this is the result of saying that the burden of proof was shifted by those admissions. But it appears to their Lordships that, if the statements made by Husein and Kamil are examined as a whole and due regard is paid to the circumstances in which they were made, neither a reference to the relevant procedural law (if the Settlement Officer does not think fit to disregard it) nor an appeal to some wider and vaguer principle of natural justice can avail the respondents.

The statements in question were made by Husein and Kamil, not on oath but as part of their speeches in the earlier litigation. Their Lordships are content to assume that the translation from the Arabic which appears in the Record is accurate and sufficient. It seems then that at one and the same time they stated first a fact upon which the respondents rely as establishing their case, viz.: that the property had been purchased by Rashid, and, secondly, a fact which would be fatal to the respondents, viz., that they had taken the property as their share of the inheritance. The statement taken as a whole is a justification of their registered title by the allegation, that they had become entitled to the property as their share of the family inheritance. It does not appear to their Lordships that this could properly be regarded as an admission which would justify any Court in throwing upon the appellant the burden of proving that one part of the statement was true, and, in the absence of such proof, holding that the registered title had been displaced.

Nor can the circumstances in which the statement was made be disregarded. Already at the time it was made Husein and Kamil had parted with their interest. Their mortgagees were proceeding to a sale of the property, and, whether or not

the appellant had notice of any adverse claim, it is not suggested that the mortgagees had had any notice that the registered title was not in order. A statement, adverse alike to the interest of the mortgagees and of a purchaser from them, made in such circumstances, even if it could be dignified by the name of an admission, could properly be regarded by the Settlement Officer as of little weight. Their Lordships are therefore of opinion that the Land Court and the Supreme Court were initially wrong in referring the matter back to the Settlement Officer upon the footing that it was for the appellant to prove an agreement between Husein and Kamil and their co-heirs.

They have felt some difficulty as to the course which should be taken. The respondents upon their original appeal from the first decision of the Settlement Officer asked that the matter should be remitted to him for rehearing upon verbal evidence. The Land Court and the Supreme Court not only remitted it but did so with directions, which were necessarily fatal to the appellant and which, as their Lordships have held, were wrongly given. It was natural that the respondents should stand upon this decision and they cannot be criticised for doing so. But at the last moment before their Lordships it was contended by counsel for the respondents that, if the appeal was not dismissed, at least the case should once more be remitted to the Settlement Officer for rehearing with liberty to the parties to adduce all proper evidence. This plea was based on the fact that the Settlement Officer had declined to hear certain verbal evidence in support of a claim of purchase by Rashid, as appeared from almost the last lines of his judgment.

Upon a careful consideration of the whole case, which the detailed record of the proceedings has made possible, their Lordships have come to the conclusion that the proper course for them to take is to allow the appeal and to direct the original decision of the Settlement Officer to be restored. In their opinion that is the course which should have been taken by the Supreme Court in November, 1938, and must be taken now. In coming to this conclusion their Lordships do not intend to cast any doubt upon the decisions which indicate that, as an exception to the general rule, oral evidence may in the case of a dispute between heirs be admitted against a registered title. But it is clear that the Settlement Officer has a wide discretion in the matter under the section that has been cited and he was in the circumstances fully justified in rejecting the verbal evidence that was tendered.

The view which their Lordships have formed upon the main point on the appeal makes it unnecessary for them to

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express any opinion upon the many subsidiary points that have been raised. For the reasons already stated they will humbly advise His Majesty that this appeal should be allowed and the decision of the Settlement Officer given on the 30th April, 1938, restored.

The respondents must pay the costs of the appellant of this appeal and of the proceedings up to and including the judgment of the Supreme Court of the 24th November, 1938. Each party must pay his own costs of the proceedings between that date and the presentation of this appeal to His Majesty in Council.

Civil Appeal No. 155 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Hubbard J.

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and
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1. JOSEPH DANA,
2. YEHUDA DANINO. . . . . *Appellants.*

v

AMIN ADEEB SALEM. . . . . *Respondent.*

Evidence — Loan — Action on cheque exceeding LP. 10 in value — Allegation that amount given as loan — Denial of allegation of loan — No documentary evidence of loan — Plaintiff cannot succeed in his claim in absence of such documentary evidence — Ottoman Civil Procedure Code, Article 80.

A cheque for LP. 500 drawn by Joseph Dana to the order of Amin Adeeb Salem was cashed by the latter, and the account of the drawer was debited with the amount of the cheque. The drawer of the cheque and his partner, Yehuda Danino, commenced proceedings in the District Court of Haifa (Civil Case No. 207/44) claiming the value of the cheque. They alleged that the sum claimed formed a loan, and in the alternative they alleged that the sum in question was paid to the defendant in connection with an agreement for the purchase by the defendant of certain vegetables to be disposed of by the plaintiffs, which venture wholly failed. Defendant denied that there was a loan and said that the cheque was given to him by a third person as part of an advance made by that third person towards the capital of a partnership of eight people of which he, the plaintiff, and that third person were members, and of which partnership he was the treasurer, and that the sum claimed, together with further sums, had already been paid out to various members of the partnership for the purchase and sale of vegetables. The District Court, constituted of the Acting Relieving President

thereof (Acting Judge Dickinson), found that the evidence tendered by both sides was incredible and dismissed the action on the ground that the plaintiffs had failed to discharge the onus laid upon them. The plaintiffs appealed.

In dismissing the appeal, the Court of Civil Appeal,

HELD that under Article 80 of the Ottoman Civil Procedure Code all claims in respect of loans exceeding LP. 10 must be proved by documentary evidence. Accordingly the appellant-plaintiffs, in the absence of any such proof by way of documentary evidence, could not suceed in their claim.

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Distinguished: CA 373/44.

Referred to: CA 62/31.
CA 87/37, 4 P.L.R. 228.
CA 115/40, 7 P.L.R. 414.
CA 93/42, 9 P.L.R. 554.

The judgment of the Court was delivered by Hubbard J.

J. Stoyanovsky for appellants.

Anton Atalla for respondent.

Hubbard J: This is an appeal by the two plaintiffs in Civil Case No. 207/44 (District Court, Haifa) against the judgment of His Honour Judge Dickinson delivered on 9th April, 1945.

The appellant-plaintiffs there claimed the return of the sum of LP. 500 which they alleged they had lent to the respondent. The respondent alleged a partnership between himself and the appellants. The learned Judge found the evidence tendered by both sides incredible, and holding that the appellants had failed to discharge the onus upon them, he dismissed their action. As to whether that was the correct course on the view he took of the evidence there may be some doubt, but it is unnecessary to make any decision on the point, since the dismissal of the action can be supported on another ground.

Under Art. 80 of the Ottoman Civil Procedure Code all claims in respect of loans exceeding LP. 10 must be proved by documentary evidence. In this case there is no such proof. There is merely evidence that a cheque drawn by the first appellant in favour of the respondent was cashed by the latter. Of a contract of loan there is no documentary evidence. It was laid down in Civil Appeal No. 93/42 (9 P.L.R. 554, at 559) that "the mere giving of a cheque is not presumptive evidence of a loan". In fact, as Mr. Atalla pointed out, the presumption under Sec. 29(1) of the Bills of Exchange Ordinance is the other way, and the drawer of a cheque, which is a bill of

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exchange drawn on a banker and payable on demand, is deemed to have received value.

The authorities cited by Mr. Stoyanovsky, with one exception, do not assist him. Civil App. 87/37 deals with the admissibility of oral evidence where a contract is in fact evidenced by a document. In Civil Appeals No. 62/31 and No. 115/40 oral evidence was held to be admissible to show on what account certain moneys had been paid: there was no question of oral evidence of any contract. It is true that Civil App. No. 373/44 is an authority for saying that when the defendant admits having received money from the plaintiff, but denies receipt as a loan, and contends that it was by way of deposit, the onus of proof shifts to the defendant, which amounts to saying that admission of the receipt of money raises a prima facie presumption that it was a loan. No previous case is referred to, no reference is made to Art. 80 in the judgment, nor is there anything in the judgment to show that the point was ever taken in the Court below or on appeal that the action must fail without documentary evidence of the loan. In fact the trial judge had expressly found that there never was any document evidencing the loan — there had been an allegation that such a document had been destroyed — but he based his judgment on an entirely different ground, namely, that he was unable to give any judgment on the claim because it was for the return of money lent, whereas he had come to the conclusion on the evidence that the money was not lent, but deposited for safekeeping. With respect, it appears to me that this case cannot serve as a precedent. Moreover, the present case is distinguishable from Civ. App. 373/44 in that the present respondent does not admit the receipt of the money from the appellants. The cheque was certainly debited to the first appellant's account, but the respondent alleges that the cheque was handed to him by a third person, and it may be, as the trial judge suggested, that there was some private arrangement between this third person and the appellants.

For these reasons this appeal is dismissed. The respondent to have his costs on the lower scale and an attendance fee of LP.10.

Shaw J: I concur.

Civil Appeal No. 64 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Hubbard J.

NASRALLA SELIM KHOURY. . . . . *Appellant.*

v

GEORGE JOSEPH KHOURY. . . . . *Respondent.*

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Bankruptcy — Interest — Merger — Bankruptcy under Ottoman Commercial Code — Judgment against bankrupt presented in bankruptcy — Payment of judgment debt with interest up to date of adjudication — Proceedings on judgment in Execution Office for interest from date of adjudication to payment — Liability of bankrupt to interest — Right of creditor to claim interest — Whether judgment merged in acceptance and payment of claim in the bankruptcy — Whether creditor required to bring action in competent Court for interest claimed — Ottoman Commercial Code, Articles 155, 246 and 305.

On 28.2.30 judgment by consent was given for George Joseph Khoury against Nasralla Selim Khoury, and execution proceedings in respect thereof were commenced on 7.3.30. On 27.10.30, Nasralla was declared bankrupt, and George withdrew the judgment from the Execution Office, presented it to the syndic and applied for payment of the sum awarded therein together with legal interest up to the date of adjudication. The claim was approved and the amount of the judgment including costs and interest up to the date of adjudication was paid by instalments, the last of which was paid on 5.10.37. The bankruptcy was closed on 19.7.40. On 18.11.44, George put the judgment in the Execution Office, asking for interest from the date of adjudication to payment. The Chief Execution Officer refused to execute and George applied for and obtained on order nisi which was made absolute (High Court Case No. 62/45, 12 P.L.R. 495), subject to the limitation that the execution would not proceed if Nasralla instituted proceedings in the competent Court for the determination of the controversy. Within the time limit Nasralla commenced proceedings in the District Court of Haifa (Civil Case No. 229/45) for a judgment declaring his non-liability in respect of interest accruing after the date of adjudication. The main submission on behalf of plaintiff was that owing to the bankruptcy he was not liable for interest for the period subsequent to the adjudication unless and until he had applied for and obtained his rehabilitation under Article 305 of the Ottoman Commercial Code. There were other submissions as to the merger of the judgment in the acceptance and payment of the claim in the bankruptcy, that defendant was estopped from claiming interest by reason of not reserving his right to do so when filing his claim in the bankruptcy, and that as the defendant was a nominee of a brother of his it was only the principal who could take action. The District Court, constituted of the President thereof (Judge Bourke), held that the plaintiff failed to establish that there was any obstacle standing in the way to prevent the defendant from pursuing the proceedings in execution to recover the interest payable and claimed under the judgment and dismissed the action. The plaintiff appealed.

In dismissing the appeal, the Court of Civil Appeal,

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HELD (1) that from Article 246 of the Ottoman Commercial Code, which must be read in the light of Articles 244, 245 and 236 of that Code, after the bankruptcy was closed each creditor was at liberty to institute proceedings in respect of his claim, that is to say, bankruptcy proceedings under the Ottoman Commercial Code do not wipe out the liabilities of the bankrupt and give him a fresh start. Article 246 gives a creditor a clear right to institute proceedings after the bankruptcy has been closed and he does not have to wait until the bankrupt applies for rehabilitation.

(2) that the creditor, in the absence of estoppel by conduct on his part, was not estopped from asking for interest after the date of adjudication on the ground that he did not reserve his right to do so when he filed his claim in the bankruptcy, because it was not necessary for him to reserve a right which is given to him by law.

(3) that there was no merger of the judgment as far as the interest after the date of adjudication was concerned in the acceptance and payment of the claim in the bankruptcy, because neither the juge commissaire nor the syndic could deal with any claim to interest after adjudication.

(4) that although Article 246 of the Ottoman Commercial Code speaks of "instituting proceedings", this does not mean that a creditor, who already holds a judgment, must file an action and obtain another judgment, and accordingly the procedure followed by the respondent when he put the judgment into execution was correct.

Distinguished: CA 113/42, 9 P.L.R. 458.

Referred to: HC 65/37, 5 P.L.R. 47.
HC 62/45, 12 P.L.R. 495.

A. Levin and E. Catafago for appellant.

A. Weinshall for respondent.

Shaw J: This is an appeal from the judgment dated 18.2.46 of the District Court of Haifa in C.C. 229/45.

The facts leading up to this appeal have been set out in the judgment of the trial Court and I need not recapitulate them. Mr. Levin submits in the first place that by virtue of Article 305 of the Ottoman Commercial Code (to be found at p. 193 of Amirayan's translation, 1906 edition) interest falling due after the date of adjudication (27.10.30) cannot be recovered from the appellant unless he has applied for his rehabilitation. The relevant part of that Article reads as follows —

> "A bankrupt may obtain his rehabilitation after he has paid in full the principal and interest of and costs on all sums due from him."

Article 155 (p. 81) provides that —

> "The order of adjudication stops, only so far as the estate of the bankrupt is concerned, the running of interest on all claims which are not privileged or secured by a pledge or mortgage..."

Article 246 (p. 144) reads as follows —

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> "If the bankrupt is not declared excusable, each creditor shall regain the right of instituting proceedings against both the person and the property of the debtor in respect of his claim.
>
> If the bankrupt is declared excusable, he shall be exonerated from the liability of being imprisoned for the claims of his creditors, and thereafter his person shall not be touched, but he may be sued only in respect of his property: Provided always that regard shall be had to the exceptions made by any special laws."

It is, I think, quite clear from this Article, which must be read in the light of Articles 244, 245 and 236, that after the bankruptcy was closed (as it was on 19.7.40) each creditor was at liberty to institute proceedings in respect of his claim. That is to say, bankruptcy proceedings under the Ottoman Commercial Code do not wipe out the liabilities of the bankrupt and give him a fresh start. Although the Turkish law may appear to be harsh in this respect we are nevertheless bound to apply it. It is, however, alleged in the present case that as a result of the great appreciation in value of the land which constituted the larger part of the estate, the appellant is well able to pay what is claimed by the respondent, and it is submitted that it would be inequitable if he could avoid payment by merely not applying for rehabilitation.

Mr. Levin has submitted that the respondent is estopped from asking for interest after the date of adjudication because he did not reserve his right to do so when he filed his claim in the bankruptcy. He submits that the consent judgment dated 28.2.30 (Exhibit A) merged in the acceptance and payment of the claim in the bankruptcy. He draws attention to the endorsement by the Juge Commissaire on the original judgment which reads —

"Settled in full as approved 5.10.37".

I am unable to find any merit in this submission. The Juge Commissaire did not, and could not, deal with any claim to interest after adjudication. It was not necessary for the respondent to reserve a right which is given to him by law. There is no estoppel by conduct since the respondent did nothing which was calculated to cause the appellant to believe that he was relinquishing his legal right. The present case can be readily distinguished from C.A. 113/42 (9 P.L.R. 458) where it was a question of the principal debt.

I find that Article 246 gives the creditor a clear right to institute proceedings after the bankruptcy has been closed and that he does not have to wait until the bankrupt applies for

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rehabilititation. I also find that there is no need for the creditor to reserve this right of action at the time of filing his claim in the bankruptcy.

The second point raised by Mr. Levin is that the respondent must in any event commence a fresh action, and cannot simply take the original judgment to execution. It is quite true that Article 246 speaks of "instituting proceedings", but I am unable to construe this as meaning that a creditor, who already holds a good judgment, must file an action and obtain another judgment. A creditor who had not already instituted proceedings would doubtless have to do so if the debtor did not pay on demand. I do not agree with Mr. Levin's submission that there was any merger of the judgment as far as concerns the interest after the date of adjudication since that was a claim with which the Juge Commissaire or Syndic could not deal. The amount due to the respondent, by way of interest after adjudication, is only a question of arithmetical calculation. It is not a matter calling for fresh adjudication by a court. I find therefore that the procedure followed by the respondent when he put the judgment into execution was correct.

The third point argued by Mr. Levin is that in view of the fact that as the respondent was admittedly only a nominee of his brother Michel, it is only the latter (or rather his heirs, as Michel has since died) who can take action. It is not disputed that the promissory note upon which the respondent obtained the consent judgment of 28.2.30 was in favour of the respondent. It is not suggested that that judgment was ever taken to appeal, so it is a final judgment which the respondent can take to execution. The fact that the respondent was a nominee of Michel is one which only concerns the respondent and Michel's heirs.

The fourth point argued by Mr. Levin is that as the respondent was admittedly a nominee, the appellant can raise the same equities and defences against him as he could have raised against Michel. As it appears from Exhibit D the judgment of 28.2.30 was given after deducting certain interest. Mr. Levin's case is that the interest which was deducted was only such illegal interest as was claimed by the respondent, and that had his client not mistakenly believed that the respondent was a holder in due course, he would have demanded the deduction of further illegal interest which had been paid to Michel. Dr. Weinshall for the respondent does not admit that the appellant acted under any such misapprehension. His case is that the appellant knew that the respondent was a nominee. Mr. Levin does not go so far as to allege fraud on the part of the respondent, and indeed there is no evidence whatever of any misrepresentation by the latter. I find myself in complete agreement with the learned trial Judge (see p. 3 of the typed record) that the appellant cannot now re-open questions between the parties existing prior to the judgment and covered by it. That judgment was given "after hearing and upon the agreement of both parties" over seventeen years ago. It was not the result of any misrepresentation by the respondent, and it was never appealed against. It is clearly too late for the respondent to try to go behind it.

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The only other point raised by Mr. Levin was the question whether it was proper that the appellant should be the person who is required to go to Court. It has already been held (H.C. 62/45) that the onus of proving that the decree cannot be executed must fall on the judgment debtor. Having regard to the facts as I now know them, to the provisions of Article 36 of the Execution Law and to the decision in H.C. 65/37 (5 P.L.R. 47), I can find no reason for disagreeing with the decision in H.C. 62/45 even if I were not bound by it.

In the result this appeal fails and must be dismissed with costs on the lower scale to include a hearing fee of LP.10.

Hubbard J: I concur.

Civil Appeal No. 21 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice, Shaw J. and Abdulhadi J.

MUNICIPAL COMMISSION OF JAFFA,
in its capacity as the
LOCAL BUILDING AND TOWN
PLANNING COMMISSION OF JAFFA. . *Appellants.*

v

NOUR MIKHAIL KHOURY,
and others. . . . . *Respondents.*

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Immovable property — Expropriation — Notice to treat under Section 5 of the Land (Expropriation) Ordinance served on owners of the land to be expropriated — Subsequent to service of notice to treat the Land (Acquisition for Public Purposes) Ordinance, 1943, enacted — Promoters applied under Section 8 of above Ordinance to Land Court to determine compensation to be paid — Land Court fixed amount of compensation payable — Appeal by promoters to Supreme Court — Appeal filed after expiry of period allowed under

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Section 11 of the Land (Expropriation) Ordinance — Proviso to Section 26 of the Land (Acquisition for Public Purposes) Ordinance, 1943, kept alive provisions of the Land (Expropriation) Ordinance if notice to treat was served under the provisions of Section 5 thereof — Whether appeal out of time — Land (Acquisition for Public Purposes) Ordinance, 1943, Section 26.

Notice to treat under Section 5 of the Land (Expropriation) Ordinance was served about the end of May, 1943, by the promoters, the Municipal Commission of Jaffa in its capacity as the Local Building and Town Planning Commission of Jaffa, on the owners of land intended to be expropriated. No agreement as to the value of the property was reached and the promoters applied in 1946 to the Land Court of Jaffa (Land Case No. 12/46) under Section 8 of the above ordinance for fixing the compensation to be paid. The Land Court, constituted of the President thereof (Judge Hubbard), fixed the amount to be paid by a judgment given by it on the 23rd of December, 1946. Dissatisfied with the decision of the Court, the promoters appealed and they filed their appeal on the 20th of January, 1947. Notice of objection under Rule 333 of the Civil Procedure Rules, 1938, was served on the appellants in which objection to the hearing of the appeal on the ground of its being out of time was raised. The point at issue was whether the appeal was governed by the provisions of the Land (Expropriation) Ordinance, Section 11 of which allowed a period of fifteen days within which a dissatisfied party might appeal, or whether it was governed by the provisions of the Land (Acquisition for Public Purposes) Ordinance, 1943, which came into force on the 10th December, 1943, the second proviso to Section 26 of which, which was repealed and replaced in May, 1946, provides that the provisions of the Land (Expropriation) Ordinance shall apply to the expropriation of land if the notice to treat in respect of that land had been served under the provisions of Section 5 thereof.

In dismissing the appeal for being out of time, the Court of Civil Appeal,

HELD that as the second proviso to Section 26 of the Land (Acquisition for Public Purposes) Ordinance, 1943, as replaced in 1946, has kept alive the provisions of the Land (Expropriation) Ordinance in respect to land in respect of which notice to treat has been served under Section 5 of the Land (Expropriation) Ordinance and as notice to treat had been served under the said section 5, the appeal was governed by Section 11 of the Land (Expropriation) Ordinance, every section of which was applicable to the present expropriation, and the appeal which was filed after the expiry of the period of fifteen days laid down in Section 11 was out of time.

Referred to: CA 67/44, 11 P.L.R. 313.

Anton Atalla for appellants.

George Berouti for thirteen respondents.

E. D. Goitein for the remaining respondent.

Judgment: This is an appeal against a decision of the Land Court of Jaffa in Land Case No 12 of 1946. The case was concerned with the expropriation of land under the provision

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of the Land Expropriation Law of Palestine. The question that arises in this appeal has its source in the fact that the Land (Expropriation) Ordinance of 1926 was replaced by a comprehensive Ordinance of 1943. So far as this appeal is concerned, the issue arises from the fact that whereas Section 11 of the 1926 Ordinance provided that a person dissatisfied with the order of compensation had a right to appeal to the Supreme Court sitting as a Court of Appeal within fifteen days, the 1943 Ordinance omitted that provision, and as a consequence an appeal from the decision of the Court would be governed by the normal Court procedure, which is Rule 321 of the Civil Procedure Rules which allows an appeal within thirty days. In regard to the facts of this case, it is not denied that the appellant did not file his appeal until more than fifteen days after the delivery of the judgment. Mr. Atalla argues that in so far as the filing of the appeal is concerned, he can have recourse to the 1943 Ordinance.

Now the proceedings in the lower Court were conducted throughout on the basis of the 1926 Ordinance. The opening words of the judgment of the learned President are: "This is an action under Section 8 of the Land (Expropriation) Ordinance", and that was a reference to the 1926 Ordinance.

It must be borne in mind that although the 1943 Ordinance repealed the previous Ordinance, it kept it alive for certain specific purposes which are detailed in Section 26 of the 1943 Ordinance, particularly the second proviso, which is to the following effect:

> "Provided further that any proceedings commenced before the date of commencement of this Ordinance, under any of the Ordinances hereby repealed, may be continued and enforced under the respective Ordinances hereby repealed as if this Ordinance had not been passed".

Before the date of the judgment appealed against this proviso was repealed and replaced by the following proviso:-

> "Provided that where a notice to treat in respect of any land has been served under the provisions of Section 5 of the Land (Expropriation) Ordinance, or Section 4 of the Land (Acquisition for Army and Air Force) Ordinance, the provisions of the former or latter Ordinance, as the case may be, shall apply to the expropriation of the said land as if this Ordinance had not been passed".

The point emphasized by Mr. Atalla in the course of his very forceful argument was that this proviso split up, as it were, the act of expropriation. It is true, he says, that I am bound by the old Ordinance as far as the actual expropriation is concerned, but in so far as bringing of an appeal is concerned, I am governed by the new Ordinance and following

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the decision of this Court in Civil Appeal 67/44 the proviso to Section 26 refers only to legal proceedings which were commenced before the date of the commencement of the new Ordinance. In other words, if legal proceedings in connection with the expropriation were deferred until after the new Ordinance had been brought into operation, the case must be determined in accordance with the provisions of the new Ordinance, despite the fact that the preliminary negotiations may have been initiated long before the new Ordinance.

Now, relying solely on the decision of the Court in Civil Appeal 67/44, there might have been some substance in this argument, but we have got to consider the fact of the repeal and replacement of that proviso in May, 1946. In our opinion, the wording of the new proviso is not open to ambiguity, and we cannot accept the view of Mr. Atalla that an expropriation can be split between the two Ordinances. In effect, the proviso states that when a certain event has happened, which is when notice to treat in respect of any land has been served under the provision of Section 5 of the Land (Expropriation) Ordinance — and it is not denied that notice to treat was served under that Ordinance — then a certain procedure shall inevitably follow, that procedure being that the provisions of the former Ordinance shall apply to the expropriation as if the new Ordinance had not been passed.

We ask ourselves the question what are the provisions of the former Ordinance in regard to expropriation? Expropriation obviously means the statutory expropriation provided for in the Ordinance. It seems to us irresistible that all the provisions of that statute in regard to the incidence of expropriation must apply. One of the statutory provisions of the incidence of this expropriation is the right of appeal given by Section 11. It follows that if the Ordinance is kept alive at all in regard to this expropriation, and we have held that it is, it is not one or two sections that apply but every section of Chapter 77.

In our opinion the preliminary point must be sustained. The appeal is out of time and it must be dismissed with LP.10 inclusive costs to applicants.

Civil Appeal No. 198 of 1946.
Civil Appeal No. 199 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Curry Ag. J.

Civil Appeal No. 198/46.

MUHAMMAD YUSEF I'LAIYAN,
and others. . . . . *Appellants.*

v

KEREN KAYEMETH LEISRAEL Ltd. . . *Respondent.*

Civil Appeal No. 199/46.

MUHAMMAD MUHAMMAD HUSSEIN,
and others. . . . . *Appellants.*

v

KEREN KAYEMETH LEISRAEL Ltd. . . *Respondent.*

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Immovable property — Awlawiyeh — Sale of land in Execution Office in satisfaction of a judgment debt — No adertisement of sale and no bidding made — Claim to land by awlawiyeh made — Whether claimant entitled to land claimed by awlawiyeh — Ottoman Land Code, Article 45.

The Keren Kayemeth Leisrael, as a judgment creditor, lodged the judgment in the Execution Office of Tel-Aviv for execution. Lands of the judgment-debtor were sold in that office with the approval of the Chief Execution Officer, but there was no advertisement of the sale and there was no public bidding. Some of the villagers of the village within which the lands are situate commenced proceedings in the Land Court of Jaffa (Land Case No. 4/44) claiming the lands so sold by awlawiyeh under Article 45 of the Ottoman Land Code. Application under Rule 21 A of the Civil Procedure Rules, 1938, was made to the Land Court by the defendant for the dismissal of the actions on the grounds: (1) want of jurisdiction, and (2) want of cause of action as the lands claimed were sold by public auction and therefore could not be claimed under Article 45 of the Ottoman Land Code. The Land Court, constituted of the President thereof (Judge Hubbard), dismissed the actions on the authority of Land Appeal 64/32, 1 P.L.R. 784. The plaintiffs in both actions appealed. The point before the Court of Appeal was whether the absence of advertisement and bidding took the sale out of the category of sales in execution.

In dismissing the appeals, the Court of Civil Appeal,

HELD that the absence of advertisement and bidding did not take the sale out of the category of sales in execution. Therefore Article 45 did not apply and the appellants in both appeals could not claim the lands by awlawiyeh under that article.

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Followed: LA 64/32, 1 P.L.R. 784.
CA 110/46, 13 P.L.R. 513.

Kamal Barbari for appellants.

I. Olshan for respondent.

Judgment: We do not consider it to be necessary to call on Mr. Olshan for the respondent to reply.

The only point for determination is whether the appellants are entitled to claim a right of prior purchase under Art. 45 of the Ottoman Land Law, in respect of the land which was the subject matter of the action.

In Land Appeal No. 64/32 (1 P.L.R. 784) it was held that Art. 45 does not apply where land is sold in execution proceedings. In the present case the land was sold in the Execution Office with the approval of the Chief Execution Officer, but there was no advertisement or public bidding of the usual kind. It was sold in execution of a judgment debt. The question is whether the absence of advertisement and bidding takes the sale out of the category of sales in execution.

In C.A. 110/46 (13 P.L.R. 513) the Court held that the fact that the sale proceedings had not been advertised could not affect the matter, and having considered the circumstances of the present sale we are unable to hold that it was not a sale in execution.

In the result the appeal must be dismissed with one set of costs on the lower scale to include an advocate's attendance fee of LP. 10.

Income Tax Appeal No. 34 of 1945.

In the Supreme Court sitting under Section 53(1) of the Income Tax Ordinance, 1941.

Before: Curry Ag. J.

I. TRACHTENGOTT. . . . . *Appellant.*

v

ASSESSING OFFICER, TEL-AVIV. . . . *Respondent.*

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Revenue — Income tax — Assessment of chargeable income of assessee, who is a partner in a firm in liquidation, at a certain figure — Disallowance by Assessing Officer of certain sums incurred by assessee in negotiations with his partners and in connection with the liquidation of the firm which assessee claimed to be deductible — Appeal by assessee — Claim by assessee that expenses incurred by him in connection with appeal also deductible — Income Tax Ordinance, 1941, Sections 11 and 13.

In his return for the year of assessment 1944/45, Trachtengott, a partner in a firm in liquidation, claimed certain legal expenses which he incurred in negotiations with his partners and legal expenses in connection with the liquidation of the firm, which exceeded LP. 1600. The Assessing Officer disallowed those sums. The assessee objected but his objection was refused. He appealed. On appeal it was submitted on his behalf that not only the above sums were deductible but also the amounts he paid in connection with the appeal which he brought against the assessment by the Assessing Officer.

In dismissing the appeal, except as to an item of LP. 50 credited to appellant in the books but not yet drawn by him, the Court,

HELD (1) that the legal expenses incurred by the appellant in connection with the liquidation of the firm were in the nature of capital expense and were not outgoings and expenses wholly and exclusively incurred in the production of the income, and were not therefore deductible.

(2) that the legal expenses incurred by the appellant in connection with the appeal brought by him against the assessment by the Assessing Officer, being given that when the law says that certain deductions can be made in respect of the production of the income it is clearly referring to the gross income, not the chargeable income, because it is after the permitted deductions have been made one arrives at the chargeable income, were not expenses incurred in the production of appellant's gross income, they were expenses incurred in respect of disputes with the Assessing Officer and could not be deducted.

Referred to: Rushden Heel Co. v. I.R.C. (1947) All E.R. 699.

E. D. Goitein for appellant.

A. Wittkowski for respondent.

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Judgment: The appellant was a partner in a diamond firm in which he owned fifty percent of the shares. A dispute arose between him and the other partners and as a result thereof he became involved in considerable litigation and legal expenses. These expenses can roughly be divided into two classes, — legal expenses incurred in abortive negotiations with the partners and legal expenses in connection with the liquidation of the firm. There is a further legal expense with which we are concerned in this appeal and that is expenses incurred in contesting the income tax claim of the present respondent — these consisted of legal expenses and an auditor's fee.

The question to be decided is whether all or any of these expenses should be deducted in order to arrive at the chargeable income of the appellant.

The sections of the law dealing with the deductions allowable and the deductions not allowable are Sections 11 and 13. Section 11(1) reads as follows —

> "For the purpose of ascertaining the chargeable income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year of assessment by such person in the production of the income."

I stress the words "in the production of the income".

Turning to Section 13(b) the relevant part of the subsection reads —

> "For the purpose of ascertaining the chargeable income no deduction shall be allowed in respect of any disbursements and expenses not being wholly and exclusively laid out and expended for acquiring the income."

In my opinion these two sections in effect say the same thing in a different manner each equally clear. Section 11 says that in order to arrive at the chargeable income you may deduct all expenses incurred in the production of the income. Section 13(b) tells you that you may not deduct expenses unless they were expended wholly and exclusively for the purpose of acquiring the income.

Dealing with the items of LP.57 and LP.84, being expenses incurred in connection with the appeal, Mr. Goitein argues that they seek to take away some of appellant's income and that the expenses incurred in resisting that false claim are expenses incurred in acquiring that income. He argues that "acquire" means to retain and hold. It is an ingenious argument but I am afraid I find it impossible to accept it. In my opinion he has lost sight of the fact that when the law says certain deductions can be made in respect of the production of the income, it is clearly referring to the gross income, not

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the chargeable income, because it is after the permitted deductions have been made one arrives at the chargeable income. The expenses incurred in resisting the claim of the Assessing Officer are clearly not expenses incurred in the production of your gross income. I have been referred to the English law on the subject but as the law is different care must be taken in applying it. However, by analogy, I certainly appear to be supported thereby. The case of Rushden Heel Co. Ltd. v. I.R.C. 1947, A.E.L.R. 699 merits consideration. The English Rule prohibits deductions in respect of any disbursements or expenses not being wholly and exclusively laid out or expended for the purpose of the trade, profession, employment or vocation. One has therefore in effect to substitute the words "for acquiring the income" for the words "for the purpose of the trade, profession, etc." In the course of his judgment Lord Greene quoted the dicta of Lord Davey in Strong & Co. Ltd. v. Woodfield who said: "It is not enough that the disbursement is made in the course of or arises out of, or is connected with the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits." Lord Greene later refers to a decision of Finlay J. in Allen v. Farquharson Bros. In that case the claim, as here, was for a deduction for income tax purposes of the cost of an appeal to the Special Commissioner. On the substance of the case Finlay J. held that the expenditure was an application of profits after they had been earned and not an expenditure necessary to earn the profits. Finally Lord Greene himself answers the question as follows, viz. that the expenditure was incurred by the company primarily in its capacity as a taxpayer and for the purpose of regulating the position as between itself as a taxpayer and the Crown. I would merely add and "not for the purpose of acquiring the income." In my opinion there can be no question that expenses incurred in respect of disputes with the Assessing Officer cannot be deducted.

The next group of items comprises LP.752; LP.75 and LP.50 — these were expenses incurred in connection with the liquidation.

It appears to me that an expenditure in connection with liquidation proceedings is in the nature of capital expense. As Mr. Wittkowski has pointed out the expenses of the formation of a company and its winding up cannot be deducted. Mr. Goitein argues that his client merely started the proceedings to safeguard the profits of the company, which he thought he was losing owing to wrong acts on the part of the other members. It may well be he did it to safeguard his future income but

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it cannot be gainsaid that he was in fact not asking for a mere taking of accounts, but a liquidation or realisation of the assets. On this ground alone I would dismiss the appeal in respect of these items. Mr. Wittkowski has also argued that by virtue of Sections 11 and 14 expenses can only be deducted in respect of the very same income shewn in the return, and as the only income is rents, any expenses in connection with the business are not deductible but I do not think it is necessary for me to deal with that line of the argument.

Finally we come to the two items LP.204 and LP.10. These were expenses in connection with consultations with Dr. Joseph and Dr. Eliash prior to the actual winding up. In his evidence the appellant says Dr. Joseph suggested he bought Amiel's share or they bought his and they negotiated on those lines. It is true the appellant goes on to say that he wanted the matter settled amicably so that he could secure his profits, but clearly on his own admission, owing to the dispute the negotiations were as to one side or the other selling out. That cannot, in my opinion, by the greatest stretch of imagination be called an expenditure wholly and exclusively laid out for acquiring the income. I can well imagine certain types of recurrent expenditure being borderline cases, but this does not even come within that category.

There is a small item of LP.50 which apparently was credited to the appellant in the books which he has not yet drawn. He says although credited to him he could not draw it. Accepting his statement to that effect that item should not be assessed as chargeable income.

For the foregoing reasons the appeal must be dismissed, with the exception of the item of LP.50.

Respondent entitled to costs fixed at LP.30.

Privy Council Appeal No. 91 of 1945.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

Before: Lord Du Parcq, Lord Morton of Henryton and Sir John Beaumont.

WOLF NIWES
and another. . . . . *Appellants.*

v

CHEIM LEIB ROSENSTRAUCH. . . . . *Respondent.*

1947
14th July

Lord Du Parcq
Lord Morton of Henryton
and
Sir
John Beaumont

PCA 91/45
Niwes
and another
v
Rosenstrauch

Appellate Court — Findings of fact — Appellate Court entitled to come to a different conclusion, on a question of fact, from that reached by the trial Court.

In humbly advising His Majesty that the appeal of the first appellant be dismissed and that of the second appellant be allowed and that the judgment entered against the second appellant in the Supreme Court in Civil Appeal No. 373/44 be set aside, the Judicial Committee of the Privy Council,

HELD that an appellate Court is entitled in proper cases to come to a different conclusion, on a question of fact, from that reached by a trial Court.

The relevant facts appear from the judgment of the Board.

The judgment of the Board was delivered by Lord Morton of Henryton.

Judgment: This is an appeal from a judgment, dated the 22nd February, 1945, of the Supreme Court of Palestine sitting as a Court of Civil Appeal, allowing the respondent's appeal from a judgment of the District Court of Haifa in an action in which the respondent was plaintiff and the appellants were defendants. The appellants are husband and wife.

By paragraph 5(F) of his Statement of Claim the respondent claimed judgment against the appellants, jointly and severally, for LP.1,000 and interest. At the trial before the President of the District Court, the respondent gave evidence to the effect that in April, 1937, when he and the appellants were living in Vienna, he handed over 41,000 schillings to his cousin the first appellant for safe custody; that a few days later it was agreed that 28,000 schillings part of this sum should be lent by the respondent to the first appellant; that the loan should bear interest and should be secured by a mortgage of a house at Haifa; and that LP.1,000 should be paid five years later in discharge of the principal sum lent. The respondent also stated

that the terms of the loan were set out in a "Deed of Loan" drawn up by himself and signed by both appellants; that the balance of 13,000 schillings was repaid to him in October, 1937; that the first appellant paid him interest monthly from August, 1937, to February, 1938, when these payments ceased; that both appellants left Vienna shortly before Hitler entered Austria; and that the respondent destroyed the Deed of Loan, on the advice of his brother-in-law Armon Kruppik, after Hitler entered Austria, because it showed that the respondent had property and would have led to his being put in a concentration camp.

After hearing this evidence the learned President made the following note "Defendant objects to any witness other than the parties. I hold that as the plaintiff has established the fact that the document was destroyed, oral evidence of witnesses in addition to that of the parties is admissible to prove the contract." In view of subsequent events their Lordships cannot construe this note as a finding that the document existed and had been destroyed. In their opinion the President was merely expressing the view that as evidence had been given of the destruction of the document, oral evidence was admissible to prove its contents. Armon Kruppik gave evidence that he had seen and read the Deed of Loan, and confirmed the evidence of the respondent as to its contents and as to the occasion on which, and the reason for which, the document was destroyed. He said: "I saw the document destroyed — burned in my own house — with my own eyes". A. Scheg, who had interviewed the first appellant in Palestine after the respondent had come to Palestine, said "I was requested by the parties (i.e., by the respondent and the first appellant) to negotiate in their dispute but nothing came of my intervention. In the course thereof defendant told me he had paid interest on the loan in Vienna. He told me he had paid the interest every month.... I think he said 1,000 Austrian schillings.... this interest was in respect of the money he had taken from plaintiff. Defendant admitted the loan of 28,000 schillings and said he wanted to repay them." Y. Hoffmann said "I know defendant. He told me he owes money LP.1,000 to plaintiff and he is going to settle it amicably.... On another occasion when plaintiff was also present plaintiff said to the defendant 'When will you give me a mortgage of LP.1,000 on your house?' and defendant replied 'If you speak of pounds I do not want to speak at all. I want to settle with you but if you speak about pounds there is nothing doing.'"

At the conclusion of the evidence for the plaintiff, counsel for the appellants stated that the first appellant was "too ill to

come" and that he wanted to have the evidence of the second appellant, who was in New York, taken on commission. The first appellant never at any time gave evidence, although it appears that later he sufficiently recovered from his illness to travel to the United States of America. The second appellant gave evidence in New York, on commission, in the form of answers given on oath to certain questions drafted by the advisers of the respondent and appellants respectively and sent from Haifa by air mail. By her answers she said that the respondent voluntarily gave about 41,000 Austrian schillings to her husband in Vienna, that it was not a loan, that neither she nor her husband paid any interest to the respondent, that about 13,000 schillings were returned to the respondent by her husband and by the witness, and that "the balance remained in Vienna because the Nazis took control of everything when they took over Austria." This last piece of evidence would appear to be hearsay if, as the respondent had said, the witness and her husband left Vienna shortly before Hitler entered Austria. To the questions "Has the witness alone or together with the first defendant received a loan of Austrian schillings from the plaintiff?" and "Has the witness alone or together with the first defendant made and signed a deed of loan or promissory note to the plaintiff?" the witness replied "No."

In giving judgment the learned President said "Now the first issue to be decided by me is whether I am satisfied by plaintiff's evidence regarding the destruction and alleged contents of the said document." He then proceeded to summarise the evidence of the respondent and of Kruppik and gave his reasons for thinking that the story told by them as to the existence of this document and its destruction was an unlikely one. The President then referred to the evidence of the second appellant, taken on commission, and referred without comment to the fact that two other witnesses were called who gave evidence to the effect that the first appellant had admitted the loan. He then said "As I have already stated, the onus is upon the plaintiff, and, as I think I have already clearly indicated, I am by no means satisfied with the truth of his story. In fact, from the evidence generally I have obtained the impression that the money was merely deposited with defendant — probably for transfer by the latter if possible to Palestine — and that the real trouble between the parties is over the question of the amount to be repaid, the plaintiff demanding sterling and the defendant insisting on repayment at a very different rate of exchange. This action was not for the return of money deposited for safe keeping and, therefore, I can enter no judgment in respect thereof as clearly a different defence would arise." For these reasons he

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dismissed the action. The respondent appealed to the Supreme Court of Palestine. The appeal was allowed, the judgment of the District Court set aside, and judgment entered for the respondent against the appellants jointly and severally for LP.1,000 with interest from the date of action at the rate of 6 per cent. and costs in that Court and below. The Court accepted the fact that the deed of loan never existed. Frumkin J. (with whose judgment Shaw J. agreed) said in regard to this point "Although we do not necessarily agree with his reasoning (i.e., the reasoning of the President) we are not inclined to interfere with his discretion arrived at after hearing and weighing the evidence.... But that is not the end of the matter." After making certain observations as to the onus of proof, Frumkin J. referred to the evidence of Scheg and Hoffmann and concluded "Even if we take it that there is no document drawn between the parties there was independent evidence to prove that the money received and kept was in the nature of a loan and not a deposit." Judgment was accordingly given for LP.1,000 and interest against both defendants in the action.

Their Lordships agree with the decision given by the Supreme Court against the first appellant. They think that this is a case in which an Appellate Court was justified in coming to a different conclusion, on a question of fact, from that reached by the trial judge. In the present case the trial judge has given his reasons for declining to accept the evidence of the respondent and Kruppik, and their Lordships do not find these reasons at all convincing. They are prepared, however, to decide this appeal on the footing that the existence of the document in question was not satisfactorily established. Even on this footing, however, there remains the clear evidence of Scheg and Hoffmann as to the admissions of the first appellant. There is nothing to show that these two men were not independent witnesses, and the trial judge has made no adverse comment upon the manner in which they gave their evidence. This latter fact does not, of course, establish that he believed them, but the trial judge seems to have left out of account altogether the very significant fact that the first appellant never gave evidence contradicting the evidence of Scheg and Hoffmann, although he must have been able to give evidence, since he recovered his health sufficiently to travel to the United States. No explanation was given as to why he did not do so, and their Lordships think it is incredible that the first appellant should have refrained from giving evidence, had the evidence of Scheg and Hoffmann been untrue. Having regard to the facts:-

(1) that their Lordships find unconvincing the reasons of the trial judge for disbelieving the evidence of the respondent and Kruppik;

(2) that the trial judge did not see any witness for the appellants in the witness box, and was not, therefore, in a position to weigh the truthfulness of one set of witnesses against the other;

(3) that the trial judge appears to have disregarded the failure of the first appellant to give evidence; and

(4) (a circumstance of less weight) that the trial judge made no adverse comment on the demeanour of any of the witnesses for the respondent,

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their Lordships think that the Supreme Court was justified in differing from the President on the question whether there was a loan from the respondent to the first appellant. Their Lordships cannot agree with the views expressed by the Supreme Court as to the onus of proof; in their view, as the 28,000 schillings were admittedly deposited for safe keeping in the first instance, the onus was upon the respondent to prove that the transaction was changed into one of loan. For the reasons already stated, however, their Lordships think that onus was discharged.

Counsel for the appellants attacked the reasoning by which the Supreme Court arrived at the conclusion that the sum payable to the respondent was LP.1,000. Their Lordships are not in agreement with this reasoning, but they think that the sum awarded was the right sum, because it was a term of the loan that the sum to be repaid should be LP.1,000 although the sum lent was in Austrian schillings.

On one point, however, their Lordships find themselves in agreement with the argument of counsel for the appellants. He submitted that, if the evidence of the respondent and Kruppik as to the existence of the deed of loan was rejected, there was no evidence to show that any sum was lent to the second appellant. Their Lordships think that this contention is well founded. The only evidence which tended to establish any liability on the part of the second appellant was the evidence that she, as well as her husband, signed the document in question. All the rest of the evidence establishes only a loan from the respondent to the first appellant.

Their Lordships will humbly advise His Majesty that the appeal of the first appellant should be dismissed; that the appeal of the second appellant should be allowed and that the judgment entered against the second appellant in the Supreme Court should be set aside. The first appellant must pay to the respondent such costs as can be awarded to a respondent appearing *in forma pauperis*. No order is made as to the costs of the second appellant, here or in the courts in Palestine.

Civil Appeal No. 161 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal

Before: Shaw J. and Hubbard J.

HAJ KAMEL GHAFIR. . . . . *Appellant.*

v

PALESTINE PLANTATIONS Ltd. . . . *Respondent.*

Immovable property — Prescription — Manner of pleading prescription — Bar to prescription is not only that mentioned in Article 1674 of the Mejelle — Mejelle, Article 1674.

In Land Case No. 13/43 of the Land Court of Haifa the plaintiff prayed for a judgment declaring that certain parcels were in its sole ownership and for an order to the defendant to vacate the parcels in dispute and not to interfere with its ownership and possession. The defendant denied plaintiff's ownership and pleaded that he had been in occupation for a period exceeding that of prescription and that therefore plaintiff's claim was barred. The Land Court, constituted of the Relieving President thereof (Judge Weldon), found that the plaintiff was the registered owner of the land in dispute, and as regards the point of prescription the court held that time did not run in defendant's favour by reason of his admission of being a mere trespasser, defendant having admitted that he saw the land waste and settled himself upon it and never paid rent to anybody nor paid any taxes. In the result the Land Court gave judgment for the plaintiff. The defendant appealed.

In dismissing the appeal, the Court of Civil Appeal,

HELD (1) that a person in possession of immovable property pleading prescription has to plead: "I am the owner of the land, but since I have been in possession for so long you cannot now put me to the proof of my title". If that person says how the land actually came to be his, then he must prove that fact at his peril, or if he admits he entered on the land without right then he cannot claim prescription.

(2) that the bar to prescription mentioned in Article 1674 of the Mejelle, namely, an admission of the plaintiff's right as claimed, is not the only bar where prescription is pleaded in respect of land either mulk or miri.

The judgment of the Court was delivered by Hubbard J.

Anwar Nusseibeh for appellant.

M. Eliash and J. Ruthberg for respondent.

Hubbard J: This is an appeal by the defendant in Land Case 13/43 (of the Land Court of Haifa) against the judgment of His Honour Judge Weldon delivered on 12th April, 1946. In that action the respondent company claimed a declaration that it was the sole owner of certain land and an order to the appellant to vacate the land. The appellant denied the respondent company's ownership and pleaded prescription.

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Hubbard J.
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v
Palestine Plantations Ltd.

The learned Judge found that the respondent company is the registered owner of the land, and it clearly is. As regards prescription, the appellant himself admitted that he was a mere squatter, and the learned Judge therefore, quite rightly, held that time did not run in his favour.

The principles of prescription as regards land in this country are too well known to need more than a summary repetition — they are set out in Goadby & Doukhan and Chiha and other learned works. The person in possession is deemed always to plead long possession as owner. He says: "I am the owner of the land, but since I have been in possession for so long you cannot now put me to the proof of my title." If he says how the land actually came to be his, then he must prove that fact at his peril. If he admits he entered on the land without right, then he cannot claim prescription. Mr. Nusseibeh, for the appellant, referred to Article 1674 of the Mejelle, but we are of opinion that the bar to prescription therein mentioned, namely, an admission of the plaintiff's right as claimed, is not the only bar where prescription is pleaded in respect of land either mulk or miri.

The learned Judge went on to deal with the actual evidence of his possession. This is purely a question of fact, and we are of opinion that he had evidence to justify his findings, namely, that the appellant did not enter on the land in 1921 as he alleged, but somewhere about 1935, and that between that date and the date of the action in 1943, apart from the fact that the period does not amount to ten years, he did not have continuous uninterrupted possession. The learned judge in giving judgment for the respondent also ordered that the appellant should demolish the house and well he had constructed on the land. Mr. Nusseibeh contended that he had no power to make such an order. It appears, however, that Tute's translation of Article 11 of the Provisional Law of 5th Jamad el Awwal, 1331, is incorrect. According to the Turkish text the owner of the land has the right to compel the person who placed the building on it to demolish it, or if its demolition is harmful to the land, then the owner of the land may take possession of the building and pay therefor the value, not of the building as it stands, but of the materials of which it is made.

For the above reasons this appeal is dismissed. The respondent company to have its costs on the lower scale in this appeal and an attendance fee of LP. 10.

Shaw J: I concur.

Civil Appeal No. 212 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Hubbard J.

MICHEL KASSATLY & FILS. . . . . *Appellants.*

v

RASHID AHMAD ABU LABAN. . . . . *Respondent.*

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Shaw J.
and
Hubbard J.

CA 212/46
Michel Kassatly
& Fils
v
Abu Laban

Judgment — Action in District Court against a foreign firm — Affidavit filed for purpose of obtaining leave for service out of jurisdiction — Advocate purporting to act for defendant filed defence — Advocate in question found to be not properly authorised — Court treated action as if there was no appearance — Judgment for plaintiff — No affidavit of service by plaintiff — Whether Court empowered to give judgment — Civil Procedure Rules, 1938, Rules 80, 81 and 134.

In Civil Case No. 207/45 of the District Court of Tel-Aviv, brought by Rashid Ahmad Abu Laban against Michel Kassatly & Fils, a foreign partnership of Beirut, the plaintiff asked for a declaratory judgment declaring him to be relieved from any liability in respect of any interest, costs and advocate fees under the judgment of the District Court of Jaffa in Civil Case No. 126/38. He averred in his statement of claim and in his affidavit filed for the purpose of obtaining leave for service out of the jurisdiction that defendants' advocate had agreed that in consideration of his (plaintiff's) not taking action for the setting aside of the judgment by default given against him in Civil Case No. 126/38 of the District Court of Jaffa, the defendants (Michel Kassatly & Fils) would give him (plaintiff) consideration for the sum of LP 283.500 mils and would waive their right to interest, costs and advocate fees under the said judgment and that in contravention of that agreement the defendants had started executing the judgment. A defence was filed by an advocate of Jaffa on behalf of the defendants. At the hearing the point was taken that defendants' advocate was not properly authorised to appear and defend the action, with which the District Court, constituted of the Relieving President thereof (Judge Hill), agreed, and thereafter the Court ruled that all acts taken by the advocate who purported to act on behalf of defendants were a nullity and that the action must be treated as if there was no appearance by the defence and taken ex parte. The Court then, in reliance on the affidavit filed by the plaintiff which was for the purpose of obtaining leave for service out of the jurisdiction, proceeded under Rule 80 of the Civil Procedure Rules, 1938, to grant the declaration asked for. The defendants appealed. The Supreme Court agreed with the District Court that defendants' advocate was not properly authorised to appear and defend, but the main ground of appeal was whether, even assuming the defence filed was not on behalf of defendants, the court was empowered to give judgment before compliance by the plaintiff with the provisions of Rule 81 of the Civil Procedure Rules, 1938.

In allowing the appeal, the Court of Civil Appeal,

HELD (1) that in the absence of an affidavit of service by the plaintiff as laid down under Rule 81 of the Civil Procedure Rules, 1938, no judgment could be given in the action, and the judgment which was given is a nullity.

(2) that the phrase "as if such party had entered an appearance" in Rule 80 of the Civil Procedure Rules, 1938, is used merely as an indication of how the trial is to proceed, and does not mean that a defendant is to be deemed for all purposes to have entered an appearance.

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and
Hubbard J.

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Abu Laban

Henry Cattan for appellants.

E. Georges Elia for respondent.

Judgment: This is an appeal from the judgment dated 23.5.46 of the District Court, Tel-Aviv, in Civil Case 207/45.

The trial Court held that Mr. Aql, who purported to appear on behalf of the appellant (original defendant), was not properly authorised to appear and defend the action, and relying on an affidavit dated 12.6.45 which, it may be observed, had been filed for the purpose of obtaining leave for service out of jurisdiction, the learned Judge gave judgment against the appellant. He did so by virtue of Rule 80 of the Civil Procedure Rules, but he erred in giving judgment on the basis of the affidavit since Rule 134 provides that such judgment shall be given on the statement of claim as the Court shall think fit. Both the affidavit and the statement of claim contained an averment that the appellant's advocate had agreed that in consideration of the plaintiff's not taking proceedings to set aside the judgment (in C.C. 126/38 of the District Court of Jaffa) the defendants would give plaintiff consideration for a sum of LP. 283.500 mils and the defendants would waive their right to interest, costs and advocate fees under the said judgment. But the statement of claim had attached to it in addition two letters which were alleged to embody the agreement.

The most important ground of appeal, however, is the question whether, in view of the provisions of Rule 81 of the Civil Procedure Rules, the Court below was empowered to give judgment. Rule 81 provides as follows:-

> "No judgment in default of appearance shall be given unless and until the plaintiff has caused an affidavit of service to be filed".

Some doubt arose during the hearing of this appeal as to whether, when the action proceeds under Rule 80 "as if such party had entered an appearance", the judgment given could nevertheless be said to be given in default of appearance. But it is clear on consulting the Annual Practice that the phrase beginning "as if..." is used merely as an indication of how the trial is to proceed, and does not mean that the defendant is to be deemed for all purposes to have entered an appearance. Our Rule 80 corresponds to O. 13, R. 12. Where an action proceeds under O. 13, R. 12, the rule under which judgment

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is given is O. 27, R. 11, which corresponds to our Rule 134, dealing with judgment in default of filing a defence. The note on O. 27, R. 11 (A.P. 1939, p. 452) referring to the necessity for the delivery of a statement of claim, as well as for the service of a writ, says: "There is no power to dispense with delivery of a statement of claim where the plaintiff is proceeding in default of appearance and defence under O. 13, R. 12 and this rule". This appears to us to be a clear indication that our Rule 81 applies also to cases under Rule 80.

In the present case, the plaintiff (respondent) had not caused an affidavit of service to be filed, and the Court had held, and in our view had rightly held, that Mr. Aql was not properly authorised to appear and defend. It follows that no judgment could be given, and that the judgment which was given is a nullity.

The appeal must, therefore, be allowed with costs on the lower scale to include a hearing fee of LP.10.

Civil Appeal No. 281 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Abdulhadi J.

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14th July

FitzGerald C. J.
and
Abdulhadi J.

CA 281/46
Kasheff
and another
v
Asfar

MAHMOUD ABDUL WAHAB KASHEFF
and another. . . . . *Appellants.*

v

HASSAN ASFAR. . . . . *Respondent.*

Landlord and tenant — Eviction — Action — Eviction proceedings against tenant — Proceedings commenced before termination of tenancy agreement — Action premature.

Muhammad and Hashem Kasheff commenced eviction proceedings against their tenant in the Magistrate's Court of Jaffa (Civil Case No. 14/46). They based their action on two grounds, namely that the tenant failed to pay the rent for the year 1365 A.H. and that they needed the premises, a bakery, for their own use. The Magistrate ordered eviction. The tenant appealed to the District Court of Jaffa (Civil Appeal No. 128/46). The District Court, constituted of the President thereof (Judge Hubbard), disagreed with the Magistrate on the issue of failure to pay the rent and held that the action was premature since it was brought several months before the expiry of the period of lease. In the result the District Court allowed the appeal. The landlords appealed to the Supreme Court by leave.

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FitzGerald C. J.
and
Abdulhadi J.

CA 281/46
Kasheff
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v
Asfar

In dismissing the appeal, the Court of Civil Appeal,

HELD that the landlords' action for eviction was premature because the action for eviction was brought several months before the expiry of the period of lease.

A. Levin and Miss N. Salomon for appellants.

Rashad Maswadi for respondent.

Judgment: This is an appeal from the judgment of the District Court of Jaffa, dated 5th June, 1946, which in its appellate capacity set aside the judgment of the Magistrate's Court, Jaffa, dated 31st March, 1946.

The facts of this case in brief are that the appellants (plaintiffs) filed an action in the Magistrate's Court of Jaffa, claiming the eviction of the bakery leased to the respondent (defendant) on two grounds, namely: that the respondent failed to pay the rent for the year 1365 Hejirah, as set out in clause 4 of his statement of claim; and that he needs the bakery for his own use, as set out in clause 5 of the statement of claim. The Magistrate who heard the case ordered eviction as prayed on the aforesaid grounds. The defendant thereupon appealed from the said judgment to the District Court of Jaffa, who disagreed with the Magistrate on the point that the respondent failed to pay the rent and held that the action was premature, and in the result allowed the appeal and set aside the judgment of the Magistrate's Court. The appellants (plaintiffs) then filed this appeal from the judgment of the District Court, and his counsel raised before us the following three points:

(1) that the defendant failed to pay the rent for the year 1365 Hejirah;

(2) that the lease is void, inasmuch as the period in the two contracts of lease, Exhibits D(1) and D(2) exceeds three years, and accordingly it is contrary to the provisions of the Land Transfer Ordinance, 1920, the lease being unregistered;

(3) that the plaintiffs need the bakery for their own use.

With regard to the first point, we interpret the contract of lease D(1) as providing that the period of the lease is three years commencing from the first day of Muharram, 1363 Hejirah, and that the rent payable in respect of this period, including the year 1365 Hejirah, had been paid. Accordingly the appellants' allegation that the respondent failed to pay the rent payable for that year is unfounded. This being the case, the appellants cannot claim for eviction on this ground.

Coming to the second point raised, we are unable to accept the contention of the appellants. Undoudtedly confusion has arisen owing to the fact that in 1943 there were two

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Abdulhadi J.

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Muharrams and the contracts were drawn up by a Jew who had little understanding of the Hejirah calendar. We think the President was right when he concluded that the two leases D(1) and D(2) overlapped. At all events we have no hesitation in accepting this explanation in preference to the contention of counsel for the appellants that the whole transaction was a camouflage to avoid the provisions of the Land Transfer Ordinance.

With regard to the third point, we find that the plaintiffs' claim for eviction on the strength thereof is premature, because the three years' period of lease (vide contract Exhibit D(1)) terminates on the last day of the month of Thul Hijjeh, 1365 Hejirah, which corresponds to 24th November, 1946, while the appellants filed the action for eviction on 2nd January, 1946, i.e. several months before the expiry of the period of lease.

For these reasons we dismiss the appeal, with costs on the lower scale to include LP.10 advocate's attendance fee.

Civil Appeal No. 18 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Hubbard J. and Abdulhadi J.

1947
14th July

Hubbard J.
and
Abdulhadi J.

CA 18/47
Said
v
Mahmoud

SALIM MUSA MUHAMMAD SAID. . . . *Appellant.*

v

HUSNI RIDWAN MAHMOUD. . . . . *Respondent.*

Immovable property — Land Court — Jurisdiction — Action in Land Court for an order to defendant not to intefere with plaintiff's ownership of certain land — Plaintiff's title not disputed — Whether Land Court has jurisdiction to entertain action.

In Land Case No. 793/46 of the Magistrate's Court of Ramle sitting as a Land Court the plaintiff prayed for an order to the defendant not to interfere with his (plaintiff's) ownership of a certain land and of a wall outside defendant's land. There was no dispute as to land or rights over land, since each of the disputants has a registered title to his own land, and there was also a judgment by a Land Court between the same disputants and in respect of the same subject matter. The Magistrate granted the prayer. The defendant appealed.

In allowing the appeal, and sitting aside the judgment of the Magistrate, the Court of Civil Appeal,

HELD *(per Hubbard J.)* that since there was no dispute as to land or rights over land, as each of the disputants has a registered title to his own

land, the Magistrate's Court sitting as a Land Court had no jurisdiction to entertain the action which was for an order in the nature of an injunction.

(per Abdulhadi J.) that the Magistrate's Court of Ramle sitting as a Land Court had no power to hear and determine the action which had been previously heard and determined by the Magistrate's Court of Rehovoth sitting as a Land Court, i.e. that the matter was *res judicata*.

Najib Germanus for appellant.

Rashad Maswadi for respondent.

Hubbard J: This is an appeal by the defendant in Land Case No. 793/46 (Magistrate's Court, Ramle) against the judgment of His Worship Ali Eff. Zein al Abidin delivered on 25.12.46.

The relevant facts are as follows. The respondent was the owner of a plot of land of 78 sq. metres on which were three shops. On 20th May, 1940, he sold 18/78 of his plot to the appellant, at the same time agreeing with him that the plot should be divided between them so that the appellant should have 18 sq.m. at the southern end of the plot together with the shop upon it. The parties also agreed that the wall between their two parts of the plot, i.e. between the appellant's 18 square metres and the respondent's 60 square metres, should remain the property of the respondent who had the right to demolish it if he wished, provided that the appellant could then build another wall on his land. The natural inference from these stipulations is that the wall was on the exact limit of the eighteen square metres. In fact, it turned out to be otherwise, and it was discovered that there was an area of 2 sq. metres and 18 sq. cms. between the northern limit of the appellant's 18 sq. metres and the southern side of the wall. But although it is probably true that there was a mistake in the area mentioned in the agreement between the parties, there is no doubt that the appellant did agree that the wall should belong to the respondent and that he might demolish it.

The sale of 18 sq. metres was registered in the Land Registry and the parties acted in accordance with the agreed division between them, except that the appellant occupied also the extra area and refused to allow the respondent to demolish the wall. The respondent, thereupon, began an action for partition in the Magistrate's Court of Rehovoth, while the appellant began an action in the Land Court of Rehovoth claiming that what he had purchased from the respondent was not limited to eighteen square metres, but included the whole area on which the shop was built right up to the respondent's southern

wall. Again I suggest that this is probably what the parties intended. But the learned Magistrate, in May, 1942, held that the appellant was entitled only to the 18 metres. The appellant did not appeal. I think this is very much to be regretted, since had he appealed, he would very probably have obtained an interpretation of the contract more in accordance with the intentions of the parties. A month later, in the partition action, judgment was given for the partition of the property in accordance with the Land Court judgment, and in June, 1943, separate parcels with new numbers were registered in the Land Registry, one of 18 sq. metres in the name of the appellant and one of 60 sq. metres in the name of the respondent.

The appellant, however, continued to trespass on the extra area and to refuse to allow the respondent to demolish the wall. The respondent, therefore, brought an action for dispossession in the Magistrate's Court of Ramle, but the action was dismissed on the ground that the dispute was within the ambit of the jurisdiction of the Land Court. This judgment was upheld in an appeal to the District Court. These judgments are most unfortunately not before this Court, but the facts just stated are stated in the sixth paragraph of the respondent's statement of claim in the Court below and were not denied in the appellant's statement of defence. None of the pleadings, however, in the dispossession case are before us, and it may well be that the appellant in that action raised a claim to the ownership of the extra area and perhaps also of the wall.

Finally, the respondent brought an action in the Land Court of Ramle praying an order to the appellant not to interfere with his ownership of the land and the wall outside the appellant's eighteen metres. This the learned Magistrate granted. It appears to me, however, with all respect to the learned Magistrate, that, sitting as a Land Court, he had no jurisdiction to entertain the action. There was no dispute whatsoever as to ownership of land. Each party has a registered title to his own parcel and the sole prayer of the respondent was for an order in the nature of an injunction. (This was the final state of his action, although he had begun by asking also for dispossession). There is no doubt that where the ownership of land is in dispute the Land Court can grant such ancillary remedies as injunctions and orders for possession. But the basis of its jurisdiction is some dispute as to land or rights over land. Here there is no such dispute. The appellant's title is clearly limited to 18 sq. metres and he has admitted before me that the wall is within the respondent's 60 sq. metres and belongs to him.

If in fact the Magistrate's Court dismissed the action for dispossession without some claim as to ownership having been raised by the appellant in the extra area or the wall, then it may be that the respondent would find himself met by a plea of *res judicata* if he brings a fresh action for dispossession. But it seems to me most unlikely that the Magistrate would have been upheld by the District Court unless some issue as to ownership had been raised. And if the respondent brings a fresh action for dispossession and no claim of ownership is raised there will be no *res judicata.*

In the defence in this action no question of title has been raised, and Mr. Germanus, for the appellant, has made it clear that he does not dispute the respondent's title.

For the above reasons, the judgment of the learned Magistrate is set aside. The appellant to have his costs on the lower scale both here and in the Court below and an attendance fee in this Court of LP. 10.

Abdulhadi J: I agree with the result arrived at by the presiding Judge in his judgment with regard to the setting aside of the judgment of the Magistrate's Court of Ramle sitting as a Land Court dated 22.12.46, on the ground that the dispute as to the ownership of the wall and the land in suit has been determined in favour of the respondent by virtue of a judgment given by the Magistrate's Court of Rehovoth sitting as a Land Court dated the 31st of May, 1942, whereby registration was effected in the name of respondent.

The Magistrate's Court of Ramle sitting as a Land Court, therefore, could not entertain the action for the second time and adjudicate on the same issue.

High Court No. 38 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: Shaw J. and Curry Ag. J.

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15th July

Shaw J.
and
Curry Ag. J.

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v
Rabbinical Court of Haifa and others

ABRAHAM DAYAN. . . . . *Petitioner.*

v

1. RABBINICAL COURT OF HAIFA,
2. RABBINICAL COURT OF APPEAL, JERUSALEM,
3. CHIEF EXECUTION OFFICER, HAIFA,
4. POUAH DAYAN. . . . . *Respondents.*

Religious Court — Attachments, Provisional — Power of Religious Court to order provisional attachment.

In discharging the rule nisi issued by it and directed to the respondents calling upon them to show cause why an order in the terms of the prayer of the petitioner (the prayer of the petitioner appears in the order of the High Court reported hereafter) should not be granted, the High Court,

HELD that a Religious Court has an inherent jurisdiction to order a provisional attachment in order to prevent any future judgment which it may give from being abortive, there is certainly nothing against natural justice in such an order.

M. S. Levison for petitioner.

P. Dickstein for fourth respondent.

Shaw J: This is a return to an Order Nisi dated 1.5.47. The claim of the petitioner as set out in para. 28 to his petition is as follows:-

"28. Your Petitioner claims therefore:-

(a) An order to issue to the First Respondent to show cause why his judgment No. 479/6/H dated 18.6.45 marked "C", should not be set aside or annulled in full or at least as to that part awarding damages to the Fourth Respondent in the sum of LP. 1,250 and why their decisions for attachment marked "H" and "I" should not be set aside and annulled.

(b) An order to issue to the Second Respondents to show cause why their judgment dated 13.2.46, marked "G", should not be set aside or annulled in whole or in that part awarding damages to the Fourth Respondent in the sum of LP. 1,550.

(c) An order to issue to the Third Respondent to show cause why the Orders of Attachment in Execution Files Nos. 40/93 and 277/44 should not be set aside and annulled.

(d) Costs and Advocate's fees against respondents."

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Article 53 of the Palestine Order-in-Council, 1922, provides that the Rabbinical Courts of the Jewish Community shall have exclusive jurisdiction in matters of marriage and divorce, and alimony, over members of their Community other than foreigners, and Article 54 gives those Courts jurisdiction in any other matters of personal status of such persons where all the parties to the action consent to their jurisdiction.

Mr. Levison for the petitioner submits that Exh. I (dated 25.9.44) is a provisional attachment connected with the action which resulted in the judgment (Exh. C dated 18.6.45). He deduces this from the fact that Exh. I refers to case files Nos. 216/616 and 216/565 which are the numbers shown at the top of Exh. C. Exh. I is a decision to place an attachment on the house of the petitioner, situated at No. 3, Hakishon Street, Haifa. Exh. L (dated 28.9.44) was sent by the Execution Officer, Haifa, to the Land Registrar, Haifa, informing him of that attachment.

With regard to Exh. H (dated 20.1.43), Mr. Levison has agreed that it does not appear to be a provisional attachment. This document speaks of an attachment which was placed on the petitioner's house, at 3, Hakishon Street, in 1940, and it "continues" that attachment, and prevents sale, mortgage or transfer of the house unless and until the sum of LP. 750 is placed to the credit of the respondent.

Exh. K (dated 22.1.43), which is a letter from the Execution Office, Haifa, to the Land Registrar, Haifa, refers to Exh. H, but it speaks of an "additional" amount of LP. 750. It is not at all clear that the word "additional" ought to have been introduced, as it appears that Exh. H was issued because no definite amount had been specified in the attachment of 1940.

So the position appears to be that whereas Exh. H (dated 20.1.43) limited the amount of the attachment on the house to LP. 750, Exh. I (dated 25.9.44) is an unconditional attachment of the house.

Exh. L (dated 28.9.44) is connected with Exh. I, and is a letter from the Execution Office, Haifa, to the Land Registrar, Haifa, informing him of the attachment on the house.

Mr. Levison has submitted that a Rabbinical Court has no jurisdiction to order a provisional attachment. In this connection he has referred us to Article 56 of the Palestine Order-in-Council, 1922, which provides that the judgments of the Religious Courts shall be executed by the process and offices of the Civil Courts.

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There is no doubt that the judgment of a Religious Court can be executed by attachment of the judgment debtor's property. In Case C.E.O. Jaffa No. 2102/33 (reported at p. 140 Vol. 1 Rutenberg), the Chief Execution Officer said:-

> "The main argument of the petitioner is that a Rabbinical Court in Palestine has no power to order the attachment of immovable property. It has been stated, however, and has not been disputed, that under Rabbinical law a wife has a lien on all property, movable and immovable, of the husband, in order to secure payment of alimony. There is nothing contrary to natural justice in this .....
>
> All I am concerned with is to see that the judgment which I am asked to execute is a judgment issued by a competent Court in the exercise of its proper jurisdiction.....
>
> It is true that the judgments of these Courts are executed by the process and offices of the District Court, but the Rabbinical Court in this case is not executing its judgment. It has given an order in the exercise of its undoubted jurisdiction to secure the carrying out of its order, and by way of security has ordered the attachment of petitioner's property. In my opinion they had the jurisdiction to do so, and I must, therefore, decline to vary my original order of attachment".

It appears to me that the Religious Court must have an inherent jurisdiction to order a provisional attachment in order to prevent any future judgment which it may give from being abortive, and I am not prepared to hold that a Rabbinical Court cannot order a provisional attachment. There is certainly nothing against natural justice in such an order.

Mr. Levison's chief submission is that the Rabbinical Court of First Instance, and the Rabbinical Court of Appeal, dealt with a matter which was beyond their jurisdiction. The action which resulted in the judgment (Exh. C dated 18.6.45) was brought by the present petitioner who asked for a divorce and other relief. The respondent made various prayers, one of which was for the registration in her name of 2/3rds of the immovable property of the petitioner. She also asked for future maintenance (mezonoth) at the rate of LP.30 per month, and a fixed monthly payment in respect of the education, etc., of the child. In its judgment the Rabbinical Court ordered that before he could obtain the divorce (Ghet) the husband would have to give his wife damages in the sum of LP.1,250 this sum to include the wife's medical expenses, and also expenditure in respect of the education, clothing and medical treatment of the child up to the date of judgment.

The Rabbinical Court of Appeal increased the amount to LP.1,550. Para. 1 of this judgment (Exh. G dated 13.2.46) reads as follows:-

> "to cover her (the wife's) maintenance and medical expenses the amount that he (the husband) will pay for the "Ketubah" and damages is increased to LP. 1,550 which does not include the furniture remaining in her ownership in accordance with the judgment".

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Neither the Court of First Instance nor the Court of Appeal purported to order the transfer of the petitioner's immovable property, and I am unable to find that either of those Courts fixed the damages in the sums stated owing to the fact that they believed that the immovable property had been partly acquired by moneys provided by the petitioner. The sums were awarded as damages to be paid by the petitioner to his wife as a condition precedent to his obtaining a divorce from her. There is nothing contrary to natural justice in that, and I am unable to find that the Rabbinical Courts were not entitled to adjudicate between the parties, there being no suggestion that the parties are not members of the Jewish Community, or that they are foreigners, and the matter being one "of marriage, and divorce" in which the Rabbinical Courts have exclusive jurisdiction.

It may be observed that the judgment (Exh. G) of the Rabbinical Court of Appeal is dated 13.2.46, and the various orders for attachment are dated as follows:-

Exh. H	20.1.43
„ K	22.1.43
„ I	25.9.44
„ L	28.9.44

This petition was not filed till 25.3.47 — that is to say, over a year after the last judgment had been given, and about two and a half years after Exh. L.

On 5.11.46, at the hearing of a claim by the petitioner for an order of injunction against the respondent, in C.C. 95/46 of the District Court of Haifa, Mr. Geiger, who then represented the respondent, said to the Court:-

> "My client does not and will not interfere with plaintiff's right to dispose by sale or mortgage of his immovable property, it being understood that all her rights already established by judgment of the Rabbinical Courts and which may be established by the same Courts also are and will be safeguarded.
>
> In his attempt to sell or mortgage, plaintiff may bring prospective buyers or mortgagees daily between 5 and 7 p.m. except Fridays, Saturdays, and other Jewish holidays. Defendant to be given reasonable notice of intended inspection."

And on the strength of that assurance, Mr. Weintrab, who appeared for the present respondent, withdrew the case.

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Even if I had come to a different conclusion on the merits, I would have found it difficult to give relief to a petitioner who comes to this Court so late and after his advocate had given the assurance, referred to above, in C.C. 95/46.

In my judgment the petition fails and the Order Nisi must be discharged with costs on the lower scale to include a hearing fee of LP.10. The petitioner can, if he so wishes, take up with the Execution Officer the question of the word "additional" in Exh. K.

Curry Ag. J: I concur.

Criminal Appeal No. 43 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Chief Justice, Hubbard J. and Abdulhadi J.

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23rd July

FitzGerald C. J.
Hubbard J.
and
Abdulhadi J.

CRA 43/47
Attorney General
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ATTORNEY GENERAL. . . . . *Appellant.*

v

MUHAMMAD AHMAD HASSAN JABALI. . *Respondent.*

Criminal law — Charge — Magistrate's Court — Offence other than that with which accused charged covered by evidence adduced — Court convicted accused of offence in question — Whether Magistrate's Court before proceeding to conviction bound to charge accused under Section of law relating to offence covered by the evidence, to take his plea anew and retry him under new section — Magistrates' Courts Jurisdiction Ordinance, 1939, Section 20.

The accused in Criminal Case No. 107/47 of the Magistrate's Court at Jericho was charged with possession of stolen property knowing the same to have been stolen contrary to Section 310 of the Criminal Code Ordinance, 1936. The Magistrate, on the evidence before him, came to the conclusion that an offence under Section 310 could not be sustained, but that an offence under Section 311 was established. He thereupon convicted the accused under the said Section 311. The accused appealed to the District Court of Jerusalem (Criminal Appeal No. 24/47). The main ground of appeal was that the Magistrate, on coming to the conclusion that an offence under Section 310 could not be sustained but that an offence under Section 311 was established by the evidence, should have charged the accused under the amended section, taken his plea anew and retried him under the amended section, and this ground involved an interpretation of Section 20 of the Magistrates' Courts Jurisdiction Ordinance, 1939. The District Court (Acting Judge Daoud), following a judgment given by the District Court of Jaffa, constituted of the President thereof (Judge Hubbard), in Criminal Appeal No. 170/45 (1946, Selected Cases, p. 262), held that the Magistrate

committed an error of procedure by proceeding simultaneously to amend the charge and convict the accused in his judgment, and it set aside the judgment and quashed the conviction and sentence. The Attorney-General appealed by leave.

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In allowing the appeal by Majority (Hubbard J. dissenting), the Court of Criminal Appeal,

HELD *(per FitzGerald C.J. and Abdulhadi J.)* that the purpose of the first proviso to Section 20 of the Magistrates' Courts Jurisdiction Ordinance, 1939, is to enable a Magistrate, if he finds that certain conditions precedent are satisfied, that is that the new offence is covered by the evidence and that the findings of fact established it, to amend the charge, and thereupon convict upon the new offence without recharging the accused. So where a Magistrate in a criminal prosecution comes to the conclusion that the offence charged cannot be sustained but that an offence other that the one charged is established by the evidence, he is not required to charge the accused under the amended section, take his plea anew and to all intents and purposes retry him under the amended section.

(per Hubbard J.) that where an accused has had a charge read to him and has pleaded to that charge, the Magistrate cannot, without the knowledge of the accused, alter the charge by changing the offence stated therein to another offence, and then convict the accused on the latter offence.

Legal Assistant (L. Weston) for appellant.

Yehya Hammoudeh for respondent.

Owing to the absence on leave of the Chief Justice and Mr. Justice Hubbard, the judgment of the Majority (FitzGerald C.J. and Abdulhadi J.) and the judgment of Mr. Justice Hubbard were read by the Acting Chief Justice (Shaw Ag. C.J.).

FitzGerald C.J. and Abdulhadi J: This appeal which was brought by the Attorney-General raises the question of the procedure to be followed if s. 20 of the Magistrates' Courts Jurisdiction Ordinance is brought into operation. The facts are that at the close of the trial the Magistrate came to the conclusion that the offence with which the accused was charged, which was an offence under s. 310 of the Criminal Code Ordinance, could not be sustained, but that an offence under s. 311 of the Ordinance was established by the evidence; he thereupon convicted him under the latter section. It was submitted on behalf of the respondent, and he was successful in his submission to the District Court, that the Magistrate erred in procedure, in that when he came to the conclusion that the accused could not have been convicted under s. 310, he should have charged him under the amended section, taken his plea anew and to all intents and purposes re-try him under the amended section. This, we understand, is the usual procedure followed in Magis-

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trates' Courts. It is a commendable procedure and we do not desire this judgment to be taken as an indication that this practice should not necessarily be followed in the future. But we are asked here to interpret the law, and in our interpretation of s. 20 the Attorney-General's submission is correct. It seems to us that the purpose of the first proviso is to enable the Magistrate, if he finds that certain conditions precedent are satisfied — that is that the new offence is covered by the evidence and that the findings of fact establish it — to amend the charge, and thereupon convict upon the new offence without re-charging the accused. We emphasise that the offence must be covered by the evidence and established by the findings of fact. It seems to us that if these conditions are satisfied, the accused person is not prejudiced. He can, in fact, be said to have already pleaded to the alternative charge when he pleaded to the original charge bearing in mind that the substance of any plea in a criminal case is that the crime alleged against the accused is not covered by the evidence adduced against him, or by the findings of fact which inevitably must flow from that evidence.

For these reasons we think that the appeal against the decision of the District Court must be allowed. As the object of the appeal was purely to determine a question of law, we do not think that the accused person should now suffer by having to serve a sentence of two months imprisonment imposed by the Magistrate.

Hubbard J: In this appeal I have the misfortune to differ from the Chief Justice. The point of law in issue has been clearly set out in the judgment just read. I do not propose to argue the matter at length, but after careful consideration I find myself quite unable to agree that where an accused person has had a charge read to him and has pleaded to that charge, the trial Judge can, without the knowledge of the accused, alter the charge by changing the offence stated therein to another offence, and then convict the accused on the latter offence. This was also the view of the District Court judge. He did not, as I read his judgment, rule that there must of necessity be in effect a new trial. What he did say was that the Court below "committed an error of procedure by proceeding simultaneously to amend the charge and convict the appellant in his judgment". A charge is a formal written pleading in a criminal case and cannot, in my view, be amended without the knowledge of the accused. When it is amended then even if the postponement of the trial which is provided for in the second proviso to Section 20 is not necessary, the Court should

nevertheless do all that the justice of the case requires, such as allowing the accused to recall any witnesses.

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It is true that under section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, a Court may convict an accused person of an offence not set out in the information and without amendment of the information. The objection to following a similar procedure under s. 20 of the Magistrates' Courts Jurisdiction Ordinance because that Section lays down that the charge must be amended may appear purely formal. But, in my view, it is not so, but is a matter of principle on which I should not feel justified in agreeing to any relaxation.

I add two observations:- (1) that it appears to me that the second proviso to section 20 contemplates especially the case where the new offence charged is so different from the original one that a fresh trial is the only fair course, and (2) that the necessity for an amendment of the charge can, and in my own experience not infrequently does, occur long before the end of the trial, usually during the case for the prosecution.

For the reasons I have given I am of opinion that this appeal should be dismissed.

Civil Appeal No. 208 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Shaw J. and Curry Ag. J.

MUHAMMAD JABER MOGRABI. . . . . *Appellant.*

v

FARHAN HABIB SAM'AN. . . . . *Respondent.*

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Shaw J.
and
Curry Ag. J.

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Mograbi
v
Sam'an

Experts — Documents — Magistrate — Signature on document produced in evidence denied by person alleged to have signed it — No application to Magistrate for examination of signature — Magistrate himself compared signature on document with other signatures of person denying signature on document to be his — Whether Magistrate correct in the course he took — Ottoman Magistrates Law, Articles 36 and 97.

The plaintiff in Land Case No. 1/44 of the Magistrate's Court of Beisan sitting as a Land Court alleged that in order to secure the payment of LP. 28, the value of 8 Kailes of wheat borrowed from the defendant, he transferred his house in the Land Registry unto the defendant's name, that he subsequently offered the LP. 28 to the defendant but that he refused to accept

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the money, and asked for the cancellation of the registration in defendant's name. In addition to the evidence of himself and that of his son, the plaintiff relied on a document which he said was signed by the defendant in which he admitted that on payment of LP. 28, he (defendant) would return the house to plaintiff. The defendant denied having signed the document produced. No application was made for the appointment of experts. The Magistrate, after comparing the signature on the document with other signatures of the defendant, came to the conclusion that the signature on the document was not that of the defendant. He accordingly dismissed the action. The plaintiff appealed. His main ground of appeal was that the Magistrate should have submitted the signature for examintation by experts in accordance with Article 97 of the Ottoman Magistrates Law.

In dismissing the appeal, the Court of Civil Appeal,

HELD that in the absence of application to the Magistrate for the appointment of experts to examine the signature on the document which plaintiff alleged to be defendant's and which defendant denied to be his, it was open to the Magistrate to decide the matter himself in accordance with Article 36 of the Ottoman Magistrates Law.

The judgment of the Court was delivered by Curry Ag. J.

Faiz Nazzal for appellant.

Hanna Atalla for respondent.

Curry Ag. J: In brief the allegation of the plaintiff-appellant was that he borrowed 8 kailes of wheat valued at LP. 28 from the respondent in 1941. As security he had transferred his house in the Tabu into the name of the respondent. He subsequently offered the LP. 28 to the respondent and requested the retransfer of his house but the respondent refused.

The evidence consisted of that of the appellant and his son and of the respondent. The appellant relied considerably in support of his case upon a document Ex. I. According to the terms of that document respondent admitted that on repayment of the LP. 28 he would return the house to the appellant. That document allegedly was signed by the respondent, but the latter denied having done so. The learned Magistrate after examining the document and comparing the signature with other signatures of the respondent came to the conclusion that it was not the signature of the respondent. The appellant argues that the Magistrate should have submitted the signature for the examination of experts in accordance with Art. 97 of the Ottoman Law. However no application was made to the Magistrate to appoint experts and therefore it was open to him to decide the matter himself in accordance with Art. 37 of the Ottoman Magistrates Law. It is to be noted that there were surrounding circumstances which might well make one suspicious of the genuineness of Ex. I. The appellant who has been residing in the house was sued for eviction which claim was

successful in the Court of First Instance and on appeal, but apparently the document was not then produced or referred to. The appellant states that the document was then lost and he only subsequently found it. On these facts it is quite impossible for the Court to say that the Magistrate was wrong in holding that Ex. I was not signed by the respondent. Without this piece of documentary evidence the case of the appellant rests on the oral evidence of himself and his son as against that of the respondent and the registered transfer in the Tabu. The Magistrate preferred the evidence of the respondent and we are certainly not in a position to say that his findings were unreasonable or against the weight of the evidence.

For the foregoing reasons the appeal must be dismissed, respondent is entitled to costs on the lower scale and an advocate's fee of LP. 10 for attendance at the hearing.

Shaw J: I concur.

Civil Appeal No. 22 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: Curry Ag. J. and Abdulhadi J.

BAHIYEH YOZBASHI. . . . . *Appellant.*

v

IBRAHIM NIJMEDDIN DAJANI,
and others. . . . . *Respondents.*

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and
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Landlord and tenant — Eviction — Agency — Action for eviction of tenant by owner of unregistered premises — Leases in respect of premises made between tenant and brother of owner — Brother held himself out as landlord — No leases between owner and tenant — Brother of owner stated in evidence to have acted as agent of owner — Whether owner entitled to evict tenant — Evidence of plaintiff and her brother only insufficient to establish agency of brother — Rent Restrictions (Dwelling Houses) Ordinance, 1940, Section 8.

Certain premises situate in Jerusalem were leased to three tenants. The contract of lease in respect of the premises for the years during which the tenants had been in occupation of the premises were made between the tenant and one Hashem Yozbashi as landlord. No mention was made in the leases that Hashem was acting as agent for his sister. In 1945, Bahiyeh Yozbashi, a sister of Hashem, commenced eviction proceedings in the Magistrate's Court of Jerusalem (Civil Case No. 1977/45) against the tenants on the ground that she was the owner of the premises in question and that she required them for her own occupation. In her evidence she stated that

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her brother had acted as her agent and Hashem gave like evidence. The Magistrate ordered eviction. Defendants appealed to the District Court of Jerusalem (Civil Appeal No 46/46) and the appeal, by agreement of both parties, was argued upon the point whether or not the plaintiff could sue for eviction by reason of the fact that she was not the lessor. The District Court, constituted of the Acting Relieving President thereof (Acting Judge Morgan), came to the conclusion that the plaintiff was not lessor within the meaning of Section 2 of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, and had therefore no right at all to claim the eviction of the tenants. The Court then allowed the appeal and set aside the judgment of the Magistrate. The plaintiff appealed to the Supreme Court by leave. The two main grounds of appeal were, firstly, that the word "landlord" in the Rent Restrictions (Dwelling Houses) Ordinance, 1940, meant "owner" and was not restricted to the meaning of lessor, and, secondly, that the brother in fact acted as agent for his sister in leasing the property.

In dismissing the appeal, the Court of Civil Appeal,

HELD (1) that the appellant, not being the lessor or the "landlord" in the wording of the Rent Restrictions (Dwelling Houses) Ordinance, 1940, could not sue the respondents for their eviction from the premises leased to them by her (appellant's) brother because the word "landlord" in the Rent Restrictions (Dwelling Houses) Ordinance, 1940, which Ordinance was enacted to restrict the increase of rent of dwelling houses and the eviction of tenants therefrom, must be construed as meaning a person who under a lease is as between himself and the tenant for the time being entitled to the rents payable under the lease, and cannot be construed as to include "owner" of premises. And if some-one other than the owner leases property without the owner's permission, the latter has another remedy for dispossessing the tenant.

(2) that in this case in which the brother held himself out as the landlord, the mere oral evidence of the plaintiff and her brother to the effect that he (the brother) was acting as her agent was, without the production of any power of attorney or other documentary evidence, quite insufficient to establish the alleged agency *vis-à-vis* the tenants.

Approved: CA 221/42, 9 P.L.R. 775.
CA 264/43, 10 P.L.R. 639.

Henry Cattan for appellant.

Faix Nazzal for respondents.

Judgment: The facts of this case are briefly as follows. The plaintiff-appellant brought an action in the Magistrate's Court against the respondents claiming their eviction from certain premises on the basis that she was the owner thereof and required them for her own occupation. It was not disputed that the respondents had been in occupation as tenants for many years under written contracts of lease granted by the brother of the plaintiff in his own name. Before the Magistrate the plaintiff alleged that her brother had acted as her agent

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and he gave evidence to the like effect. The Magistrate accepted their evidence and gave judgment for the plaintiff by virtue of section 8(1)(c) of the Rent Restrictions (Dwelling Houses) Ordinance, 1940.

On appeal to the District Court the two parties agreed to the appeal being argued, in the first place, upon the point whether or not the plaintiff could sue as she was not the lessor. It was, of course, quite wrong of the learned Judge to hear the appeal in this piecemeal fashion. However, he did so, and reversed the judgment of the Magistrate on the ground that the plaintiff was not the lessor.

The first argument of Mr. Cattan on behalf of the appellant is that the word "landlord" in the Ordinance means "owner" and is not restricted to the meaning of lessor. Now, the Ordinance was enacted to restrict the increase of the rent of dwelling houses and the eviction of tenants therefrom. That being the case, it appears to me that "landlord" must be construed as meaning a person who under a lease is as between himself and the tenant for the time being entitled to the rents payable under the lease. It has been held in C.A. 221/42, 1942 Supreme Court Judgments p. 770, that a tenant with power to sub-let is in the position of landlord and can sue his sub-tenant under the Ordinance. It would appear to me only reasonable that this should be the case. If someone other than the owner leases the property without the owner's permission, the latter has, of course, another remedy for dispossessing the tenant.

Coming to the next point, as to whether, in fact, the brother acted as agent for the plaintiff in leasing the property. Now, the property, although within the Urban District of Jerusalem, is unregistered. The only documents were the leases which were made by the brother as principal. *Prima facie,* therefore, he held himself out as the owner. It was pointed out in C.A. 264/43, 10 P.L.R. 639, that the tenant cannot query the title of the landlord with whom he entered into a tenancy agreement, but if someone alleges that he has derived title from the original landlord, the tenant may query whether, in fact, the new landlord has acquired from the original landlord a valid title. In this case the brother held himself out as the landlord. He now goes back on that and agrees with his sister that she was the landlord and he only her agent. To my mind the mere oral evidence of the plaintiff and her brother to the effect that he was acting as her agent was — without the production of any power of attorney or other documentary evidence — quite insufficient to establish the alleged agency *vis-à-vis* the tenant.

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Considering this point from another aspect, I think it is very doubtful if the Magistrate could investigate the title as owner claimed by the sister when such title was not alleged to have been derived from her brother subsequent to the lease but always to have been vested in her.

For the foregoing reasons this appeal must be dismissed with costs on the lower scale and an advodate's attendance and hearing fee of LP. 10.

Civil Appeal No. 307 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Acting Chief Justice and Curry Ag. J.

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ZUHDI MALHAS. . . . . *Appellant.*

v

HAJ TAHER KARAMAN,
and others. . . . . *Respondents.*

Appeal — Respondent — Failure to cite as respondent a party affected by appeal — Notice under Rule 333 of the Civil Procedure Rules, 1938, to appellant — Remedy of defect by filing an amended notice of appeal after expiry of period of appeal — Discretion of Court of Civil Appeal to direct service of notice of appeal to be made on respondent who was not originally cited as such — Civil Procedure Rules, 1938, Rule 333.

In Civil Case No. 96/46 of the District Court of Haifa an order for the dissolution of a partnership was made. A motion for the setting aside of that order was also dismissed. The applicant to have the order of dissolution set aside appealed. He cited as respondent the party who applied for and obtained the order of dissolution and failed to cite the other party who was a respondent to the District Court proceedings as respondent. Notice under Rule 333 of the Civil Procedure Rules, 1938, was served on the appellant in which it was stated that it was intended to argue as a preliminary objection at the hearing of the appeal that there was no appeal before the Court inasmuch as all of the parties in the Court below were not cited as respondents in the notice of appeal. The appellant remedied the defect by filing an amended notice of appeal. This amended notice of appeal was filed after the period of appeal had expired. At the hearing of the appeal the point raised in the notice served on appellant was taken.

In directing that service of the notice of appeal be made on the partner who was not cited in the original notice of appeal, the Court of Civil Appeal,

HELD that since the question with which the appeal was concerned was a question of the winding up of a partnership, and as the first respondent had not been prejudiced by the failure to cite the other partner, namely Yassin Rahwanji, as respondent in the original statement of appeal, and as the appellant took steps to remedy the defect when served with notice, it would be in the interests of justice that service of the notice of appeal be made on that third partner, Yassin Rahwanji.

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Referred to: CA 203/42, 10 P.L.R. 17.
CA 283/43.
CA 85/45, 13 P.L.R. 63.
CA 139/46, 14 P.L.R. 239.

Yehya Hammoudeh for appellant.

Theodore Mogannam for respondents.

Ruling: On 25.6.46 an order was made in the District Court of Haifa in C.C. 96/46 for the dissolution of a partnership, and appointing Messrs. Saba & Co. as liquidators. That order was made on the application of Haj Taher Karaman, and it was made in the absence of the two respondents who had been duly served.

On 22.7.46, in Motion No. 436/46, the District Court dismissed an application to set aside the order dated 25.6.46.

On 2.10.46 Zuhdi Malhas, who is the appellant before us, filed a notice of appeal against the order dated 22.7.46, but he cited as respondent only Haj Taher Karaman. That is to say, he omitted to cite Yassin Rahwanji who was the second respondent in C.C. 96/46 and who is obviously affected by the order of dissolution.

The advocate for Haj Taher Karaman gave notice, in pursuance of Rule 333 of the Civil Procedure Rules, stating, *inter alia*, that he intended to argue, as a preliminary objection at the hearing of the appeal, that all of the parties in the Court below were not cited in the notice of appeal and that, therefore, there was no appeal before the Court.

After he had received this notice the appellant (Zuhdi Malhas) on 28.11.46 filed an amended notice of appeal. It is admitted that this amended notice of appeal was filed after the period of appeal had expired.

The point to be decided is whether the failure to cite Yassin Rahwanji was a defect in form that could be remedied under the provisions of Rule 333.

In C.A. 139/46 (1947 A.L.R. 380) this Court said —

"We would have great hesitation in holding that the failure to cite as respondent the party who is affected by the appeal is a defect in form of the type contemplated in Rule 333. We would hesitate still

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more before we held that it was a defect which could be remedied by the appellant, without any order of the Court, and after expiry of the period fixed by law for the filing of the appeal. But in the present case, the appellant, in spite of the notice, and although he has had over a year's time within which he might have taken steps with a view to remedying the defect, has repeated it in the amended notice of appeal."

And at an earlier stage in the same judgment we find the following passage —

"In our opinion although by virtue of this rule (i.e. Rule 313) it is not necessary to serve parties who are not affected by the appeal, those parties should nevertheless be named as respondents to the appeal."

Mr. Hammoudeh, for the appellant, has referred us to C.A. 203/42 (10 P.L.R. 17) where the Court held that the appellants, by failing to cite all the parties to the original action as respondents, did not comply with the provisions of Rule 313 of the Civil Procedure Rules, 1938, and as they did not show good cause for their failure so to do, the Court refused to apply the provisions of Rule 333.

It must, of course, be observed that that case was decided before the amendment of Rules 313 and 333, which took place in 1945.

Mr. Hammoudeh has also referred us to C.A. 85/45 (1946 A.L.R. 73) where the following appears in the judgment —

"It will be observed that the Court may direct service 'on all or any parties to the action'. That in our opinion includes a party 'directly affected by the appeal' if such party has not been served. It follows that the Court has a discretion and is not bound to dismiss the appeal by reason of non-service of a directly affected party."

In that case there was a failure to cite as respondent a party who was directly affected by the appeal.

In C.A. 283/43 (not reported) to which Mr. Mogannam, who appears for the first respondent, has referred us, the Court said —

"When one looks carefully at Rules 313 and 333 it is to be observed that Rule 333 applies only when notice of appeal has been filed. In this case no notice of appeal has been filed which includes the 3rd party No. 8. In these circumstances the appellant cannot rely on Rule 333."

Again it must be observed that that case was decided before the 1945 amendments came into force.

In the present instance the appellant failed to cite as respondent a party who was his partner. That is to say, he

failed to cite a party who to his knowledge would be affected by the winding-up proceedings, and who would therefore be interested in the appeal. On the other hand, the first respondent has not been prejudiced, and the appellant took steps to remedy the defect when served with a notice.

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As this is a question of the winding-up of a partnership, and as the first respondent has not been prejudiced, we feel that it would be in the interests of justice to exercise our discretion by directing service to be made on Yassin Rahwanji.

The first respondent must, however, have the costs of this hearing in any event, and we fix these costs in the sum of LP.10.

Privy Council Leave Application No. 13 of 1947.
Privy Council Leave Application No. 15 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Acting Chief Justice and Curry Ag. J.

Privy Council Leave Application No. 13/47.

ATTORNEY GENERAL. . . . . *Applicant.*

v

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and others . . . . . *Respondents.*

Privy Council Leave Application No 15/47.

ATTORNEY GENERAL. . . . . *Applicant.*

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Privy Council — Government of Palestine — Application by Government of Palestine for leave to appeal to Privy Council filed within statutory period — Failure to file at time of filing application sufficient copies for service on all parties who were not represented by advocates — Whether application out of time by reason of failure to file sufficient copies thereof for service on those parties who were not represented by advocates — Whether Government of Palestine not entitled to appeal to the Privy Council.

Two appeals, Civil Appeal No. 166/45 and Civil Appeal No. 168/45, against the decision of the Land Settlement Officer, Safad Settlement Area, refusing to revise the Schedule of Rights, were lodged by the Government of

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Palestine against two sets of respondents. The appeal in Civil Appeal 168/45 was dismissed (see 14 P.L.R. 91). The appeal in Civil Appeal No. 166/45, the parties thereto having agreed that it should abide the result in Civil Appeal 168/45, was accordingly dismissed. The Government of Palestine filed two applications for leave to appeal to the Privy Council against the judgments of the Supreme Court given in those two appeals. At the hearing of the application for leave to appeal, the point was taken that the application for leave to appeal against the judgment in Civil Appeal 168/45 was out of time, inasmuch as no sufficient copies of the application for leave were filed within the period of thirty days prescribed in Article 5 of the Palestine (Appeal to Privy Council) Order-in-Council for service on the parties who were not represented by advocates; such copies having been filed and served after the expiry of the period of thirty days. On behalf of the Government, Crown Counsel said that sufficient copies of the application for leave were filed at the time of making the application for service on the advocates who represented the respondents, who, as to two of them, were represented each by an advocate and, as to the rest, all were represented by another advocate, according to a power of attorney filed, but on finding out later that the advocate for all the rest of the respondents did not represent some of them any more, a further supply of copies was filed for service on such of the respondents not represented by advocate.

In dismissing both objections and granting conditional leave to appeal, the Court of Civil Appeal,

HELD (1) that the application for leave to appeal to the Privy Council was filed in time and the failure to file sufficient copies for service on all the parties who were not represented by advocates did not, in the circumstances of the present case, afford any ground for dismissing the application for leave to appeal.

(2) that the Palestine (Appeal to Privy Council) Order-in-Council, 1924, which provides for appeals to the Privy Council from judgments of the Supreme Court, covers judgments which arise out of appeals brought by the Government of Palestine. Accordingly the Government of Palestine is entitled to appeal to the Privy Council judgments in appeals brought by it.

Crown Counsel (J. Wicks) for Government.

M. Scharf for two of respondents.

Robert Mulki for great majority of remaining respondents, rest did not appear.

Order: With regard to the submission that the application for leave to appeal is out of time, we find that the application itself was filed in time, and that the failure to file sufficient copies for service on all parties who were not represented by advocates does not, in the circumstances of the present case, afford any ground for dismissing the application for leave to appeal.

With regard to the question whether the Government of Palestine can appeal to the Privy Council, we rule that such

an appeal lies. Section 7 of the Crown Actions Ordinance (Cap. 38) provides that an appeal shall lie from the judgment of the District Court and the Land Court to the Supreme Court sitting as a Court of Appeal. In our view, the Palestine (Appeal to Privy Council) Order-in-Council, which provides for appeals to the Privy Council from judgments of the Supreme Court, covers judgments which arise out of appeals brought by the Government of Palestine.

We accordingly dismiss both objections.

High Court No. 86 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Acting Chief Justice and Weldon Ag. J.

RIVKA KIRSHENBAUM. . . . . *Petitioner.*

v

MAJOR-GENERAL E.L. BOLS, C.E., D.S.O. *Respondent.*

Forfeiture — Order of forfeiture in respect of certain building made under Regulation 119 of the Defence (Emergency) Regulations 1945, — Whether authorities entitled under Regulation in question to turn occupiers out of building without an order of eviction from competent Court — Defence (Emergency) Regulations, 1945, Regulation 119.

Being satisfied that some of the inhabitants of the streets known as Hashmonaim and Herzl in Haifa town had abetted an offence involving violence against the Defence (Emergency) Regulations, 1945, the Military Commander of the Civil Districts of Galilee and Haifa, in exercise of the powers conferred upon him by Regulation 119 of the Defence (Emergency) Regulations, 1945, and all other powers enabling him, directed the forfeiture to the Government of Palestine of two houses together with their gardens in Hashmonaim street and a house together with its garden in Herzl street, and directed further that the forfeiture be deemed effective from 8 a.m. on 24th July, 1947, by which time all occupeirs of the said houses where to leave the premises, which latter direction he amended to 4 p.m. instead of 8 a.m. One of the tenants in each of the three forfeited houses applied to the High Court for the issue of an order nisi calling upon the respondent to show cause why he should not cancel his orders of forfeiture. One of the petitions was argued and it was agreed that the other two petitions should abide the result of the one argued. It was submitted on behalf of the petitioner that Regulation 119 of the Defence (Emergency) Regulations, 1945, does not empower the Military Commander to turn the occupiers out of the building, since the term "eviction" in Regulation 119(2) refers to eviction upon a judgment of a Court in an action for possession.

In dismissing the petition, the High Court,

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HELD that a Military Commander exercising the powers vested in him by Regulation 119 of the Defence (Emergency) Regulations, 1945, and ordering forfeiture, is empowered to turn the occupiers of the forfeited property out and is not required after forfeiture to bring a possessory action, because if he were to bring a possessory action there would be no object in having Regulation 119(2) at all — the Court would give possession.

A. Levin for petitioner.

Order: This is an application for an Order Nisi commanding the respondent to cancel a Forfeiture Order dated 24.7.47, as amended, and/or his direction in regard to the eviction of the petitioner and other inhabitants of 3 Hashmonaim Street from their premises.

Mr. Levin, for the petitioner, has not argued that the order of forfeiture is invalid, but he submits that Regulation 119 of the Defence (Emergency) Regulations, 1945, does not empower the Military Commander to turn the occupiers out of the building. He submits that the term "eviction" in Regulation 119(2) refers to eviction upon a judgment of a Court in an action for possession.

The Regulation is clearly a very drastic one, and we agree with Mr. Levin that if there is any doubt as to its interpretation the benefit of that doubt must be given to the person or persons whose rights are adversly affected.

But having carefully considered Mr. Levin's submission we are quite unable to accept it. The words used in Regulation 119(2) are "seize and occupy", and these words are followed (with certain words intervening) by the words "after eviction without compensation". In our judgment this cannot possibly mean that after forfeiture the Military Commander must bring a possessory action. If he had to bring a possessory action there would be no object in having Regulation 119(2) at all — the Court would give possession.

Mr. Levin has referred us to Regulation 121(2) which provides for eviction "by any members of the Police Force", but we do not think that there is any analogy. If His Majesty's Forces were used for the purpose of an eviction under Regulation 121(2) Mr. Levin could very reasonably submit that it is the Police and not His Majesty's Forces who are empowered to carry out the eviction.

The matter being as clear to us as it is we do not feel that we should be justified in making an Order Nisi. The petition must therefore be dismissed.

It was agreed that Petitions Nos. 87/47 and 88/47 should abide the result of this petition, so we direct their dismissal also.

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THE LAW REPORTS OF PALESTINE

Volume 14

1947

AUGUST AND SEPTEMBER

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate, and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.

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Privy Council Appeal No. 25 of 1943.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

Before: Lord Roche, Lord Normand and Mr. James Stratford.

BAHIYA LEVI. . . . . *Appellant.*

v

AMIN NICOLA KHOURY, and others. . . . . *Respondents.*

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Appeal — Settlement proceedings — Dismissal of appeal to the Court of Civil Appeal for failure to cite as respondents to the appeal all parties to the original action other than appellant — Parties not so cited were not dismissed in original action — Rule 313 of the Civil Procedure Rules, 1938, and the Rules connected therewith apply to appeals from Settlement Officers — Court competent to review or disturb proceedings of a court which are questioned — Civil Procedure Rules, 1938, Rule 313 — Settlement of Title (Procedure) Rules, Rule 13.

This appeal to the Privy Council was against the judgment of the Court of Civil Appeal given in Civil Appeal No. 113/41, whereby the Court (Trusted C.J., Copland J. and Rose J.) dismissed the appeal upon the preliminary ground that the appellant failed to comply with Rule 313 of the Civil Procedure Rules, 1938, in that appellant failed to cite as respondents all parties to the original action other than herself.

In advising His Majesty that the appeal should be dismissed, the Judicial Committee of the Privy Council,

HELD (1) that although it is as a rule unsatisfactory, if it can be avoided, to dispose of a matter on a technicality, yet in this present case the Court of Civil Appeal was correct in dismissing the appeal upon the preliminary ground that Rule 313 of the Civil Procedure Rules, 1938, had not been complied with, inasmuch as by the dismissal of the appeal on the preliminary ground no injustice resulted to the appellant.

(2) that Rule 313 of the Civil Procedure Rules, 1938, and the Rules connected therewith apply to appeals from Settlement Officers.

(3) that where the proceedings of a Court are in question they can only be reviewed or disturbed by a Court of equal or superior jurisdiction.

Approved: CA 143/43, 10 P.L.R. 407.

The relevant facts appear from the judgment of the Board.

The judgment of the Board was delivered by Mr. James Stratford.

Judgment: This is an appeal from the judgment dated 23rd July, 1941, of the Supreme Court of Palestine, sitting as

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a Court of Appeal, dismissing an appeal from a decision of the Settlement Officer for the Haifa area. The Settlement Officer had decided a dispute arising between the parties to this appeal and other parties in favour of the respondents. The appellant appealed but did not join the parties other than the respondents as parties to the appeal. The Court of Appeal dismissed the appeal upon the short and preliminary ground that the parties, whose presence was required by the Civil Procedure Rules, were not before them. The question for this Board is whether that dismissal was justified.

The facts and circumstances of the case are short and simple. They are as follows: Prior to the year 1917 the appellant was the registered owner of an undivided one-quarter share in a number of plots in Haifa Village. In 1918 the respondents or their predecessors in title became the registered owners of the aforesaid quarter share of the appellant. The change of registration was effected in consequence of a sale purporting to be made by virtue of two Powers of Attorney given by the appellant under her signature to one Gad Hakim and bearing the date of 19th June, 1914. They were not acted upon until after the end of the war of 1914-1918. These Powers of Attorney were made and authenticated in and before the Sharia (Religious) Court, Nazareth District. The appellant subsequently, that is to say in 1920, gave or caused to be given Notarial Notices alleging that her signatures to these Powers of Attorney were forged but she took no steps to set them aside. The respondents or their predecessors in title and the owners of the remaining three-quarter shares in the plots in due course proceeded to partition of their property. This was effected in the year 1929 and the respondents became the registered owners of plot 10875/7. Eleven years after, that is to say on 29th March, 1940, the appellant filed with the Settlement Officer, Haifa, a claim to a quarter share of Parcels 3 to 7 inclusive and of Parcels 18, 19, 21, 27, 29, 35, 36, 37, 47, 48 and 38 all in the same Block No. 10875 and therefore in the same vicinity as No. 7. The claimant supported the claim by production of the two Powers of Attorney and by alleging that they were forged. By the claim she objected to the partition. In accordance with Land Settlement of Title (Procedure) Rules competing claimants to the plots claimed by the appellant came forward. They included the respondent's whose claim was numbered 1391 and dealt with Parcel No. 7. Seven other claims competing with the appellant's claim were lodged by other persons in respect of seven parcels additional to No. 7. The respondents and these other persons were constituted either defendants or third parties by the Settlement Officer empowered

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by Section 10 of Ordinance 80 (Land Settlement of Title) to hear and decide upon such disputed claims to land in his area. The matter was heard before the Settlement Officer and a number of parties other than the appellant and respondents appeared and were represented. In the course of the proceedings the appellant continued to allege that the Powers of Attorney were forged and to insist on her claim against the respondents but took a course as to certain other parcels stated by the Settlement Officer as follows: "At the trial of the claims the plaintiff withdrew her claim to parcels 3, 19 and 21 and was furthermore prepared to accept the parcellation of the properties which her co-owners had been instrumental in securing and was willing to accept Parcel 7 in whole in lieu of the undivided quarter share claimed in all the parcels in which she had not unconditionally withdrawn her claim provided that the acceptance of this parcellation did not imply her acquiescence in the transaction". Their Lordships observe in passing that this curious and conditional withdrawal of claims in effect disputed the very root of title to all the partitioned properties in dispute — namely the Powers of Attorney by reason of which the defendants became registered and were able to effect or join in effecting the partition — but at the same time proceeded to claim Parcel No. 7 which only came into undivided ownership by reason of the partition. Their Lordships are therefore not surprised to find that the Settlement Officer when passing his final decision on the matter between the appellant and the respondents in favour of the latter expressly stated that his decision was given without prejudice to the conflicting claims of the defendants and third parties which remained to be decided. He passed no decision and made no formal order dismissing any party from the proceedings.

With regard to the allegation of forgery raised in respect of the Powers of Attorney the Settlement Officer recited that the appellant had served the Notarial Notice in 1920 but took no action to have the respondents' title vacated though she instituted actions in the Courts for other properties that had been transferred' in similar circumstances, viz., under Powers of Attorney challenged as forgeries, but these actions were never carried by the appellant to a decision upon the issue of forgery. The Settlement Officer then proceeded as follows:

> "The Plaintiff now comes to the Land Settlement Officer and asks him to enquire into the genuineness of the Powers of Attorney which were executed before the competent Authority 27 years ago, and nearly 20 years after the notarial notice to the 5th Defendant and the Registrar of Lands. He is asked to do this by reason of the proviso to Section 10(3) of the Land (Settlement of Title) Ordinance Cap. 80 which

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requires him to have regard to equitable as well as legal rights to land in deciding questions of disputed ownership or possession.

This I must decline to do and find support for my decision in Rule 13 of the Land Settlement of Title (Procedure) Rules which empowers a Settlement Officer to enquire into the authenticity of documents not authenticated before the Court, notary public or similar authority.

Where documents are authenticated by a competent authority and their authenticity is challenged the complainant must go and seek her remedy from that authority or one superior to it, and the Land Settlement Officer has no authority to enquire into the authenticity of the document or vary its contents even if he thought it equitable to do so.

The only question for me to decide is whether the Plaintiff should be granted time in which to prove the forgery she alleges. In this instance the powers were executed 27 years ago, and were acted upon 23 years ago and the Plaintiff was aware of this not less than 20 years ago when she served her notarial notice. Since then she has instituted proceedings in the Courts and these powers have been before the Courts during proceedings that extended over a period of from 8 to 10 years. The question of title has been examined and decided against her and I find she has had ample opportunity to prove the allegation of fraud.

After considering this lapse of time and the opportunities the Plaintiff has had to prove her allegations I find it would be unjust to permit her to harass and pursue the Defendants through the Courts and put them to the inconveniences and expenses of continued litigation.

I therefore dismiss Plaintiff's claim to ownership based on the original registrations in her favour and leave her to prove her claim by possession adverse to the present registered owners."

Later the appellant failed also in her claim to a title based on possession.

This appeal was then brought and was dismissed upon the preliminary ground that the appellant had failed to comply with Rule 313 of the Civil Procedure Rules which is in the following terms:

"An appeal shall be lodged by filing a notice of appeal in the Registry of the Court to which the appeal lies and all parties to the original action other than the appellant shall be made respondents to the appeal."

The Court of Appeal held that the words "the original action" mentioned in the Rule covered and applied to the claim and proceedings before the Settlement Officer. It was also held that what had passed before the Settlement Officer without any actual dismissal of these other parties in no way made them cease to be parties. In consequence the preliminary objection was upheld and the appeal dismissed. Their Lordships are of

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opinion that the decision of the Court of Appeal was correct. It was argued that Rule 313 did not apply to proceedings before the Settlement Officer for a variety of reasons, including the contention that those proceedings were not an action. Their Lordships are clearly of opinion that Rule 313 and the Rules connected therewith did apply to appeals from a Settlement Officer and that the reasons assigned for a contrary opinion are without foundation. It follows that their Lordships will humbly advise His Majesty that this appeal should be dismissed. But their Lordships feel constrained having regard to the very full argument that was addressed to them to make some further observations. The Chief Justice, after giving the decision of the Court of Appeal, added, "That is of course in some respects an unsatisfactory result. At the same time we do not feel that in this particular case it is likely to result in any injustice." Their Lordships agree that it is as a rule unsatisfactory, if it can be avoided, to dispose of a matter on a technicality. But they agree even more unreservedly that in this case no injustice resulted. They are of that opinion not merely because of the appellant's dilatory conduct, but also because after the full argument on the point addressed to them they are satisfied that the judgment of the Settlement Officer was right in respect of his incompetence to adjudicate upon the alleged forgeries.

It is to be observed that under Rule 333 of the Procedure Rules adequate provision is made for the curing of defects consisting in the non-fulfilment of conditions precedent to the hearing of an appeal. No application whatsoever was made to the Court of Appeal to exercise this power of amendment. Had it been made and good cause shown within the meaning of the Rule their Lordships cannot doubt but that leave to put matters right would have been granted. Their Lordships would also observe in reference to the decision of the Court of Appeal that in addition to the reasons assigned in the judgment of the Court there is a further reason which appears to their Lordships to be substantial. The appeal sought to raise a matter going to the root of the title of all the parties to the original proceedings. It seems to be obvious that a decision favourable to the appellant on the forgery issue would of necessity have a practical effect on the titles of owners of plots contiguous to No. 7 and dependent on the like root of title, as for example by reducing their status to that of possessory titles. If, having been cited, such parties felt uninterested and cared to rely on the conditional oral statement in their favour before the Settlement Officer no harm would have been done. They were entitled to be cited and they were not so cited and that is more than a technicality.

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Their Lordships propose now to state briefly their view of the substantial matter of his jurisdiction dealt with by the Settlement Officer. That does not depend wholly or even mainly upon Rule 13 of the Land Settlement of Title (Procedure) Rules and the Settlement Officer did not say that it did so depend. He said that he found support for his decision in Rule 13 and so do their Lordships. Rule 13 provides as follows:

> "13. (1) The person against whom a document (other than a document authenticated before the Court, notary public or similar authority) is produced, including the heirs or assigns of the alleged author of the document, may be called upon either to acknowledge or to deny the signature or seal and the handwriting of the author of the document: silence on the part of the alleged author, or a profession of ignorance on behalf of the heirs or the assigns, shall be regarded as an acknowledgment.
>
> (2) If a person by whom the document purports to have been executed denies his signature, seal or handwriting, or if the heirs or assigns of such person deny their knowledge of the same, the Settlement Officer shall proceed to verify and compare the seal, signature or handwriting either himself or by the appointment of an expert or experts as he deems fit.
>
> (3) The person denying the handwriting shall produce, if required, specimens of his handwriting and, subject to any order as to the costs of the case made by the Settlement Officer, shall pay the fee of the expert or experts."

It was said at one stage of the argument that Rule 13 was not apt to cover a case such as this because the appellant and not the respondent had produced this document. Their Lordships do not agree with this view of the facts but this point is really immaterial. Rule 13 clearly recognises that there is removed from the jurisdiction of the Settlement Officer competence to deal with documents authenticated before a Court. This is a clear provision, it may be *ex abundante cautela,* that where as here the proceedings of a Court are in question they can only be reviewed or disturbed by a Court of equal or superior jurisdiction. This principle is well recognised by the Courts of Palestine, see *Rutman* v. *Khulil and others,* 1943, L R. (Palestine) vol. x, p. 407. That decision related to the setting aside of a judgment but the same principle applies to the setting aside of an act solemnly done, as was the execution of these Powers of Attorney, in and under the authentication of a Court. That is the principle which is recognised and safeguarded by Rule 13. The Settlement Officer's jurisdiction is a strictly limited one and extends to the limits laid down in the Ordinance and no further. Competence and power to undo what has been done by Courts properly so called, of which he is not one, are not within those limits. It follows

from this conclusion that in their Lordships' opinion no injustice at all has been suffered by the appellant by reason of her appeal to the Court of Appeal in Palestine having been dismissed sooner rather than later.

The advice that their Lordships will humbly tender to His Majesty is that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Privy Council Appeal No. 56 of 1945.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

Before: Lord Roche, Lord Normand and Mr. James Stratford.

PAUL COUVREUR,
and another. . . . . *Appellants.*

v

M. G. SHAPIRO. . . . . *Respondent.*

and

M. G. SHAPIRO. . . . . *Appellant.*

v

PAUL COUVREUR,
and another. . . . . *Respondents.*

Land Transfers Regulations, 1940 — Do not have the effect of frustrating a contract for the transfer of land within Zon A to a non-Palestinian Arab — Land Transfers Regulations, 1940, Regulation 3.

This was an appeal and cross appeal from the judgment of the Court of Civil Appeal given in Civil Appeal No. 11/44, whereby the Court (Rose J. and Edwards J.) held that the Land Transfers Regulations, 1940, had operated a frustration of the contract for the transfer to the purchaser, a Jew, of land within Zone A in which the transfer save to a Palestinian Arab was prohibited, and ordered the vendor to repay the sum of LP.3100 to the purchaser which the purchaser never paid to the vendor.

In advising His Majesty that the appeal be allowed and the cross appeal refused, the Judicial Committee of the Privy Council,

HELD that the Land Transfers Regulations, 1940, Regulation 3 of which prohibits the transfer of land within Zone A save to a Palestinian Arab except in cases in which the High Commissioner permits such transfer, did not have the effect of frustrating the contract for sale of land situate within Zone A between the appellant as vendor and the respondent, a Jew, as purchaser.

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Referred to: Andrew Miller & Co. Ltd. v. Taylor & Co. Ltd. (1916) 1 K.B. 402.

Austin Baldwin & Co. v. Turner & Co. 36 T.L.R. 769.

Leavey & Co. Ltd. v. George H. Hirst & Co. Ltd. (1944) 1 K.B. 24; 60 T.L.R. 72.

Mitchell Cotts & Co. Ltd. (Middle East) Ltd. v. Hairco Ltd. (1943) 60 T.L.R. 31.

Tayler v. Landauer (1940) 57 T.L.R. 47.

The relevant facts appear from the judgment of the Board

The judgment of the Board was delivered by Lord Normand.

Judgment: This is an appeal from a judgment of the Supreme Court of Palestine allowing an appeal from a judgment of the District Court of Jerusalem and *inter alia* decreeing for payment of £3,100 against the appellants. There is also a cross appeal by the respondent, the purpose of which is to enable him to claim a larger sum than that awarded by the Supreme Court.

By an agreement dated 22nd December, 1934, as modified by subsequent letters of 12th and 24th January, 1935, the appellant Father Couvreur (hereinafter called the appellant) on behalf of the second appellant agreed to sell to a nominee of the respondent certain land at Latrun in two parcels, one of 863 dunams or thereby at a price of £P.13,823 or thereby, and the other of 148 dunams or thereby at a price of £P.2,371 or thereby. A deposit of £2,000 was paid by the respondent, and the appellant agreed to accept the balance as follows:— £P.5,000 on 1st June, 1935, and £P.1,000 monthly thereafter. The respondent was not able to fulfil his undertakings under the agreement and various concessions were made to him by subsequent agreements. Finally on 12th January, 1938, by which time the respondent had paid in all £P.9,500 and had received a transfer of 148 dunams, a new agreement was made. It cancelled the contract of 22nd December, 1934, and all its supplements. It declared that 148 dunams had already been transferred to the respondent and by Clause 3 the appellant undertook, when requested by the respondent, to transfer to the respondent 100 dunams, adjacent to the 148 dunams already delivered, as paid for and without further consideration. By Clause 4 the respondent agreed to pay £.3,100 by 12th January, 1941. By Clause 5 the appellant agreed to transfer the remaining 763 dunams on payment of the £3,100. By Clause 6 the respondent undertook to prepare the transaction of transfer at

the Land Registry at his own expense and to call upon the appellant to appear at the Land Registry and effect the transfer. He also undertook to pay the fees of transfer. Clause 7 provided that the respondent might call on the appellant to transfer the 763 dunams in lots of not less than 50 dunams each. It also provided that the transaction for sale and transfer should be prepared and followed up by the respondent at his expense in all respects. No part of this agreement was ever carried out by the respondent: he paid no more money: he did not request the appellant to transfer the 100 dunams: he did not call upon the appellant to attend at Land Registry, nor did he take any step towards preparing the transaction of sale and transfer during the three years ending 12th January, 1941.

On 28th February, 1940, the Palestinian Land Transfers Regulations, 1940, were published. Regulation 2 divided Palestine into two zones, A and B. The lands with which this appeal is concerned are in Zone A. Regulation 3 *inter alia* provided,

> "The transfer of land situated within Zone A save to a Palestinian Arab shall be prohibited:
>
> Provided that the High Commissioner may, if he considers it desirable so to do, —
>
> (*a*) permit of the mortgage of such land to such companies or societies as he may approve;
>
> (*b*) permit the transfer of such land by Palestinian Arabs to religious or charitable institutions;
>
> (*c*) permit the transfer of such land to persons not being Palestinian Arabs if in his opinion such transfer is necessary for the purpose of consolidating existing holdings, or of effecting the parcellation of village musha' within the meaning of the Land (Settlement of Title) Ordinance;
>
> (*d*) in the case of land within the said Zone owned by persons not being Palestinian Arabs, by general or special order, permit the transfer of such land to persons not being Palestinian Arabs."

The appellant took no step at any time to obtain a permit from the High Commissioner, but the respondent made an application for a permit on 17th March, 1941, and it was granted on 17th October, 1941.

The appellant regarded the contract as at an end, so far as the 763 dunams were concerned, on 12th January, 1941, but he remained ready and willing, as he still is, to transfer the 100 dunams as soon as the respondent made a request for transfer. The respondent on the other hand attempted to negotiate for a reduction of the price of the 763 dunams but nothing came of this negotiation and in September, 1941, the appellant finally decided that he would make no new agreement

for the sale of the 763 dunams on any terms. On 13th August, 1942, the respondent served on the appellant a Notarial Notice calling on him to sign an application to the Land Registrar and to appear at the Land Registry to receive the price due under the contract of 12th January, 1938, and to effect a transfer of the 863 dunams to the respondent. The appellant did not comply with this notice.

In January, 1943, the respondent commenced this action. It was as originally framed an action for damages for breach of contract, the breach being the appellant's failure to transfer the lands when he was asked to transfer them. But subsequently the claim was amended and two new grounds of action were tabled:—(1) that performance of the contract was prohibited by the Land Transfers Regulations and, (2) alternatively, that the parties by mutual consent had enlarged the time for carrying out the agreement of 12th January, 1938, until the consent of the High Commissioner could be obtained to the transfer of the land. The case thus became in effect an alternative case: an action for the return of money paid for a consideration which had failed, or an action of damages for breach of contract because the appellant had refused to transfer the lands when he was asked to do so after the High Commissioner had granted a permit to the respondent. Issues were agreed for the trial of the case in the District Court. The learned judge after hearing evidence found that the respondent, on whose veracity and conduct he made severe criticisms, was at no time willing and able to carry out his part of the contract, whereas the appellant was during the three years of its currency always willing to carry out his obligations under it. He also found that time was of the essence and that there was no extension of time by agreement of parties. He held therefore, as regards the 763 dunams, that the appellant was not in breach of his contract, but that the respondent was not willing to carry out his part during its currency and therefore could not recover damages; nor could he recover money paid in respect of a consideration which had failed since he had in fact paid nothing for the 763 dunams. As regards the 100 dunams he held that the appellant had always been and was still willing to execute a transfer and had never been in breach of his contract and that there had been no failure of consideration in respect of the price paid for these lands.

The Supreme Court, reversing this decision on appeal, appears to have based its judgment on the proposition of law that the Palestine Land Transfers Regulations had operated a frustration of the contract, and on the supposition that the respondent had paid £P.3,100 under the contract of 12th January, 1938, and on this basis the Court ordered the appellant to repay £P.3,100 to the respondent. The respondent's counsel, however, admitted that he was unable to support the judgment, and it is clear that the Palestine Land Transfers Regulations did not have the effect of frustrating the contract *(Leavey & Co. Ltd.* v. *George H. Hirst & Co. Ltd*, (1944) 1 K.B. 24, 60 T.L.R. 72). The respondent's counsel had also to admit that the Supreme Court had fallen into error in supposing that any sum had been paid under the contract. The judgment of the Supreme Court therefore needs no further consideration, but it is important to notice that the findings of fact by the learned judge of the District Court which have been noticed above were accepted by the Supreme Court.

Counsel for the respondent in the present appeal put forward an argument which turned on the two contentions:—(1) that the appellant, and not the respondent, had the duty arising out of the Land Transfers Regulations to apply to the High Commissioner for a permit to transfer the lands; (2) that in any event the respondent was entitled to a reasonable extension of time to allow the permit to be obtained from the High Commissioner and that the permit was in fact obtained before the expiry of such reasonable extension. These contentions are inconsistent with the respondent's amended pleadings and with the agreed issues, in which the respondent's position was that the Land Transfers Regulations prohibited performance of the contract, or alternatively, that the time for performance was enlarged by mutual consent. The respondent cannot be heard to advance an argument which is irreconcilable with the case put forward in his pleadings and which has consequently not been adjudicated upon by the Courts below. But it is also manifest that neither of the contentions now put forward can be made good by the respondent. The sixth and seventh clauses of the contract expressly lay on the respondent the duty of preparing and following up in all respects the transaction for sale and transfer of the lands, and this stipulation is the inevitable sequel of the earlier provisions of the contract by which it falls to the respondent to request the appellant to transfer the 100 dunams of land, to make payment of the £P.3,100 and to call upon the appellant to transfer the 763 dunams in lots of 50 dunams each. It is clear, therefore, that under the contract the duty of taking all steps necessary for effecting a transfer in his favour rested on the respondent. The wording of the stipulation is wide enough to cover a step not foreseen to be necessary at the time when the parties entered into the contract, such as obtaining a permit required by supervening regulations.

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Counsel for the respondent relied on *Tayler* v. *Landauer* (1940), 57 T.L.R. 47, in which it was held that the seller under a C.I.F. contract had a duty to apply for a permit for the sale of butter beans under the Cereal Products Order, 1939. That is a decision which was inevitable having regard to the incidents of a C.I.F. contract, but the contract in the present case has no resemblance to a C.I.F. contract for the sale of goods. Counsel also cited *Mitchell Cotts & Co. (Middle East) Ltd.* v. *Hairco Ltd.* (1943) 60 T.L.R. 31, which decided that when the importation of goods is prohibited except under licence, it is the duty of the owner of the goods to obtain the licence. That also was a decision which was inevitable having regard to the nature of the contract and the prohibition, but it has no application to the present contract. The proposition that a reasonable time must be allowed to see whether the prohibition against transfer would be maintained or a permit to transfer would be granted has been applied to contracts which fall to be carried out in a reasonable time, and *Andrew Miller & Co. Ltd.* v. *Taylor & Co. Ltd.* (1916) 1 K.B. 402, and *Austin Baldwin & Co.* v. *Turner & Co.*, 36 T.L.R. 769, are cases dealing with such contracts, but here the contract fell to be completed within a fixed period and it has been conclusively found that time was of the essence. To require of the vendor that he should allow reasonable time beyond the fixed period to enable the purchaser to do what he was required to do by the terms of the contract, would amount to making a new contract for the parties.

On all these grounds, therefore, their Lordships are of opinion that the appeal should be allowed and the cross appeal refused; that the judgment of the Supreme Court should be set aside and the judgment of the District Court restored. Their Lordships will humbly so advise His Majesty.

The respondent will pay the appellant's costs of the appeal and the cross appeal and in the Courts below.

Privy Council Appeal No. 24 of 1945.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

Before: Lord Simonds, Lord Normand and Lord MacDermott.

ARIEH ZVI LIPSHITZ. . . . . *Appellant.*

v

HAIM ARON VALERO,
and others. . . . . *Respondents.*

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and
Lord MacDermott

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Supreme Court — Appeal — Ultra Vires — Jurisdiction — Supreme Court sitting as a Court of Appeal lacks jurisdiction to entertain appeals from judgments of District Courts in their appellate capacity from judgments of Magistrates' Courts — Section 12 of the Magistrates' Courts Jurisdiction Ordinance, 1939, is ultra vires — Effect of a provision in the Palestine Order-in-Council, 1922, that a specified jurisdiction of a Court shall be subject to Ordinance — Palestine Order-in-Council, 1922, Articles 43, 49, 87 and 88 — Magistrates' Courts Jurisdiction Ordinance, 1939, Section 12 — Palestine (Appeal to Privy Council) Order-in-Council, 1924, Article 3(a).

This appeal to the Privy Council was against the judgment of the Supreme Court given in Civil Appeal No. 240/43, 10 P.L.R. 584, whereby the Supreme Court allowed an appeal to it against the judgment of the District Court in its appellate capacity and restored the judgment of the Magistrate by which he ordered the eviction of the tenant (Lipshitz) from a piece of land on which he erected a winter garden café on the ground that the Rent Restrictions (Business Premises) Ordinance 1941, had no application to unbuilt land. Before the Board the appellant maintained that the Supreme Court had no jurisdiction to entertain the appeal from the District Court in its appellate capacity because the Palestine Order-in-Council, 1922, had by Article 43 specified the appellate jurisdiction of the Supreme Court and it had not given power to the High Commissioner to extend that jurisdiction by Ordinance and therefore Section 12 of the Magistrates' Courts Jurisdiction Ordinance, 1939, was *ultra vires*. He further argued that the right construction of the phrase "shall have jurisdiction subject to the provisions of any ordinance to hear appeals" should be "shall have jurisdiction subject to the provisions of any ordinance to hear certain appeals and no others." The respondents maintained that the High Commissioner has power by Article 43 itself to vary and extend by Ordinance the jurisdiction of the Supreme Court sitting as a Court of Appeal, and they argued that the phrase "shall have jurisdiction subject to the provisions of any Ordinance to hear appeals" should be construed as meaning "shall have jurisdiction to hear certain appeals and such other appeals as any ordinance shall provide."

In advising His Majesty that the appeal be allowed, that the judgment of the Supreme Court be set aside and that the judgment of the District Court be restored, the Judicial Committee of the Privy Council,

HELD (1) that the Supreme Court sitting as a Court of Appeal has no jurisdiction to entertain appeals to it from District Courts in their appellate capacity from judgments of Magistrates' Courts, because Article 43 of the Palestine Order-in-Council, 1922, specifies and

limits the appellate jurisdiction of the Supreme Court, which jurisdiction the High Commissioner has no power to vary and extend by ordinance, and because when a specified jurisdiction of a Court is declared by the Order-in-Council to be subject to Ordinances, it is intended only that the High Commissioner shall have power to prescribe by ordinance such procedure and practice as cannot appropriately be dealt with by rules made under Article 49, and because the words "shall have jurisdiction subject to the provisions of any ordinance to hear appeals" in the said Article 43 must mean "shall have jurisdiction subject to the provisions of any ordinance to hear certain appeals and no others" and not "shall have jurisdiction to hear certain appeals and such other appeals as any ordinance shall provide". Accordingly, the ordinances contemplated by Article 43 are necessarily confined to the regulation of matters of procedure and practice (for example prescribing the time for appeals or the conditions under which appeals may be taken without leave) which are not appropriate for rules of court made under Article 49.

(2) that Section 12 of the Magistrates' Courts Jurisdiction Ordinance, 1939, is not within the powers conferred on the High Commissioner by the Palestine Order-in-Council, 1922, and is *ultra vires*.

Approved: CA 177/38.

Overruled: CA 158/38, 5 P.L.R. 488.

The judgment of the Board was delivered by Lord Normand.

Judgment: This is an appeal from the judgment of the Supreme Court of Palestine setting aside the judgment of the District Court of Jerusalem in its appellate capacity and restoring the judgment of the magistrate in the Magistrate's Court of Jerusalem in favour of the plaintiff. The plaintiff was the original respondent in this appeal, but he died in July, 1945, and the present respondents were substituted as respondents in his place by an Order-in-Council of 7th December, 1945.

The respondents deny the jurisdiction of this Board; and the appellant denies the jurisdiction of the Supreme Court to entertain the appeal from the District Court. It is first necessary therefore to decide whether this Board has jurisdiction to entertain the appeal, and if the Board's jurisdiction is upheld, it will then be necessary to decide whether the Supreme Court had jurisdiction to entertain the appeal from the judgment of the District Court; and this Board will become concerned with the merits of the dispute between the parties only if the jurisdiction of the Supreme Court also is upheld.

But in order that the first of these questions of jurisdiction may be understood it is necessary to explain the facts. The appellant, the defendant in the action, is the owner of a café in King George Avenue, Jerusalem. The deceased Moshe Valero, the plaintiff and the original respondent, was the owner of an

adjoining piece of land. From 1937 to 1940 the appellant took a part of this land on yearly lease for use as a garden for his café. Then by agreement in writing, executed on 28th November, 1940, the plaintiff let to the appellant part of the land of an area of 7½ x 6½ metres as a garden for the café for 12 months at a rent of £P.60. Subsequently the parties added a clause to this agreement providing for the contemplated event of the appellant's building a winter garden on the leased land; and during the currency of the lease the appellant in fact built a winter garden at a cost exceeding £P.500. On the 28th November, 1941, the parties entered into another agreement by which the plaintiff let to the appellant the same area of ground as had been let by the agreement of 28th November, 1940, and an additional area of 50 square metres. The lease bore to be granted "for the arrangement of a garden" for the appellant's café. The lease was for one month and the rent was £P.13.500 payable in advance. Other provisions of this lease were as follows:—

"3. In the event of the lessor needing the plot of land for the purpose of building or for any other purpose whatsoever, the lessee must vacate the said plot within 3 days from the receipt of a notice in writing from the lessor of his desire in that regard: in such an event the lessor shall have to return to the lessee the proportional rent for the remainder of the period during which the lessee shall not have used the plot in consequence of the demand by the lessor as aforesaid and this agreement shall be deemed abrogated upon the delivery of a notice as aforesaid.

4. All the construction which the lessee shall make shall remain his private property, it being expressly provided that at the end of the term of lease or upon demand being made by the lessor to vacate the land under clause 3 of this agreement it shall be removed. Should the lessee fail to vacate the let property as aforesaid all the construction made by the lessee shall remain the property of the lessor, and the lessee may not claim the expenses he had incurred therefor.

5. Should there be no notice by the lessor under clause 3 or for any other arrangement, this agreement shall be renewed automatically for one further month and so forth month by month on the same conditions as in this agreement are included, provided that the lessee shall notify the lessor of his such desire three days before the expiration of each month and shall pay the monthly amount of £P.13.500 in advance."

The appellant did not give notice under the fifth clause of this agreement but he paid the rent of £P.13.500 on 28th November, 1941, and on the 28th day of each of the five following months. Instead of tendering payment of the next monthly rent on 28th May, 1942, the appellant tendered payment on 31st May, 1942. This tender was not accepted, and by letter of the same date the plaintiff gave notice under Clause 3 of the agreement, terminating the lease because the ground was

limits the appellate jurisdiction of the Supreme Court, which jurisdiction the High Commissioner has no power to vary and extend by ordinance, and because when a specified jurisdiction of a Court is declared by the Order-in-Council to be subject to Ordinances, it is intended only that the High Commissioner shall have power to prescribe by ordinance such procedure and practice as cannot appropriately be dealt with by rules made under Article 49, and because the words "shall have jurisdiction subject to the provisions of any ordinance to hear appeals" in the said Article 43 must mean "shall have jurisdiction subject to the provisions of any ordinance to hear certain appeals and no others" and not "shall have jurisdiction to hear certain appeals and such other appeals as any ordinance shall provide". Accordingly, the ordinances contemplated by Article 43 are necessarily confined to the regulation of matters of procedure and practice (for example prescribing the time for appeals or the conditions under which appeals may be taken without leave) which are not appropriate for rules of court made under Article 49.

(2) that Section 12 of the Magistrates' Courts Jurisdiction Ordinance, 1939, is not within the powers conferred on the High Commissioner by the Palestine Order-in-Council, 1922, and is *ultra vires*.

Approved: CA 177/38.

Overruled: CA 158/38, 5 P.L.R. 488.

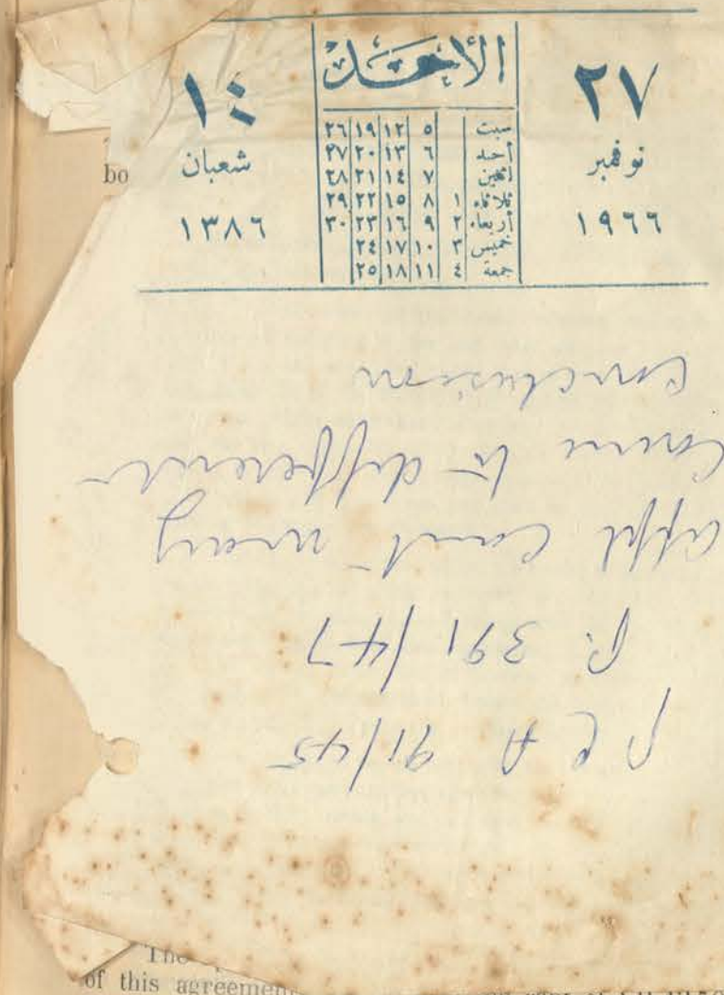
The judgment of the Board was delivered by Lord Normand.

Judgment: This is an appeal from the judgment of the Supreme Court of Palestine setting aside the judgment of the District Court of Jerusalem in its appellate capacity and restoring the judgment of the magistrate in the Magistrate's Court of Jerusalem in favour of the plaintiff. The plaintiff was the original respondent in this appeal, but he died in July, 1945, and the present respondents were substituted as respondents in his place by an Order-in-Council of 7th December, 1945.

The respondents deny the jurisdiction of this Board; and the appellant denies the jurisdiction of the Supreme Court to entertain the appeal from the District Court. It is first necessary therefore to decide whether this Board has jurisdiction to entertain the appeal, and if the Board's jurisdiction is upheld, it will then be necessary to decide whether the Supreme Court had jurisdiction to entertain the appeal from the judgment of the District Court; and this Board will become concerned with the merits of the dispute between the parties only if the jurisdiction of the Supreme Court also is upheld.

But in order that the first of these questions of jurisdiction may be understood it is necessary to explain the facts. The appellant, the defendant in the action, is the owner of a café in King George Avenue, Jerusalem. The deceased Moshe Valero, the plaintiff and the original respondent, was the owner of an

adjoining piece of land. From 1937 to 1940 the appellant took a part of this land on yearly lease for use as a garden for his café. Then by agreement in writing, executed on 28th November, 1940, the plaintiff let to the appellant part of the land of an area of 7½ x 6½ metres as a garden for the café for 12 months at a rent of £P.60. Subsequently the parties added a clause to this agr[illegible]emplated event of the appellant [illegible]d land; and [illegible] built



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[illegible]e

The [illegible] of this agreement [illegible] paid the rent of £P.13.500 on 28th November, 1941, and on the 28th day of each of the five following months. Instead of tendering payment of the next monthly rent on 28th May, 1942, the appellant tendered payment on 31st May, 1942. This tender was not accepted, and by letter of the same date the plaintiff gave notice under Clause 3 of the agreement, terminating the lease because the ground was

needed by him for another purpose, and stating that the appellant had committed a breach of the agreement by failing to pay the rent due on 28th May, 1942. As the appellant remained in possession of the premises the present action was commenced on the 10th June, 1942, for an order on him to vacate. One of the grounds of defence and the only ground now maintained is that the action is contrary to the provisions of the Rent Restrictions (Business Premises) Ordinance, 1941. On the 28th February, 1943, the magistrate gave judgment in favour of the plaintiff, and on the 18th June, 1943, the District Court of Jerusalem on appeal set aside the magistrate's judgment and dismissed the action. Leave to appeal to the Supreme Court was applied for and granted, and on 24th November, 1943, the Supreme Court allowed the appeal and restored the magistrate's judgment. The appellant then applied to the Supreme Court under Article 3(a) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, for leave to appeal to His Majesty in Council. This application was opposed, but on 1st February, 1944, the Supreme Court granted conditional leave as of right.

The first question is whether the Supreme Court should have refused the application on the ground that this Board has no jurisdiction. Article 3(a) of the Palestine (Appeal to Privy Council) Order-in-Council, 1924 (S.R. & O. 1924, No. 1243), is in these terms:—

> "Subject to the provisions of this Order an appeal shall lie (a) as of right, from any final judgment of the Court, when the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards or where the Appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards."

The respondents maintain that the Board has no jurisdiction because all that is in dispute or in any way involved in the appeal is the appellant's right to occupy a small piece of land, and that this right of occupation, having been granted under a lease for one month terminable on three days' notice and at a rent of only £P. 13.500 a month, is worth £P.50 at most. They maintain also that the value of the building erected by the appellant on the land leased by him does not enter into the value of "the matter in dispute" or of the right claimed, since there is no mention of the building in the Statement of Claim or Pleadings and no decision has to be made respecting it. Their Lordships are of opinion that this is too narrow a construction of Article 3, and that the true test under the article is whether it is worth £500 to the appellant that the Rent Restriction Order should be held to give him protection against an order to vacate the land leaving on it a building which cost

£450 to erect. This is the test which was applied by the learned judges of the Supreme Court, who held that the tenancy right amounted in value to at least £P.50 and the value of the building to £P.450.(1)

It is therefore necessary to consider next whether the Supreme Court had jurisdiction to entertain the appeal from the District Court of Jerusalem. Article 12 of the Magistrates' Courts Jurisdiction Ordinance (No. 45 of 1939) provides that "The decision of the District Court in an appeal from a Magistrate's Court shall be final, but the presiding judge of the District Court which heard the appeal may, if the decision involves a point of law of novelty, complexity or general importance, grant leave to appeal to the Supreme Court sitting as Court of Appeal." In this case the presiding judge of the District Court granted leave to appeal, and accordingly there was jurisdiction in the Supreme Court unless Article 12 can be successfully challenged as *ultra vires*, and that is what is now in issue. The decision depends primarily on the meaning and effect of Article 43 of the Palestine Order-in-Council, 1922 (S.R. & O. 1922 No. 1282). It is one of a series of articles forming Part V of the Order-in-Council, the heading of which is "Judiciary", and it will be convenient to set out those articles in Part V or so much of them as was specially referred to in the argument.

> *Article* 38 (as amended by the Palestine (Amendment) Order-in-Council, 1935). Subject to the provisions of this part of this Order and any Ordinance or Rules, the Civil Courts hereinafter described, and any other Courts or Tribunals constituted by or under any of the provisions of any Ordinance, shall exercise jurisdiction in all matters and over all persons in Palestine.
>
> *Article* 39 (as amended by the Order-in-Council of 1935). Magistrates' Courts shall be established in each District and Sub-District as may be prescribed from time to time by Order under the hand of the High Commissioner. These Courts shall have the jurisdiction assigned to them by the Ottoman Magistrates Law of 1913, as amended altered or extended by any subsequent law or Ordinance or Rule for the time being in force.
>
> *Article* 40. District Courts shall be established in such Districts as may be prescribed from time to time by Order under the hand of the High Commissioner, and every such Court shall exercise jurisdiction
>
> (1) As a Court of First Instance:—
>
> (a) In all civil matters not within the jurisdiction of the Magistrates' Courts in and for that District.
>
> (b) In all criminal matters which are not within the jurisdiction of the Court of Criminal Assize.
>
> (2) As an Appellate Court from the said Magistrates' Courts subject to the provisions of any Ordinance or Rules.

(1) See PCLA 24/43, 11 P.L.R. 33.

Article 41. There shall be a Court of Criminal Assize which shall have exclusive jurisdiction with regard to offences punishable with death and such jurisdiction with regard to other offences as may be prescribed by Ordinance.

Article 42 (as amended by Order-in-Council of 1939). The High Commissioner may by order under his hand establish Land Courts and determine the area of their jurisdiction. The constitution of such courts and the matters in which they shall have jurisdiction within the area so determined shall be prescribed by Ordinance.

Article 43. There shall be established a Court to be called the Supreme Court of which the constitution shall be prescribed by Ordinance. The Supreme Court sitting as a Court of Appeal shall have jurisdiction subject to the provisions of any Ordinance to hear appeals from all judgments given by a District Court in first instance.

Article 49. The Chief Justice may, with the approval of the High Commissioner, make rules for regulating the practice and procedure of the Supreme Court and of all other Civil Courts which are or may be established in Palestine.

Article 64(1). Matters of personal status affecting foreigners other than Moslems shall be decided by the District Courts, which shall apply the personal law of the parties concerned in accordance with such regulations as may be made by the High Commissioner, provided always that the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an Ordinance is passed conferring such jurisdiction.

It will also be necessary to refer to the following:

Article 17(1)(a) (as amended by Order-in-Council of 1923). The High Commissioner shall have full power and authority, without prejudice to the powers inherent in, or reserved by this Order to His Majesty, and subject always to any conditions and limitations prescribed by any such instructions as may be given to him under the Sign Manual and Signet or through a Secretary of State, to promulgate such Ordinances as may be necessary for the peace, order and good government of Palestine, provided that no Ordinance shall be promulgated which shall restrict complete freedom of conscience and the free exercise of all forms of worship, save in so far as is required for the maintenance of public order and morals; or which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion, or language.

Article 87. The High Commissioner may by Proclamation in the Gazette at any time within one year from the date of the commencement of this order, and provided he has previously obtained the approval of the Secretary of State, vary, annul or add to any of the provisions of this order in order to carry out the purposes of the same, and may provide for any other matters necessary in order to carry into effect the provisions thereof.

Article 88. His Majesty, His heirs and successors in Council, may at any time revoke, alter or amend this order.

The Orders-in-Council are, it may be noted, made in exercise of the power vested in His Majesty by the Foreign Jurisdiction Act, 1890 (53 and 54 Victoria c. 37), section 12,

to assign to or confer on any court held under the authority of His Majesty, any jurisdiction, civil or criminal, original or appellate, which may lawfully by Order-in-Council be assigned to or conferred on any British Court in any foreign country, and to make such provisions and regulations as to His Majesty in Council seem meet respecting the exercise of the jurisdiction so assigned or conferred and respecting the enforcement and execution of the judgments, decrees, orders and sentences of any such Court, and respecting appeals therefrom.

The appellant maintained that Article 12 of the Magistrates' Courts Jurisdiction Ordinance (No. 45 of 1939) is *ultra vires*, because the Order-in-Council has by Article 43 specified the appellate jurisdiction of the Supreme Court and the Order has not given power to the High Commissioner to extend that jurisdiction by Ordinance. The respondents maintained that *Part V* of the Order-in-Council is but an outline of the Civil Courts which the High Commissioner is given power to fill in by means of Ordinances and in particular that he has power under Article 43 itself to vary and extend the jurisdiction therein conferred on the Supreme Court sitting as a Court of Appeal. Their counsel construed the words "shall have jurisdiction subject to the provisions of any ordinance to hear certain appeals" as meaning "shall have jurisdiction to hear certain appeals and such other appeals as any Ordinance shall provide" and the question really is whether that construction is right or whether the sound construction is, "shall have jurisdiction subject to the provisions of any ordinance to hear certain appeals and no others." If the restrictive construction is the true one, the ordinances contemplated by the Article would, it is admitted, necessarily be confined to the regulation of matters of procedure and practice (for example prescribing the time for appeals or the conditions under which appeals may be taken without leave) which are not appropriate for Rules of Court made under Article 49. Their Lordships are of opinion that that is the true meaning of the Article and that the respondent's construction strains and distorts its language. This opinion is fortified by a comparison of the language of the Article with that of other Articles in Part V. Article 38 gives to the Civil Courts as a whole universal jurisdiction in all matters and over all persons in Palestine. It is impossible to widen this jurisdiction by a Palestine Ordinance, and it cannot be supposed that power would be given to exclude by Ordinance any matter or person in Palestine from the jurisdiction of the Civil Courts. Therefore the Ordinances to which the jurisdiction of the Civil Courts as a whole is declared by the Article to be subject can only be such as might deal with matters of practice and procedure. The language of Articles

39, 41, 42 and 64(1) shows that, when it is intended to provide for amendment, alteration or extension of jurisdiction by Ordinance, the intention is expressed in clear and unambiguous terms, and nothing is left to doubtful inference or implication. Article 40(1) draws the distinction between District Courts as Courts of first instance and as Courts of Appeal, and this important distinction becomes in Article 43 the basis of the definition of the Supreme Court's jurisdiction. In Article 40(2) the Ordinances contemplated can only be Ordinances regulative of procedure and practice, for the Article has already given to the District Courts all the appellate jurisdiction which can be given to them, by giving them jurisdiction to hear appeals from the only Court subordinate to them established by the Order-in-Council. The powers of amendment under Articles 87 and 88 are fully adequate for the purpose of amending those Articles which deal with jurisdiction and which themselves make no express provision for amendment by Ordinance.

Accordingly, the conclusions relevant to the issue in the appeal which result from this examination of the Order are:— (1) Article 43 specifies and limits the appellate jurisdiction of the Supreme Court, and (2) when a specified jurisdiction is declared to be subject to Ordinances, it is intended only that the High Commissioner shall have power to prescribe by Ordinance such procedure and practice as cannot appropriately be dealt with by rules made under Article 49. If these conclusions are well founded it is not necessary to give separate consideration to the respondents' alternative contention, that the extension of the Supreme Court's appellate jurisdiction by Ordinance is warranted by Article 17(1)(a) (as amended), for the respondents' counsel admitted that if Article 43 confers a limited jurisdiction the High Commissioner has no power to extend it by Ordinance made under Article 17(1)(a).

It should be added that the respondents submitted an argument *ab inconveniente* for recognising the validity of Article 12 of the Magistrates' Courts Jurisdiction Ordinance. This, however, is not an argument which can be allowed to affect the judicial construction of the Order-in-Council and it is for the legislative power to remedy any inconvenience which may result from the present decision.

Their Lordships therefore hold that Article 12 of the Magistrates' Courts Jurisdiction Ordinance is not within the powers conferred on the High Commissioner by the Order-in-Council and is *ultra vires*.

This question first came before the Supreme Court in *Doukhan* v. *Drucker* (No. 177 of 1938). In that case Acting

Chief Justice Copland, Mr. Justice Frumkin and Mr. Justice Khayat held that they had no jurisdiction to entertain an appeal from the District Court sitting as an Appellate Court. The learned Acting Chief Justice said, "The words 'subject to the provisions of any Ordinance', in our opinion refer to the manner in which such appeals shall be brought, such as imposing a limit of penalty below which an appeal does not lie, imposing a definite period for appealing, ordering that in any particular class of cases appeal shall only be by leave, and such like matters, but cannot extend the jurisdiction of the Supreme Court to allow it to hear appeals from the District Court in its appellate capacity." With this opinion their Lordships agree. The same question again came before the Supreme Court in *Municipal Corporation of Jerusalem* v. *Cattan* (Civil Appeal No. 158 of 1938), Palestine Law Reports, 1938, page 488. On this occasion it was considered by a bench of five judges, who by a majority held that the words "subject to the provisions of any Ordinance" do empower the High Commissioner to enlarge the jurisdiction by Ordinance. Chief Justice Trusted based his decision partly on the ground that the practice of the Supreme Court had since 1924 conformed to the view that its jurisdiction had been enlarged and that an amending Order-in-Council had been passed in 1935 which contained no provision correcting this practice, and he said that it was too late to raise the question of jurisdiction. Mr. Justice Copland after examining the relevant articles of the Order-in-Council adhered to the opinion which he had expressed in the earlier case. Mr. Justice Frumkin on this occasion came to the opposite conclusion from that to which he had come in the previous case, and held that Article 43 did not restrict the jurisdiction of the Supreme Court to hearing appeals from the District Court sitting as a Court of first instance. Mr. Justice Khayat agreed with Mr. Justice Copland and Mr. Justice Abdul Hadi with the Chief Justice. Their Lordships find themselves in agreement with the clearly reasoned judgment of Mr. Justice Copland. They are unable to attach any importance to practice as interpreting an Order-in-Council of recent date, and they find in the amending Order-in-Council of 1935 nothing that implies approval of the practice of the Supreme Court or of the construction of Article 43 on which that practice had tacitly proceeded.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment of the Supreme Court should be set aside and that the judgment of the District Court should be restored.

Counsel for the respondents submitted that as the appellant had not objected to the jurisdiction of the Supreme Court

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Lord Simonds
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when application was made in the District Court for leave to appeal, nor when the case was before the Supreme Court itself the costs to be awarded to him should be modified. But it does not appear that the appellant could, in view of the decision in the *Jerusalem Municipal Council* v. *Cattan*, have done more than reserve the point in the event of an appeal to this Board or that such a reservation could have had any effect on the course of the litigation. The appellant is entitled to the costs of this appeal and in the Courts in Palestine.

Criminal Appeal No. 80 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: The Acting Chief Justice, Weldon Ag. J. and Abdulhadi J.

1947
7th August

Shaw Ag. C.J.
Weldon Ag. J.
and
Abdulhadi J.

CRA 80/47
Nassar
v
Attorney General

MUHAMMAD ABDUL FATTAH NASSAR. . *Appellant.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

Criminal law — Banknote — Tendering of a LP.5 banknote — Banknote in question found to be a forged banknote — Arrest of person tendering banknote and taking him to police station — Endeavour by person in question on the way to make off — Whether the tendering of the forged LP.5 banknote is absolute proof of knowledge of forgery — Whether from endeavour to run away guilt may safely be inferred — Criminal Code Ordinance, 1936, Section 349.

In Criminal Case No. 98/47 of the District Court of Jaffa the accused was charged with tendering a forged banknote, knowing the same to be forged, contrary to Section 349(1) of the Criminal Code Ordinance, 1936. The facts were that on 3.3.47, at Ramleh, the accused tendered a LP.5 banknote in payment for a cup of coffee, although at the time he had small change. The banknote tendered was found to be counterfeit and the person tendering it was arrested and when he was being conducted to the Police Station he endeavoured to run away but was persuaded by the Police Constable who had him in custody not to escape. The District Court (Judge Touqan) held that the tendering of this banknote in payment for a cup of coffee, although the accused had on him at the time small change, was absolute proof that he knew the banknote to be counterfeit, and he convicted the accused of the offence charged and sentenced him to nine months imprisonment. The accused applied for leave to appeal and his application for leave was treated as the appeal.

In allowing the appeal and quashing the conviction, the Court of Criminal Appeal,

HELD (1) that the tendering by the accused of the forged LP.5 banknote, although at the time he had small change on him, was not absolute proof that he knew the banknote to be counterfeit — he might innocently have wished to change the note.

(2) that it would not be safe to draw from the fact that the accused showed a tendency to run away after his arrest the inference that he was a guilty man.

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7th August

Shaw Ag. C.J.
Weldon Ag. J.
and
Abdulhadi J.

CRA 80/47
Nassar
v
Attorney General

Accused in person.

Crown Counsel (J. Wicks) for respondent.

Judgment: This is an application for leave to appeal from the judgment dated 12.7.47 of the District Court of Jaffa in Criminal Case No. 98/47. In accordance with our usual custom we have treated this application for leave to appeal as an appeal.

The appellant was charged with the offence of uttering a forged bank-note, knowing the same to be forged, contrary to section 349(1) of the Criminal Code Ordinance. The particulars of the offence were that the appellant, on the 3rd day of March, 1947, at Ramleh, uttered a forged bank-note, No. 618189, purporting to be a bank-note of LP.5, knowing the same to be forged. It may be observed that an ingredient of an offence under section 349(1) is an intent to defraud, and such fraudulent intent was not charged in the information.

There was evidence that the appellant tendered what purported to be a bank-note of LP.5 in payment for a cup of coffee. There happened to be in the café at that time an employee of one of the Ramleh banks, and he upon scrutinising the bank-note pronounced it to be counterfeit. This resulted in the arrest of the appellant.

There was also evidence that when the appellant was being taken to the Police station he declined to proceed further, and endeavoured to make off, but the Police constable who had him in custody persuaded him not to escape.

In his judgment the learned Judge observed that the fact that the appellant had tendered this note in payment of the price of a cup of coffee, although at the time he had small change in his possession, was absolute proof that he knew the bank-note to be counterfeit. The learned Judge did not record any finding as to whether the forgery was a good one or not, and the bank employee who was called as a witenss was not asked to state whether in his opinion the note was a good counterfeit.

In our judgment the trial Court misdirected itself when it said that the tendering of the note in such circumstances was absolute proof that the appellant knew it to be a forgery. The appellant might quite innocently have wished to change the note. And we do not think it would be safe to draw from the fact that the appellant showed a tendency to run away after he was arrested the inference that he was a guilty man.

Mr. Wicks, Crown Counsel, has, in our opinion very properly, submitted that the conviction cannot be supported. We

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find that there was no evidence before the trial Court to warrant a conviction, and we therefore allow this appeal and quash the conviction.

The appellant will be released unless he is required to be detained on any other charge.

High Court No. 92 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Acting Chief Justice and Weldon Ag. J.

1947
8th August

Shaw Ag. C.J.
and
Weldon Ag. J.

HC 92/47
Rubovicz
v
Inspector General
of Police
and others

NEHEMIA RUBOVICZ. . . . . *Petitioner.*

v

1. INSPECTOR GENERAL OF POLICE,
2. ASSISTANT INSPECTOR GENERAL OF POLICE,
3. SUPERINTENDENT OF POLICE, JERUSALEM DISTRICT,
4. ROY ALEXANDER FARRAN, formerly DISTRICT SUPERINTENDENT OF POLICE, JERUSALEM, now in MILITARY CUSTODY AT ALLENDBY BARRACKS, JERUSALEM. . . . . *Respondents.*

High Court — Habeas Corpus — What is a writ of habeas corpus and circumstances in which it may issue.

In refusing to issue a summons to all the respondents to show cause why they or any of them should not produce the body of Alexander Rubovicz, petitioner's brother, before it (the High Court) on a date to be fixed for the purpose of his release and to await its further orders, the High Court,

HELD that the writ of habeas corpus ad subjuciendum is a prerogative writ which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate. Though it is a writ of right, it is not a writ of course, and therefore may be refused where there is an alternative remedy available by which the validity of the detention can be questioned. When it is clear that the person charged with unlawfully detaining another has *de facto* ceased to have any custody or control, the writ ought not to issue.

Referred to: Barnardo v. Ford, (1892) A.C. 326.

Secretary of State for Home Affairs v. O'Brien (1923) A.C. 603.

The relevant facts appear from the Order.

R. Nochimowski for petitioner.

Order: The petitioner, who states that he is the brother of a Jewish youth named Alexander Rubovicz aged 16½ years,

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is asking for an order "in the nature of habeas corpus" in respect of the said Alexander Rubovicz.

The petition sets out that on the 6th of May, in the evening, the said Rubovicz left his father's house in order to proceed to the petitioner's house. When on his way, at the corner of Keren Kayemeth Street and Ussishkin Street in Jerusalem, he was forcibly detained or arrested or abducted by persons wearing civilian clothes, one of whom was armed with a revolver. During the scuffle a civilian hat of one of the boy's assailants fell off and was picked up by a bystander. Inside the hat the name of the fourth respondent — Farran — was found written in ink, and this hat was handed over to the Police. Respondent No. 4 was at the time of this incident serving with the Palestine Police. At the end of May, 1947, respondent No. 4, together with two other Police officers, fled to Syria, and were there detained and arrested by the Syrian Police. Respondent No. 3 swore an affidavit, for the purpose of extradition proceedings in respect of respondent No. 4, accusing the latter of kidnapping Rubovicz, and the Syrian authorities surrendered respondent No. 4 to the Government of Palestine. At an identification parade on the 18th June, 1947, three eyewitnesses identified respondent No. 4 as the man who forced Rubovicz into a car and drove off with him. Thus Rubovicz was unlawfully and without any authority detained or arrested or abducted by respondent No. 4, who is allegedly the last person known to have had in his custody the body of Rubovicz.

The petition further sets out that respondents Nos. 1 and 2 were the immediate superiors of respondent No. 4, and it is probable that respondent No. 4 acted under their order. The petition goes on to state that it is certain that respondents Nos. 1 and 2 were immediately informed by respondent No. 4 of the incident referred to above, and of the detention, custody and fate of Rubovicz.

Finally, the petition states that in view of the above facts there is no doubt that respondent No. 4, together with other Police officers, with the knowledge of their superiors, respondents Nos. 1 and 2, unlawfully and without authority detained and abducted Rubovicz, deprived him of his liberty, had actual control over him and held him in illegal custody.

The petitioner's prayer is, therefore, that this Court do issue a summons directed to all of the respondents to show cause why they or any of them should not produce the body of the said Alexander Rubovicz before the Court on a date to be fixed for the purpose of his release, and to await the further orders of this Court.

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It is clear on the face of the petition that so far as the third respondent is concerned he is not alleged to have done anything apart from swearing an affidavit for the purpose of extradition proceedings. And so far as respondents Nos. 1 and 2 are concerned, it is entirely a matter of surmise whether they had given any order to the fourth respondent to do what he is alleged to have done or whether respondent No. 4 made any report to them subsequently.

It is not alleged that any one of respondents 1, 2 or 3 has now, or at any time had, Alexander Rubovicz in his custody. In the face of the petition, therefore, no cause has been shown which could justify the issue of any order against respondents Nos. 1, 2 and 3.

It is equally clear that the fourth respondent, who is described as being "now in military custody at Allenby Barracks, Jerusalem," cannot have the missing boy Rubovicz in his custody at present.

The question to be decided is whether, in these circumstances, the petitioner is entitled to have an order issued.

The writ of habeas corpus ad subjuciendum is a prerogative writ which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate. Though it is a writ of right, it is not a writ of course, and therefore may be refused where there is an alternative remedy available by which the validity of the detention can be questioned. When it is clear that the person charged with unlawfully detaining another has *de facto* ceased to have any custody or control, the writ ought not to issue.

The petitioner in the present case does not know where the body of the boy Rubovicz is, and his advocate, Mr. Nochimowski, can only express the hope that he is still alive. Mr. Nochimowski has told us that as far as he knows, the petitioner filed a petition in the Magistrate's Court at Jerusalem, on 31.7.47, asking that a preliminary enquiry might be held in respect of the abduction and possible murder of Rubovicz. That petition was made under Section 26 (b) of the Criminal Procedure (Trial Upon Information) Ordinance, Cap. 36, and nobody was named as an accused. Mr. Nochimowski stated that his client had no definite evidence on which he could accuse Farran of a crime. He stated further that the Magistrate had ordered a copy of the petition to be sent to the Attorney-General.

Mr. Nochimowski has further told us that the petitioner approached the third respondent with a request to make an investigation and charge the person who abducted the boy.

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Mr. Nochimowski has referred us to the case of Barnardo v. Ford (1892 A.C. 326), and to the case of Secretary of State for Home Affairs v. O'Brien (1923 A.C. 603), but we are unable to see that these cases are in any way analogous.

The facts alleged by the petitioner call urgently for investigation, and from what Mr. Nochimowski has told us it is evident that certain enquiries have already been made, although with what result he could not say. But we are unable to find that this Court can interfere in the matter at this stage. If either the Magistrate or the responsible Police authority fails to perform his or their duties under the law, the petitioner could doubtless come to this Court for an order under Section 7 (b) of the Courts Ordinance No. 31/1940. So also if the petitioner could show that the boy Rubovicz was being unlawfully detained in custody, he could ask for an order under Section 7 (a). He is not in a position at present to ask for an order under either of these sub-sections of Section 7. In effect, what he is really seeking is an investigation or enquiry which may result in the bringing of a criminal charge or charges against the fourth respondent.

It is not the function of this Court to conduct such an investigation. It is the function of the Police or the Magistrate, or both.

In the result we find this petition to be misconceived, and we therefore dismiss it.

Privy Council Leave Application No. 24 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Acting Chief Justice and Frumkin J.

1947
14th August

Shaw Ag. C.J.
and
Frumkin J.

PCLA 24/47
Husseini
and others
v
Mutawalli

MUHAMMAD ALI NAQIB HUSSEINI,
and others . . . . . *Applicants.*

v

MUHAMMAD ADIB MUTAWALLI,
in his capacity as Mutawalli of waqf
SINAN PASHA. . . . . *Respondent.*

Privy Council — Order granting conditional leave to appeal to His Majesty in Council — Condition that the appellants do take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England within two months of the date of the order — Whether condition means that record must be finally in shape and ready to be despatched to England within two months.

1947
8th August

Shaw Ag. C
and
Weldon Ag.

HC 92/47
Rubovicz
v
Inspector Ge
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1947
14th August

Shaw Ag. C.J.
and
Frumkin J.

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The aggrieved party to Civil Appeal 137/46, 14 P.L.R. 242, applied f leave to appeal to His Majesty in Council and conditional leave to appe was granted on the following two conditions: "(i) that the appellants enter within two months of the date of this order into a bank guarant ....., and (ii) that the appellants do take the necessary steps for th purpose of procuring the preparation of the record and the despatch there to England within two months of the date of this order." Consequent upo the opinion expressed in P.C.L.A. 5/46, 14 P.L.R. 357, the appellants move the Court to vary the second condition to read "that the applicants do tak the necessary steps for the purpose of preparing the index of the record be despatched to England within two months of the date of this order", o as may otherwise be directed by the Court.

In holding that no fresh order was necessary, the Court of Civil Appea

HELD that the order which appellants were seeking to vary (the variatio suggested appears in the headnote) did not mean that the recor must be finally in shape and ready to be despatched to England wit in two months, it meant that the appellants should within two month take the necessary steps for the purpose of procuring the preparatio of the record and the despatch thereof to England, and one of thos necessary steps was, of course, the preparation of the index.

Referred to: PCA 5/46, 14 P.L.R. 357.

Anton Atalla for applicants.

Najib Germanus for respondent.

Order: As a result of the expression of opinion by Comarmond J. in P.C.L.A. 5/46, Mr. Atalla fears that the Orde dated 3.7.47, granting conditional leave to appeal, will be rea as meaning that the record must be ready for despatch England within the two months time allowed.

We think that the words "within two months of the dat of this order" should be read as if they came between th words "do" and "take" in paragraph (ii) of the Order date 3.7.47, and that they should be inserted at that point in futu Orders.

We further rule that the Order does not mean that th record must be finally in shape and ready to be despatched England within two months. It means that the appellant sha within two months take the necessary steps for the purpose procuring the preparation of the record and the despatch ther of to England. One of those necessary steps is, of course, th preparation of the Index. We are supported in this view b the wording of Article 24.

In view of what we have said above, no fresh order necessary.

No costs.

JULY

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THE LAW REPORTS OF PALESTINE

Volume 14

1947

OCTOBER

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate, and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.

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Criminal Appeal No. 69 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: Shaw J., Rigby Ag. J. and Frumkin J.

ATTORNEY GENERAL. . . . . *Appellant.*

v

MUHAMMAD ALI KIRIDLY. . . . . *Respondent.*

1947
8th October

Shaw J.
Rigby Ag. J.
and
Frumkin J.

CRA 69/47
Attorney General
v
Kiridly

Criminal law — Charge sheet — Election by accused brought before a Magistrate's Court of trial summarily by District Court — Whether a fresh charge sheet necessary — Magistrates' Courts Jurisdiction Ordinance, 1939, Section 6 — Criminal Procedure /Summary Trials by District Courts/ Ordinance 1946, Section 4.

An accused before the Magistrate's Court of Haifa (Criminal Case No. 2113/47) elected under Section 6 of the Magistrates' Courts Jurisdiction Ordinance, 1939, trial by the District Court and the Magistrate remitted the case to the District Court. At the hearing before the District Court accused's advocate raised the point that in order for the case to be properly before the District Court, there should be a fresh charge sheet made in accordance with the provisions of Section 4 of the Criminal Procedure (Summary Trials by District Courts) Ordinance, 1946. The District Court (Judge Baradey) upheld the point raised and discharged the accused. The Attorney-General appealed.

In allowing the appeal, setting aside the judgment of the District Court and remitting the case for trial, the Court of Criminal Appeal,

HELD that where an accused person brought before a Magistrate's Court elects under Section 6 of the Magistrates' Courts Jurisdiction Ordinance, 1939, trial by a District Court, it is not necessary that a fresh charge sheet be filed in the District Court.

Distinguished: CRA 34/43.

Assistant Government Advocate (Issa Haxou) for appellant.

Fouad Bustani for respondent.

Judgment: This is an appeal from the judgment dated 7th May, 1947, of the District Court of Haifa, in Misdemeanour No. 98/47. The case had been remitted to the District Court under the provisions of section 6 of the Magistrates' Courts Jurisdiction Ordinance, No. 45 of 1939. The learned Judge discharged the accused because he held that it was necessary for a fresh charge-sheet to be filed in the District Court before the case could be heard there. He based his decision on the provisions of Section 4 of the Criminal Procedure (Summary Trials by District Courts) Ordinance, No. 70 of 1946.

1947
8th October

Shaw J.
Rigby Ag. J.
and
Frumkin J.

CRA 69/47
Attorney General
v
Kiridly

Section 6 of the Magistrates' Courts Jurisdiction Ordinance provides that if a person elects to be tried by the District Court the Magistrate shall not try the case but shall remit it accordingly. That can only mean remit it to the District Court.

Section 9 provides that where a person is brought before a District Court under the provisions of Section 6 or 7 of the Ordinance he shall be tried summarily by such Court. There is no suggestion in that section that before he is tried summarily a new charge sheet must be filed.

Having considered the terms of Section 4 of Ordinance No. 70 of 1946, and the reasons for which that Ordinance was enacted, we are unable to find that the provisions of Section 4 make it necessary for a fresh charge sheet to be filed in circumstances such as these.

Mr. Boustani has referred us to Criminal Appeal No. 34 of 1943 (A.L.R. 1943, p. 384). But that case can easily be distinguished, because in that case there was no order of remittal to the District Court.

In the result we find that this appeal must be allowed and the judgment of the Court below set aside. We order the case to be remitted to the District Court for trial.

Criminal Appeal No. 84 of 1947.

In the Supreme Court sitting as a Court of Criminal Appeal.

Before: Shaw J., Rigby Ag. J. and Frumkin J.

1947
9th October

Shaw J.
Rigby Ag. J.
and
Frumkin J.

CRA 84/47
Abed
and another
v
Attorney General

1. FATMEH RUSHRASH ABED
2. MUHAMMAD ASOUD. . . . . *Appellants.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

Criminal law — Information — Information charging accused with obtaining a cheque by false pretences contrary to Section 301 of the Criminal Code Ordinance, 1936, and the particulars of the offence stated that the accused, with intent to defraud, obtained from the Treasury, Government of Palestine, a cheque... — Objection to information on ground that prosecution must designate a living person as the person defrauded — Whether objection well founded — Criminal Procedure (Trial Upon Information) Ordinance, Rule 10 of the Schedule — Criminal Code Ordinance, 1936, Section 301.

1947
9th October

Shaw J.
Rigby Ag. J.
and
Frumkin J.

CRA 84/47
Abed
and another
v
Attorney General

In this appeal from the judgment of the District Court of Haifa in Criminal Case No. 113/47 whereby that Court, constituted of the President thereof (Judge Weldon), convicted the appellants on two counts contrary to Section 301 of the Criminal Code Ordinance, 1936, the counts in question appear in the judgment of the Court of Criminal Appeal reported hereunder, and sentenced the first appellant to six months imprisonment and the second appellant to eighteen months imprisonment, objection was taken to the form of the information on the ground that it was not sufficient that there was intent to defraud the Treasury of the Government of Palestine and that the prosecution must designate a living person as the person defrauded.

In overruling the objection raised, the Court of Criminal Appeal,

HELD that as Section 301 of the Criminal Code Ordinance, 1936, does not make an intent to defraud a particular person an essential ingredient of the offence, the objection raised as to the form of the information was completely disposed of by Rule 10 of the Schedule to the Criminal Procedure (Trial Upon Information) Ordinance.

That part of the judgment dealing with the objection raised is reported only.

J. Habibi for first appellant.

J. Salomon for second appellant.

Crown Counsel (M. Heenan) for respondent.

Judgment: We do not consider it necessary to call on Crown Counsel to reply.

This is an appeal from the judgment dated 25.7.47 of the District Court of Haifa in Crime No. 113/47. The two appellants were convicted on two counts, and as objection has been taken to the form of the indictment it is well that the counts should be set out in full. They read as follows —

1st Count

Statement of offence: Obtaining a cheque by false pretences contrary to section 301 of the Criminal Code Ordinance, 1936.

Particulars of offence: The two above named accused, on the 23rd of August, 1940, at Acre, with intent to defraud, obtained from the Treasury, Government of Palestine, a cheque in the sum of LP.200, No. C.51 472381 to the order of Zarifeh Ishtawi and Muhammad Asoud, by falsely pretending that the above named first accused was Zarifeh Ishtawi, the widow of the deceased Hassan Hussein Soudi.

2nd Count.

Statement of offence: Obtaining money by false pretences contrary to section 301 of the Criminal Code Ordinance, 1936.

Particulars of offence: The two above named accused on the 23rd of August, 1940, at Acre, with intent to defraud, obtained from the Barclays Bank (Acre Branch) the sum of LP.200 by falsely pretending that the first above named accused was Zarifeh Ishtawi, the widow of the deceased Hassan Hussein Soudi.

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The case for the prosecution was, briefly, that some time in 1940 Zarifeh Ishtawi, who was alleged to be the widow of Hassan Hussein of Arab Saadya, and Muhammad Asoud, who is alleged to be the present appellant, were appointed to be guardians of the minor children of Hassan. The case for the prosecution is, and it is not denied, that Hassan was never married to Zarifeh and that he had no children by her. On the strength of that order of appointment, on 23.8.40, the two appellants appeared at the office of the Sub-Accountant in Acre and put their thumb impressions on Exhibit P. 1 which is a form headed "Other Charges Voucher." After they had done this a cheque was issued in favour of Zarifeh Ishtawi and Muhammad Asoud, and on the same day that cheque was presented at Barclays Bank in Acre and was paid. The case for the prosecution is that on both of those occasions, that is to say, at the Sub-Accountant's Office and at Barclays Bank, the appellant Fatmeh appeared and personated Zarifeh.

Objection has been taken by Mr. Salomon to the form of Information. He submits, in the first place, that it is not sufficient to say that there was intent to defraud the Treasury of the Government of Palestine. He submits that the prosecution must designate a living person as the person defrauded. He takes the same objection in regard to the second count, which sets out that there was intent to defraud Barclays Bank (Acre Branch).

Rule 10 of the Schedule to the Criminal Procedure (Trial Upon Information) Ordinance (Cap. 36) reads as follows:

> "It shall not be necessary in stating any intent to defraud, deceive or injure, to state an intent to defraud, deceive or injure any particular person, where the law or Ordinance creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence."

Section 301 of the Criminal Code does not make an intent to defraud a particular person an essential ingredient of the offence, and it appears to us that Mr. Salomon's objection is completely disposed of by Rule 10.

. . . . . .

. . . . . .

High Court No. 77 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and Abdulhadi J.

KHALIL IBRAHIM DAYEH. . . . . *Petitioner.*

v

BISHARA QAQUNDAH
and another. . . . . *Respondents.*

1947
9th October

FitzGerald C. J.
and
Abdulhadi J.

HC 77/47
Dayeh
v
Qaqundah
and another

Chief Execution Officer — Consent judgment — Containing certain conditions — Application for execution of consent judgment on ground of non-compliance therewith — Denial of non-compliance — Issues raised questions of law — Whether Chief Execution Officer competent to determine issues so raised.

In Civil Case No. 1137/46 of the Magistrate's Court of Ramleh, which was an action for the eviction of a tenant from the premises occupied by him, the parties came to an agreement which was made an order of Court. One of the terms of the agreement was that the tenant had to pay LP. 26 within one week of the date thereof, and the balance of the year's rent on the 1st May, 1947. The rent of the coming years was to be paid in two equal instalments. There was a further term that if the tenant failed to pay any of the instalments of the rent when it fell due, he undertook to vacate the premises. The tenant paid the LP. 26 within the time fixed, but did not pay the balance of the rent on 1st May, 1947, apparently on the mistaken belief that he was to pay that balance on the last day of May, and on discovering, according to his averment, that he was to pay the balance on the 1st of May, he offered on the 20th May to pay the sum due forthwith. On the 22nd May, execution of the consent judgment was applied for and was ordered. The tenant asked the Chief Execution Officer to refrain from executing the judgment in question on the grounds that it did not order eviction, that there was no discontinuance of payment of rent, and that the delay in payment was due to causes beyond the tenant's control, but the Chief Execution Officer ordered execution to proceed. Thereupon the tenant applied for and obtained an order nisi calling upon the Chief Execution Officer to show cause why his order of eviction should not be revoked and why he should not refrain from ordering eviction.

In making absolute the rule nisi, the High Court,

HELD that inasmuch as the contentions of the petitioner, namely that he had a reasonable excuse for not paying on the exact date stipulated and that his failure to pay on the exact date did not amount to a discontinuance of payment of rent within the meaning of the cases decided under the Rent Restrictions (Dwelling Houses) Ordinance, 1940, which contentions may have no merit but which did *prima facie* raise substantial questions of law and which should have been left for judicial decision, the Chief Execution Officer, acting in that capacity, was incompetent to deal with such questions and he should have referred the parties to the appropriate Court for the determination of the issues raised.

Anton Atalla for petitioner.

Jamal Khairy for 1st respondent.

1947
9th October

FitzGerald C. J.
and
Abdulhadi J.

HC 77/47
Dayeh
v
Qaqundah
and another

Order: This case raises once again the question of the powers of a Chief Execution Officer when he is confronted with the execution of a consent judgment. The consent judgment on which the respondent relies in this case was given in the Magistrate's Court of Ramleh. It contains, *inter alia*, a clause to the effect that the defendant undertakes to pay the sum of LP.26 during one week from the date of the agreement, and then to pay the balance of the year's rent on the 1st May, 1947. This is followed by a further clause which provides that if the defendant failed to settle any of the rent instalments in time he must leave the premises. The respondent interprets this clause as being a consent to eviction in certain circumstances. The Chief Execution Officer agreed with this interpretation and made an order for eviction accordingly.

Now if for the moment we do accept this clause as a consent for eviction embodied in the judgment of the Magistrate, it does not end the matter. The petitioner contended that he had a reasonable excuse for not paying on the exact date stipulated. He further pleaded the provisions of the Rent Restrictions (Dwelling Houses) Ordinance, and he argued that his failure to pay on the exact date did not amount to a discontinuance within the meaning of the cases decided under the Ordinance. There may have been no merit in these contentions of the petitioner, but they did *prima facie* raise substantial questions of law with which the Chief Execution Officer, acting in that capacity, was not competent to deal. These were clearly issues which should have been left for judicial decision, and the parties should have been referred by the Chief Execution Officer to the appropriate Court for their determination.

For these reasons the rule must be made absolute. The petitioner is entitled to his disbursements and the sum of LP.5.

High Court No. 48 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: Shaw J. and de Comarmond J.

1947
14th October

Shaw J.
and
de Comarmond J.

HC 48/47
Friedmann
and another
v
Director of
Immigration

GERSHON FRIEDMANN
and another. . . . . *Petitioners.*

v

DIRECTOR OF IMMIGRATION. . . . . *Respondent.*

Immigration — Traveller's visa issued to a person to enter Palestine — Traveller did not leave Palestine after expiry of period of visa — Deportation order against traveller — Subsequent cancellation of deportation order — Application for naturalisation —

Refusal of application on ground that it could not be accepted from applicant because the qualifying residence was not lawful residence as immigrant — Palestinian Citizenship Order-in-Council, 1925, Article 7.

1947
14th October

Shaw J.
and
de Comarmond J.

HC 48/47
Friedmann
and another
v
Director of
Immigration

Gershon and Erna Friedmann entered Palestine in 1939 on a traveller's visa valid for three months. The period of the visa expired without their leaving the country. In 1940 a deportation order was issued against them, but on representations made to Government on their behalf, Government decided that they should not be deported and the police and migration authorities had been so informed. In the beginning of 1947, petitioners' application for naturalisation as Palestinian citizens was refused on the ground that it could not be accepted because their qualifying residence was not lawful residence as immigrants. The applicants thereupon applied for and obtained an order nisi calling upon the Director of Immigration to show cause why he should not accept petitioners' application for naturalisation, and why he should not entertain and grant the said application. On the return the Director of Immigration conceded that it could be assumed that the quota of Jewish immigrants had been reduced by two to allow the two petitioners to remain in Palestine.

In making absolute the rule nisi but without fettering in any way the discretion vested by the law in the High Commissioner, the High Court,

HELD that inasmuch as the quota of Jewish immigrants had been reduced by two in order to allow the two petitioners to remain in Palestine, which procedure was tantamount to recognizing them as immigrants lawfully admitted, they (the petitioners) have resided in Palestine since 1940 within the meaning of Article 7 of the Palestinian Citizenship Order-in-Council, 1925.

R. Weyl for petitioners.

Crown Counsels (J. Wicks & M. Heenan) for respondent.

Order: We do not consider it necessary to hear Dr. Weyl further.

The short point in this case is whether the Director of Immigration was justified in refusing to consider an application for naturalization made by the petitioners.

It is clear that the refusal was based on the ground that the applicants had not resided in Palestine during the period prescribed by Article 7 of the Palestinian Citizenship Orders, 1925 to 1941. It is not disputed that the applicants have lived in Palestine since 1939, but learned Crown Counsel has submitted that their residence was not such as to fall within the meaning of the aforesaid Article 7.

In 1940 a deportation order was made against the present petitioners because the temporary visa granted to them had lapsed. The petitioners were arrested and detained pending deportation, and were subsequently let out on bail. They applied to His Excellency the High Commissioner for a pardon, and in a letter dated the 13th September, 1940, the Chief

1947
14th October

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and
de Comarmond J.

HC 48/47
Friedmann
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Director of
Immigration

Secretary signified that it had been decided not to deport the two present petitioners and that the police and migration authorities had been so informed. As a result, the bail bond was cancelled.

We have taken cognizance of Mr. Arnott's affidavit and have had the benefit of hearing him giving further explanations in this Court. Mr. Arnott conceded that it could be assumed that the quota of Jewish immigrants had been reduced by two in order to allow the two petitioners to remain in Palestine.

Our view is that such a procedure was tantamount to recognizing them as immigrants lawfully admitted, and we therefore hold that they have resided in Palestine since 1940 within the meaning of the aforementioned Article 7.

Dr. Weyl has made it clear that he only seeks an order, in the nature of mandamus, directed to the respondent and enjoining him to give consideration to the application for naturalization.

For the reasons given above, we make this order on the clear understanding that we do not intend to fetter or limit in any way the discretion vested by the law in the High Commissioner (see Article 7(3) of the Palestinian Citizenship Orders).

We grant LP.10 inclusive costs.

Civil Appeal No. 94 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Frumkin J.

1947
30th October

FitzGerald C. J.
and
Frumkin J.

CA 94/47
Abdul Basit
v
Judeh
and others

KHAMIS MUHAMMAD ABDUL BASIT. . . *Appellant.*

v

ABDUL JAWAD DARWISH JUDEH
and others. . . . . *Respondents.*

Immovable property — Non-interference — What must party asking for non-interference establish to succeed in his action.

In this appeal from the judgment of the Magistrate's Court of Majdal sitting as a Land Court in Land Case No. 266/46, the Court of Civil Appeal,

HELD that the term "non-interference" is not a right in itself; it is the consequence that flows from a right. And a condition precedent to a decree of non-interference must be the establishment of a title.

Followed: CA 6/42, 9 P.L.R. 143.

N. Germanus for appellant.

A. Michaeli for 2nd and 3rd respondents by delegation from *S. Zein Eddin*.

1947
30th October

FitzGerald C. J.
and
Frumkin J.

CA 94/47
Abdul Basit
v
Judeh
and others

Judgment: This is an appeal against the decision of the Magistrate's Court at Majdal sitting as a Land Court. The Magistrate dismissed the claim of the plaintiff-appellant to a certain piece of land on the ground that the action was misconceived. It is important, in our opinion, to note the grounds on which the Magistrate founded his decision.

It appears that the action as instituted by the plaintiff took the form of an action for non-interference. There was at one time a claim for specific performance but this was withdrawn by counsel. Now we would point out that the term "non-interference" is not a right in itself. It is the consequence that flows from a right. It seems to us to follow that a condition precedent to a decree of non-interference must be the establishment of a title. Counsel in this case having withdrawn the plea for specific performance, the question of title was, as it were, left in the air, and we consider that the Magistrate rightly concluded that the action for non-interference was therefore misconceived. We would add that having given full weight to the arguments advanced by Mr. Germanus, we fail to find any substantial difference in principle between this case and CA 6/42.

For these reasons the appeal must be dismissed. Respondents to have LP.10 costs.

High Court No. 102 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and Abdulhadi J.

1947
31st October

FitzGerald C. J.
and
Abdulhadi J.

HC 102/47
Shehadeh
and another
v
Commissioner of
Prisons,
Jerusalem,
and another

1. ABDALLA IBRAHIM SHEHADEH
2. ALI KASEM EL FAHED. . . . . *Petitioners.*

v

1. COMMISSIONER OF PRISONS, JERUSALEM
2. SUPERINTENDENT OF CENTRAL PRISON, ACRE. . . . . *Respondents.*

Extradition — Provisional Agreement for the Extradition of Offenders between Syria and the Lebanon and Palestine — Agreement in question made between High Commissioner for Syria and Lebanon and High Commissioner for Palestine — Change of form of Government in Syria and Lebanon — Whether such change affects the agreement in question.

1947
31st October

FitzGerald C. J.
and
Abdulhadi J.

HC 102/47
Shehadeh
and another
v
Commissioner of
Prisons,
Jerusalem,
and another

Two persons, whose extradition to Lebanon at the request of the Lebanese Authorities was ordered pursuant to the Provisional Agreement for the Extradition of Offenders between Syria and the Lebanon and Palestine, made application in the nature of habeas corpus to the High Court challenging the extradition proceedings and an order nisi was issued. The main ground advanced on their behalf was that the Provisional Agreement for the Extradition of Offenders between Syria and the Lebanon and Palestine became, in view of the change in the form of government in Lebanon, i.e. from a mandatory to a republic, ineffective.

In discharging the rule nisi, the High Court,

HELD that the well-recognised principle of international law which is that changes in the form of Government or in the constitution of a state have as such no effect upon the continued validity of the state's international obligations applied to the present case, and the provisional agreement, unless it is abrogated, binds the successor government.

Referred to: HC 67/26, 3 Rotenberg, page 897.

John Asfour for petitioners.

Solicitor General (M.J.P. Hogan) for respondents.

Order: This is a petition by way of habeas corpus, the petitioners being detained in consequence of proceedings taken under Article 10 of the Provisional Agreement for the Extradition of Offenders between Syria and Palestine.

Those proceedings have been challenged on six grounds by Mr. Asfour.

The first two grounds, which can be considered together, are that there is in fact no valid treaty for the surrender of offenders between this country and the Lebanese Republic, and that even if there purported to be such an agreement it is not a binding one. The provisional agreement in question was made in 1921 between General Gouraud, the High Commissioner of the French Republic for Syria and the Lebanon, and Sir Herbert Samuel, the High Commissioner for Palestine. Mr. Asfour's contention is that as the constitution of the territory known as the Lebanon has been changed the treaty has no effect. But as the Solicitor General submitted it is a well-recognised principle of international law that changes in the Government or in the constitution of a state have as such no effect upon the continued validity of the state's international obligations. Advocate for petitioners while conceding this principle of international law submits that it does not apply to this case because, so he argued at all events, the previous state was a Mandatory and the successor state is a Republic. We are unable to agree that the form of government that prevailed in the previous state is a relevant consideration in applying the principle of international law we have quoted. It seems to us

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immaterial whether that form of Government was Despotic or Democratic, Monarchal or Republican or even that recent innovation known as Mandatory. The important question is whether legal sovereignty to enable it to enter into treaty negotiations was vested in the previous state. It cannot be doubted that the sovereignty, in so far as it affected treaty-making power, vested in the French Republic in the case of the Lebanon, and in the Mandatory in the case of Palestine, and their duly accredited representatives could lawfully make the treaty which is incorporated in the Second Schedule to Cap. 56 of the Laws of Palestine. That treaty, unless it is abrogated, binds the successor Government. It is, therefore, still effective between the Lebanese Republic and Palestine.

Pursuing his argument Mr. Asfour submitted that the Treaty, even if it could be considered to have outlived the French Administration in the Lebanon, had become impossible of performance. His argument here is based on Article 11 which mentions the High Commissioner for Syria and the Directeur du Services Judiciel, neither of which officials now exist. But the holders of these offices are only concerned with the details of administrative machinery by which the provisions of the Treaty can be put into effect, and the fact that the official designation of the person charged with the execution of those administrative details has been changed would, in our opinion, have no more consequences than if, say, the official title of the Magistrate at Jerusalem had been altered to 'Chief Magistrate' or 'District Magistrate'. When there has been a change of Government it must, in our opinion, be left to the successor Government to decide which officer of the new administration shall give administrative effect to the treaty obligation inherited from the previous state.

The next point taken by Mr. Asfour was that the warrant of arrest did not give all the necessary particulars. It is true as the Solicitor General conceded that the warrant of arrest was in general terms. It must, however, be borne in mind when questions of extradition come before the Courts, that two different systems of jurisprudence are involved, and it would not be practicable to insist that the judicial procedure which may have been developed during long years in one of these countries should be followed in all its technical detail in the other. All that can reasonably be expected is that the state which is delivering a person on a warrant of extradition should be satisfied that the substance of the law in regard to the charging of a person with an offence is adhered to. In this case the person of whom extradition was sought was charged

1947
31st October

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under Articles 336 and 505 of the Lebanese Code. Neither of these articles can be said to be ambiguous. 336 provides that if three persons or more walking in a public road are guilty of assault or robbery they become liable to penal servitude. Article 505 provides that any person who forces a person other than his wife to co-habit with him shall also be liable to penal servitude. The person charged could not, therefore, be in any doubt as to the nature of the offence he had to meet. The warrant itself apparently did not contain particulars as to the date and place of these offences, and we are prepared to agree with Mr. Asfour that total absence of such important details would justify the Magistrate in refusing to issue his warrant. But the application for extradition had attached to it the usual depositions which, of course, were available to the Magistrate and the person who had to answer the charge. Those contained minute details as to the date, place, and hour of the alleged offences. We are unable to agree with Mr. Asfour that such depositions are not documents within the meaning of High Court Case 67/26 seeing that the main documents that support any request for extradition are the depositions. We consider that the particulars given in those depositions cured any defect in this respect in the charge-sheet.

A further point made was that there was no evidence to show that the alleged offences were committed within Lebanese territory. Now we are aware that it is not easy to say where the precise boundary between Palestine and the Lebanon runs. But the best evidence as to whether a piece of territory is within the boundary of one or the other is the evidence of the Government of those territories. Here the only inference we can draw from the fact that the Head of the Lebanese State requested the extradition, and the Head of the Palestine State accepted without question the application, is that both were satisfied that the place where the alleged crime was committed was within Lebanese territory. Furthermore, there is the evidence of the victims of the assault and robbery that the offences did take place in Lebanese territory. These factors we consider are more than sufficient to overcome Mr. Asfour's objections.

Finally, it was argued that the statements recorded in the depositions did not establish a *prima facie* case against the petitioners. As to this, we need only remark that the statements speak for themselves, and if accepted, as they must be accepted, there can be no doubt that they establish a *prima facie* case.

For these reasons the rule must be discharged. The respondents will have LP.10 costs.

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THE LAW REPORTS OF PALESTINE

Volume 14

1947

NOVEMBER

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate,
and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.

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High Court No. 103 of 1947.

In the Supreme Court sitting as a High Court of Justice.

Before: The Chief Justice and Frumkin J.

PIERRE GEORGE DABBAS. . . . . *Petitioner.*

v

1. CHIEF EXECUTION OFFICER, JAFFA

2. SHARIF SHANTI. . . . . *Respondents.*

1947
10th November

FitzGerald C. J.
and
Frumkin J.

HC 103/47
Dabbas
v
C.E.O., Jaffa
and another

Execution, Stay of — Chief Execution Officer — Judgment put in execution — Application to Chief Execution Officer under Article 22 of Ottoman Law of Execution for stay of execution on ground that judgment was appealed against — Order of stay given — Whether Chief Execution Officer correct in the course he took — Ottoman Law of Execution, Article 7.

Judgment for recovery of possession of immovable property was given in favour of Dabbas against Shanti. It was put in execution in the Execution Office of the Magistrate's Court of Jaffa. Shanti applied to the Chief Execution Officer under Article 22 of the Ottoman Law of Execution for stay of execution of the judgment on the ground that he appealed against that judgment. The Chief Execution Officer ordered stay of execution pending the result of the appeal. Dabbas applied for the cancellation of the order of stay but the Chief Execution Officer refused so to do. Subsequently Dabbas applied for and obtained an order nisi calling upon the Chief Execution Officer and Shanti to show cause why the order of stay of execution given in the Jaffa Magistrate's Court Execution File No. 486/47 should not be set aside and execution continued.

In making absolute the rule nisi, the High Court,

HELD that Article 7 of the Ottoman Law of Execution does no more than give power to a Chief Execution Officer to suspend the execution of a judgment to enable an application to be made to a Court which is authorised to grant a suspension of execution. The Article in question is not an alternative procedure for obtaining postponement of execution; it is supplementary to the normal procedure by which a stay of execution of a judgment is obtained. A party seeking stay of execution of a judgment should apply for stay either to the Court which gave the judgment or to the Court of Appeal to which that judgment was being appealed.

G. Berouti for petitioner.

M. Eliash for second respondent.

Order: The point in issue in this return is whether the Execution Officer had satisfactory grounds for postponing an execution under Article 7 of the Execution Law. The first point we desire to emphasize is that in our opinion Article 7

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10th November

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is not an alternative procedure for obtaining postponement of execution. It is supplementary to the normal procedure by which a stay of judgment is obtained. In this case the party seeking a stay could have applied either to the Court which gave judgment, or to the Court of Appeal to which the judgment was being appealed, but he has not done so. It is clear in this case that the learned Magistrate considered the issue on which this application is now based, but nevertheless he did not grant a stay of execution pending an application to any other tribunal. This Court has on many occasions stated that it is no part of the duty of the Execution Officer to extend or modify the terms of a judgment. We think that Mr. Berouti's argument in regard to Article 7 is the correct one, that is, that it does no more than give power to the Execution Officer to suspend the execution of a judgment to enable an application to be made to a Court which is authorised to grant a suspension.

For these reasons the order must be made absolute, with LP.5 costs.

Civil Appeal No. 13 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Frumkin J.

1947
20th November

FitzGerald C. J.
and
Frumkin J.

CA 13/47
Friedman
v
Friedman
and others

MENDEL FRIEDMAN. . . . . *Appellant.*

v

SARA FRIEDMAN
and others. . . . . *Respondents.*

Personal status — Succession — Application for declaration of succession to immovable property of de cujus — Order given dealt merely with mulk property — Subsequent application by one of heirs for amendment of order of succession to include miri immovable property — Whether applicant entitled to make application — Succession Rules, Rule 25.

A son of the late Mordechai Friedman applied to the District Court of Jerusalem for an order declaring the succession to the estate of his late father. The District Court gave an order declaring the succession to the movables and the mulk immovable property, but did not deal with the miri immovable property. Sometime later, the widow of the deceased applied to the same Court for amendment of the order so as to include the miri immovable property. The District Court granted the prayer. The son, who was the applicant in the first application to the Court, appealed. The main

ground of appeal was that Rule 25 of the Succession Rules had no application to the case for two reasons both of which appear in the judgment of the Court of Appeal hereinbelow.

In dismissing the appeal, the Court of Civil Appeal,

HELD that the widow, who was a party to the first application made by one of the sons of the deceased for declaring the succession to the estate of the deceased, was not precluded from applying under Rule 25 of the Succession Rules for amendment of the order of succession which dealt merely with movables and mulk immovable property so as to include miri immovable property, inasmuch as the words "any person" in Rule 25 are very wide and cannot be read as excluding a person who was originally a party to the proceedings.

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20th November

FitzGerald C. J.
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Frumkin J.

CA 13/47
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The judgment of the Court was delivered by Frumkin J.

A. Perlmutter by delegation from *J. Eisenberg* for appellant.

H. Gilead and I. Tunik for three of respondents, rest did not appear.

Judgment: This is an appeal from an order of the District Court of Jerusalem to amend a declaration for succession of one, Mordechai Friedman deceased.

In 1944 the respondents had applied for an order declaring the succession relating, *inter alia*, to the immovable property of the deceased in Palestine. An order was given dealing only with the mulk property of the deceased omitting to deal with miri property and that order went to the Court of Appeal and was upheld.(1) The application giving rise to the present appeal was then made by the respondent asking to include in the declaration an order as to the succession of the miri immovable property belonging to the deceased. The applicant succeeded in her application and hence this appeal.

The ground of appeal is that rule 25 of the Succession Rules is not applicable in this case for two reasons:-

(a) that the order of the District Court was already before the Court of Appeal and no objection was then taken as regards the omission of miri property from the order of succession, and

(b) that Rule 25(1) could not be extended to persons who were originally parties to an application of that sort.

As regards the latter ground, the words "any person" are very wide and cannot be read as excluding a person who was originally a party to the proceedings, who, within the limits outlined in C.A. 183/45 (14 P.L.R. 97), can always apply for the alteration of an order.

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(1) CA 340/45, 13 P.L.R. 101.

1947
20th November

FitzGerald C. J.
and
Frumkin J.

CA 13/47
Friedman
v
Friedman
and others

As regards the first ground, it is to be noted that the appeal was on quite different grounds and had nothing to do with the issue in question, and the learned President of the District Court was quite right in his conclusion that because there was an appeal, the respondents should not be deprived from availing themselves of this remedy.

The appeal is, therefore, dismissed with costs to include LP.5 to each of the advocates representing the respondents.

Civil Appeal No. 14 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Abdulhadi J.

1947
25th November

FitzGerald C. J.
and
Abdulhadi J.

CA 14/47
Daoudi
and others
v
Husseini
and others

RAQIYA TAHER DAOUDI,
and others. . . . . *Appellants.*

v

AYISHA ALI HUSSEINI,
and others. . . . . *Respondents.*

Contract — Specific performance — Equitable title — Immovable property — Proof of delivery of possession of immovable property unnecessary in an action for the specific performance of a contract for sale but necessary where equitable title is sought.

In dismissing this appeal from the decision of the Land Settlement Officer, Ramle Settlement Area, in Case No. 6/Mukhaizin, whereby he refused an application under Section 34(4) of the Land (Settlement of Title) Ordinance to revise his decision on the Schedule of Rights, the Court of Civil Appeal,

HELD that in an action for the specific performance of a contract for sale of land proof of the delivery of possession of the land is not necessary, but where equitable title is sought proof of possession is necessary.

Followed: CA 274/42, 10 P.L.R. 105.
CA 254/45.

S. Yifrach for appellants.

Muhammad Hawari for respondents.

Judgment: This is an appeal from the decision of the Settlement Officer of the Ramle Settlement Area, refusing an application under Section 34(4) of the Land (Settlement of Title) Ordinance to revise his decision on the Schedule of Rights.

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25th November

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and
Abdulhadi J.

CA 14/47
Daoudi
and others
v
Husseini
and others

The first question that arose was the effect of the minority of certain persons on the period of prescription from the point of view of determining when the period of prescription should run against them. The Settlement Officer's decision was not based on this issue, and in view of the fact that we are upholding his judgment on other grounds, we also find it unnecessary to consider the point.

The appellants claimed the revision of the schedule so as to include a claim on their behalf of 750 shares out of 1723 shares of the parcels of land which were entered in the schedule. The root of their claim was to be found in what the Settlement Officer called "an unofficial sanad" (Exhibit A.) which was dated 23.10.1910. According to this sanad, Sheikh Darwish 'Isa al-Wuheidi, the testator of the respondents, sold to Ahmad Arif el-Husseini, the testator of the appellants, these 750 shares in consideration of 1200 French pounds. Now it is found as a fact, and that finding can be accepted, that neither Ahmad Arif el-Husseini, nor any of his successors, ever took possession of this land. The unfortunate man himself was executed by the Turks in 1916, during the first World War. The appellants' case was capable of being stated with simplicity. They say, and it is true, that the Settlement Officer found that this sanad was a genuine document. Therefore, they submitted, they are entitled to claim the land on it.

We must now examine this document to ascertain what it purported to do. It is in our opinion nothing more than a contract or agreement to do something. Before it became effective certain conditions which were in the minds of the parties must have been fulfilled. One of the conditions, which the Settlement Officer held the document contemplated, was the taking of possession, which admittedly was not done. Advocate for the appellants' argument is that as their claim is for specific performance, then following Civil Appeal 254/45 and Civil Appeal 274/42 proof of the delivery of the land was not necessary. That is true if the claim were one for specific performance. But it seems to us that what the appellants were seeking here was an equitable title, and to succeed on that they must prove possession. Alternatively, they argued that Sheikh Darwish and his descedants were in possession merely as agents of the appellants. As to this we need only say that there was no evidence whatsoever, and there was nothing in the sanad which would justify this inference.

On the question of possession the Settlement Officer found as follows:-

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"But there is unshakable evidence before me, including that of the applicant 2, the eldest son of Ahmad Arif, that neither Ahmad Arif nor his heirs entered into possession of the land in dispute or enjoyed any form of possession in it at any time. It is clear that six years passed after writing the sanad and Ahmad Arif kept silent about it and did not take any steps to give effect to it either by registration or by entering into possession. His heirs also kept silent about it from 1917 to 1933. I am of the opinion that in this case the question of proof of delivery of possession and the exercise of possession are essential elements for the grant of an equitable title. Failing these requirements the application must obviously fail."

This seems to us a correct summing up of the evidence given before the Settlement Officer, and the correct conclusion to be drawn from it.

The appeal must therefore be dismissed, with LP. 10 inclusive costs to the respondents.

Civil Appeal No. 66 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Abdulhadi J.

1947
25th November

FitzGerald C. J.
and
Abdulhadi J.

CA 66/47
Abulhuda
v
Attorney General

IBRAHIM ADHAM ABULHUDA. . . . . *Appellant.*

v

ATTORNEY GENERAL. . . . . *Respondent.*

Rates and taxes — Waqf Thurry — Whether such class of waqf entitled to exemption from rates and taxes — Rates and Taxes (Exemption) Ordinance, 1938, Section 15(b).

In Civil Case No. 77/43, the District Court of Jaffa (Judges Daoudi and Touqan) dismissed a claim by the plaintiff to exemption from payment of taxes due to Government in respect of certain properties belonging to waqf Abulhuda Farouqi, a waqf dedicated from father to son. The plaintiff appealed and the main ground of appeal was that he came under the word "body" in Section 15(b) of the Rates and Taxes (Exemption) Ordinance, 1938, which word should not be limited in any way by the words before or after it.

In dismissing the appeal, the Court of Civil Appeal,

HELD that the word "body" in Section 15(b) of the Rates and Taxes (Exemption) Ordinance, 1938, is limited by the word "religious" and the only body which is exempted under the provisions of paragraph (b) of Section 15 is a religious body. Accordingly the beneficiaries of waqf Abulhuda Farouqi, which is a private dedication from father to son, cannot be considered a religious body and do not therefore fall within the ambit of Section 15(b) and cannot claim exemption under that section.

The judgment of the Court of Civil Appeal covered also Civil Appeal 67/47 and Civil Appeal 68/47, both of which were

appeals against the judgment of the District Court of Jaffa dealing with the same point in actions before it which were consolidated with action 77/43.

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and
Abdulhadi J.

CA 66/47
Abulhuda
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Hanna Atalla for appellants in the three appeals.

Assistant Government Advocate (Issa Akel) for respondent.

Judgment: This is an appeal from the judgment of the District Court of Jaffa in Civil Case No. 76/43, which dismissed the claim of the appellant for exemption from rates and taxes in respect of certain properties.

The translation of the judgment from Arabic into English is not a very happy one, but the effect of it is not open to ambiguity. Three cases were consolidated in the lower Court. They concerned the Waqf of Abou el Huda el Taji el Farouki and the Waqf of Khair ed-Din el Ramli. It is clear that in Turkish times these Waqfs were exempted from Government dues and taxes. The British Administration, when it assumed the control of Palestine, decided to respect certain exemptions from rates which had been granted by the old régime to Waqfs and other religious and pious institutions. The conditions under which Government would continue these privileges were gradually codified, and embodied in legislation. The two main legislative enactments dealing with these exemptions are the Rural Property Tax Ordinance, No. 1 of 1935, which has been repealed, and the Rates and Taxes (Exemption) Ordinance, No. 18 of 1938, which is now the law governing the subject. There are, it must be borne in mind, many types of Waqf; Waqfs, the subject-matter of this appeal, are all private and beneficiary, in that they have been dedicated from father to son.

It has been admitted that from the year 1935 to 1937 they were exempted from payment of tithes, but they were not exempted from Werko. It is clear that they had a legal right to that exemption under the provisions of the then existing law, which was Section 6 of the Rural Property Tax Ordinance, 1935. But that law was repealed and replaced by the Rates and Taxes (Exemption) Ordinance, No. 18 of 1938. That is the law which now regulates all exemptions from rates and taxes whether the claims for exemption are based on old Turkish Firmans or other grounds. The appellants, if they are to succeed at all, must therefore bring their claim within the ambit of this Ordinance.

The argument of the appellant is a short and simple one. He has intimated in this appeal that he relied on the interpretation of Section 15(b) of the Ordinance. That sub-section reads as follows:-

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"(b) any State, religious community or body, charitable organization or educational institution to which this Ordinance applies claiming by virtue of any treaty or firman or any other ground whatsoever any exemption from taxation other than the exemptions for which provision is made in this Ordinance, may within such period as may be specified by order of the High Commissioner petition the District Court in accordance with the provisions of the Crown Actions Ordinance and notwithstanding anything contained in that Ordinance the provisions thereof shall apply to such claims as though they were claims which could be brought against the Government under the provisions of that Ordinance."

Now Mr. Atalla argues that the word "body" in the first line must be interpreted by itself. It is not limited in any way by the words that go before or after it. He concedes, as he must do, that he is not any "state" or any "religious community". He says he cannot be a "religious body" because such an organisation has no meaning in Palestine, as religious associations are always referred to as "religious communities". It seems to us that the plain English reading of the section does not coincide with his interpretation. In our view the word "body" is limited by the word "religious". It follows that the only body which is exempted under the provisions of this paragraph is a religious body. It is quite clear that the beneficiaries of these Waqfs, which are purely private dedications from father to son, cannot be considered religious bodies. They do not therefore fall within the ambit of Section 15(b) and they cannot claim exemption under that section.

The appeal must therefore be dismissed, with LP.10 costs to respondents.

Civil Appeal No. 99 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: The Chief Justice and Abdulhadi J.

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25th November

FitzGerald C. J.
and
Abdulhadi J.

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Sukhon
and others
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Mahmoud
and another

YUSEF ES-SUKHON
and others. . . . . *Appellants.*

v

SHUKRI SALEEM MAHMOUD
and another. . . . . *Respondents.*

Immovable property — Prescription — Instances to which presumption of law under Section 2 of the Land Law (Amendment) Ordinance applies — Land Law (Amendment) Ordinance, Section

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25th November

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and
Abdulhadi J.

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Mahmoud
and another

In the year 1903 one Ahmad Hamdan Daoud died and his estate was distributed among his heirs. Certain lands of the estate went to one of his two wives, Hamdeh Mir'i Yusef, as her share in the estate. Hamdeh had children from another husband. One of her children, namely Rida Sukhon, possessed the lands Hamdeh got by way of inheritance until 1934 when he sold the lands in question to Shukri and Sudqi Mahmoud. Hamdeh died in 1935. In 1944 two children of Hamdeh from her other husband on their own behalf and on behalf of the other heirs of Hamdeh commenced proceedings in the Magistrate's Court of Nablus sitting as a Land Court (Land Case No. 38/44) against the Mahmouds for judgment declaring their ownership to the lands in question and ordering their registration in their names. From the evidence adduced, the Magistrate found that Rida's possession was independent from after the death of Ahmad Hamdan Daoud until the year 1934 when he agreed to sell the lands in question to the defendants and therefore the action was unmaintainable owing to limitation of action under Article 20 of the Ottoman Land Code. The plaintiffs appealed. Their main argument on appeal was that the presumption under Section 2 of the Land Law (Amendment) Ordinance is that possession by one heir is deemed to be on behalf of the other heirs.

In dismissing the appeal, the Court of Civil Appeal,

HELD that Section 2 of the Land Law (Amendment) Ordinance was not applicable to the facts of the present case, because when Rida Sukhon exercised possession during the lifetime of his mother Hamdeh, he and his mother were not co-heirs to a common ancestor, and likewise the respondents, the purchasers from Rida Sukhon, are not co-heirs with the appellants.

Naim Touqan for appellants.

Yehya Hammoudeh for respondents.

Judgment: This is an appeal against the judgment of the Magistrate's Court of Nablus sitting as a Land Court, dated 1st April, 1947, whereby the appellants' claim for ownership to the shares in the land in dispute was dismissed.

The appellants, Yusef and Amneh, the children of Badawi es-Sukhon, brought this action in their personal capacity and on behalf of the rest of the heirs of their mother, Hamdeh Bint Mir'i el Yusef, against the defendants asking for the ownership of 12 out of 24 qirats in the land of Khallet Issa, and 6 out of 24 qirats in the land of Khallet Mansour, alleging that these shares were in the ownership of their mother Hamdeh, and that on the latter's death they passed to them and the rest of the heirs according to their respective rights of inheritance.

The respondents denied the appellants' claim and submitted that they are in possession of those shares and that they have acquired equitable rights thereon.

The Magistrate heard the pleadings of the advocates of both parties and the evidence of their witnesses, scrutinized

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the produced documents and gave preponderance to the respondents' evidence. He found that the claimed shares were originally in the ownership of Ahmad el Hamdan el Daoud, who died in the year 1323 A.H. (1903), and that after his death they were assigned together with other lands to his wife, Hamdeh Bint Yusef el Mir'i, the mother of the appellants; that they were in the possession of one of her sons, el Sheikh Rida el Sukhon, who exercised his possession on the said shares independently during the lifetime of his mother Hamdeh, and continued as such until the year 1934, and that in that year he appointed an attorney for the sale of the shares to the respondents, and received the price thereof from them. They took possession during the lifetime of his mother Hamdeh, who died in the year 1935, and remained in possession until the date of the filing of this action. In the result the Magistrate dismissed the appellants' case under Article 20 of the Ottoman Land Code on the ground that the possession of el Sheikh Rida el Sukhon and the respondents of the claimed shares was for a period exceeding that of prescription.

The two plaintiffs appealed this judgment and submitted that the Magistrate erred in dismissing their claim on the ground of prescription, the possession they argued of el Sheikh Rida el Sukhon having been on behalf of his mother Hamdeh; and further that under Section 2 of the Land Law (Amendment) Ordinance No. 25/33, there is a presumption that the possession of one of the co-heirs of a property held in common is on behalf of the other co-heirs, until it is proved that such possession was adverse.

In our opinion this argument is untenable, because Section 2 of the Land Law (Amendment) Ordinance is not applicable to the facts of this case, because when Sheikh Rida el Sukhon exercised possession during the lifetime of his mother Hamdeh, he and his mother were not co-heirs to a common ancestor. Likewise the respondents are not co-heirs with the appellants.

In these circumstances the judgment of the Magistrate's Court is not open to challenge. The appeal is therefore dismissed, with costs on the lower scale to include LP. 10 advocate's fees.

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THE LAW REPORTS OF PALESTINE

Volume 14

1947

DECEMBER

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter, and Magistrate,
and Member of the Palestine Bar.

Price 250 mils.

Printed by The Greek Convent Press, Jerusalem.

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High Court No. 39 of 1947.

the Supreme Court sitting as a High Court of Justice.

Before: de Comarmond J. and Frumkin J.

FREDERIC MORGENSTERN. . . . . *Petitioner.*

v

1. CUSTODIAN OF ENEMY PROPERTY,
2. CHIEF SECRETARY, GOVERNMENT OF PALESTINE. . . *Respondents.*

1947
1st Decem:e:

de Comarmond J.
and
Frumkin J.

HC 39/47
Morgenste.n
v
Custodian of Enemy Property and another

High Court — Affidavit — Instances in which Hi: Cour: will hear a respondent who failed without good cause to file an affidavit in reply within the time allowed in the order nisi — High Court Rules, 1937, Rule 6.

Where a respondent fails without good cause shown to file an affidavit in reply to an order nisi within the time allowed, the High Court will, in cases where the respondent relies only on law and in which knotty legal points have to be debated, under Rule 6 of the High Courts, 1937, allow that respondent to make his legal submissions and will take the facts sworn to by the petitioner as admitted.

Considered: HC 96/41, 8 P.L.R. 559.
HC 30/44, 11 P.L.R. 83.
HC 118/44, 11 P.L.R. 574.
HC 100/45, 12 P.L.R. 570.
HC 58/46, 13 P.L.R. 502.
HC 70/46, 13 P.L.R. 443.
HC 111/46, 14 P.L.R. 24.

The relevant facts appear from the ruling.

Z. Ellner for petitoner.

Acting Attorney General (M.J. Hogan) for respondents.

Ruling on Preliminary Objection: The Custodian of Enemy Property, who is cited as first respondent in this matter, swore an affidavit on the 25th July, 1947. Unfortunately, through a misunderstanding between the Custodian and his legal adviser the affidavit was not filed until the 12th September.

On the 27th September, when the matter came up for hearing, petitioner's advocate, Mr. Ellner, took the point that the respondents should not be heard because respondent No. 1 had filed his affidavit too late and respondent No. 2 had not filed an affidavit at all.

The Order Nisi specified that the affidavits in reply were to be filed within 8 days of the date of service of the said

order, and Rule 6 of the High Court Rules, 1937, provides that "no respondent who has not filed and served an affidavit as herein provided shall be heard in opposition to the petition unless the Court shall otherwise direct".

Mr. Ellner, for petitioner, has quoted several cases in support of his submission that the aforementioned rule should be strictly applied. Thus, in the case of Abyad v. Chief Execution Officer, Haifa, and others, 8 P.L.R. 559, certain affidavits were filed two days too late and the Court ruled that "No good cause was shown for that delay and the rules have to apply strictly." I would point out, however, that in that case there were other respondents who did file their affidavits in time and there was, therefore, no question of the matter going by default.

Mr. Ellner also quoted the case of Said Muhammad Ubeid and others v. Food Controller and another (H.C. 30/44, 11 P.L.R. 83) where an order nisi was made absolute because the affidavits in reply were three or four days out of time. I note that in that case learned Crown Counsel appeared for the respondents and stated that no reason or good cause could be shown to explain the delay. In H.C. 100/45 (1946) A.L.R. 112 the Court considered itself bound by the decision in H.C. 30/44.

The learned Solicitor General has called our attention to H.C. 70/46, 13 P.L.R. 443. He also submitted that the affidavit had been prepared with due diligence and that, the Court having been in vacation, the hearing had not been delayed by reason of the unfortunate misunderstanding about the filing.

Undoudtedly, there is authority for the proposition that this Court has interpreted the words "unless the Court shall otherwise direct" occurring in Rule 6 to mean that although the Court has a discretion it would not exercise it unless good cause be shown. I do not, however, consider that any hard and fast rule has been laid down by this Court concerning the matter; in fact, I fail to see how a rigid rule could possibly be laid down.

One distinction which I make is between cases where questions of facts are concerned and cases where the respondent does not dispute facts and relies only on law. In the last mentioned class of cases it is obvious that the affidavit merely serves the purpose of a notice that the application will be resisted on legal points. Another point which does perhaps affect the application of Rule 6 is whether the respondent has treated the order nisi with scant respect. Personally, I would be slow in refusing to hear a respondent on a point of law,

merely because his affidavit was not filed in time. It should be borne in mind that an order nisi is made on an ex parte application and the Court may, and no doubt does, grant such orders in cases where knotty legal points have to be debated; in such cases, I cannot accept that the Court is expected to make an order absolute without hearing a party who is ready to make legal submissions. I wish to draw attention to H.C. 118/44 (1945) A.L.R., 1-181, where the petitioner was allowed to file additional affidavits after the first respondent's affidavit had been duly filed. This was clearly a case where the Court did not consider itself bound to adhere strictly to the High Court Rules. I have also in mind H.C. 111/46 (Husseini and others v. Assistant District Commissioner, Beersheba, and another), where this Court held that an extension of time to file affidavits could not be granted but that it was still open to the respondents to invoke the concluding words of Rule 6 and ask the Court to be heard in opposition to the petition. And, finally, I might refer to H.C. 58/46, 13 P.L.R. 502, where the Court pointed out that an order nisi would not automatically be made absolute against a respondent who had filed no affidavit and had not even appeared (in that case there was another respondent who was fighting the case).

In the present matter I am satisfied that the failure to file the affidavit cannot be interpreted as a lack of respect towards this Court. I am not, however, prepared to accept that good cause has been shown why the affidavit was out of time; the result therefore is that facts (if any) sworn to by the petitioner must be taken as admittdd (see H.C. 118/43 (1944) A.L.R. 5). Being given that there are legal points, and fairly important ones, to be decided, being given also that property vested in the Custodian of Enemy Property is involved, I consider that this is a proper case for directing that the respondent be heard on the legal aspects of the case.

Civil Appeal No. 108 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Abdulhadi J.

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2nd December

de Comarmond J.
and
Abdulhadi J.

CA 108/47
Salem
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SALEM KASSAB SALEM. . . . . *Appellant.*

v

HASSAN KASSAB SALEM
and others. . . . . *Respondents.*

Immovable property — Awlawiyeh — Jurisdiction — Land Court — Magistrate's Court — Action for awlawiyeh in Magistrate's Court sitting as Land Court — Finding of fact that value of property claimed by awlawiyeh exceeds jurisdiction of Court — Course to be followed by Court.

An action for awlawiyeh was brought in the Magistrate's Court of Nablus sitting as a Land Court (Land Case No. 28/46). On the evidence before it, the Court found that the value of the property claimed by awlawiyeh exceeded its jurisdiction; but it further found that the plaintiff was entitled to half of the shares claimed the registration of which in his name it ordered and dismissed the claim in so far as it concerned the other half. The plaintiff appealed.

In remitting the case for retrial by the competent Land Court, the Court of Civil Appeal,

HELD that since the Magistrate's Court found as a fact that the value of the property claimed by awlawiyeh exceeded its jurisdiction the proper course for it was to remit the case for trial by the appropriate Land Court.

Followed: CA 156/43, 10 P.L.R. 427.

Naim Touqan for appellant.

Subhi hijab for two of respondents.

Judgment: This is an appeal from a decision of the Magistrate's Court of Nablus, sitting as a Land Court. The appellant was plaintiff in the Court below. There were seven defendants, but only two of these defended the action (and even filed a counterclaim). These two defendants are now respondents Nos. 6 and 7.

The claim is based on Article 41 of the Ottoman Land Code. The plaintiff-appellant seeks to exercise the right of prior purchase in respect of 6 out of 18 shares in a plot of land of 60 dunums and 561 square metres. The six shares were, it seems, acquired at different times by respondents 6 and 7; in fact, some of the six shares were acquired separately by the aforesaid respondents. However, the statement of claim is in respect of six shares out of 18 shares, i.e. one-third of 60 odd

dunums. If, as the learned Magistrate found, the value per dunum is LP.18, then the subject matter exceeds LP.250, and is therefore outside the Magistrate's jurisdiction.

The learned advocate appearing for the plaintiff-appellant has argued before us that his client had considered the land to be worth LP.10 per dunum, which would mean that the Magistrate had jurisdiction. We realise that in cases based on Article 41, the plaintiff's position is somewhat awkward because it is impossible for him to know beforehand what value will be fixed by the Court as being the value at the time of the claim. Where, as in the present case, the plaintiff thinks that the sum he will have to pay is less than LP.250, it is for the learned Magistrate, as soon as he finds that the subject-matter is worth more than LP.250, to remit the case to the District Court.

The learned advocate for the appellant submitted that there was an admission in paragraph 7 of the statement of defence that the value did not exceed LP.200. Even if this were so, the Magistrate's finding carries more weight because parties cannot, by setting their own valuation, determine the jurisdiction. We would add, moreover, that paragraph 7 of the statement of defence is rather ambiguous, being given that in paragraph 1 the defendants had averred that the value of the subject-matter exceeds LP.250.

It is important to mention that the learned advocate for the respondents 6 and 7 has stated that the case should be sent for re-trial by the competent Court.

A similar difficulty arose in a case decided by the Court of Appeal in 1943 (C.A. 156/43, 10 P.L.R. 427) where it was held that the proper course was to remit the case for re-trial by the appropriate Land Court. In giving that decision, the Court was, it seems, exercising the powers conferred by Rule 350 of the Civil Procedure Rules, 1938. We propose to follow the same course. We therefore set aside the judgment of the Court below and remit the case for re-trial by the competent Land Court, with the stipulation that the plaintiff-appellant will take steps to pay all necessary fees so as to have the case ready for re-trial; if he fails to do so within fifteen days from the date of delivery of our decision in his presence, or notification thereof if he is no present, the order for re-trial will lapse.

Costs of this appeal will be costs in the cause and will be granted either to the appellant or to respondents 6 and 7 according as to which side is ultimately successful. To facilitate final arrangements as regards costs, we direct that the costs will be on the lower scale together with LP.5 advocate's attendance fee.

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de Comarmond J
and
Abdulhadi J.

CA 108/47
Salem
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Privy Council Appeal No. 61 of 1946.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

Before: Lord Du Parcq, Lord Normand and Sir Madhavan Nair.

RAPHAEL HABIB BEN SHALOM. . . . *Appellant.*

v

SADIQA AS-SHEIKH KHALIL AD-DASUKI and another. . . . . *Respondents.*

Immovable property — Awlawiyeh — Claim to awlawiyeh by some of several co-owners of miri immovable property — Whether necessary that all other co-owners should join in claim — Whether those co-owners claiming by awlawiyeh entitled to whole of property sold — Ottoman Land Code, Article 41.

This appeal to the Privy Council was against the judgment of the Supreme Court in Civil Appeal No. 366/44, reported in 12 P.L.R. 238.

In advising His Majesty that the appeal should be dismissed, the Judicial Committee of the Privy Council,

HELD (1) that in claims of awlawiyeh to miri immovable property it is not necessary that all the co-owners should join in the claim, although it is desirable that they should be so joined.

(2) that where some co-owners claim by awlawiyeh miri immovable property, such co-owners are entitled to the whole of the property so claimed by awlawiyeh.

The judgment of the Board was delivered by Lord Du Parcq.

Judgment: This is an appeal by the defendant in the action from a judgment of the Supreme Court of Palestine delivered on the 13th April, 1945, dismissing an appeal by the appellant from a judgment of the Land Court of Nablus which ordered that on payment within one month of LP. 19.200 mils per dunum, the respondents should be entitled to registration in Tabu of certain shares in certain land in their names equally.

Some difficulty has been occasioned because some of the points which were raised in the grounds of appeal set out in the Notice of Appeal to the Court of Appeal, and which are said to have been taken in the course of a very long argument before the Court of Appeal, are not specifically dealt with in the judgment; but having had the assistance of very careful, concise and helpful arguments from the counsel on both sides, and after full consideration, their Lordships find it possible to come to a conclusion on the matter.

The facts of the case are well set out in Paragraphs 3 to 11 inclusive of the Case for the appellant, and it is unnecessary

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to recapitulate them. The law which is relevant is contained in Article 41 of the Ottoman Land Code (as amended by sec. 6(1)(A) of the Land Law (Amendment) Ordinance, cap. 78) and that also it is not necessary now to recite.

The questions which arise on the appeal are set out in Paragraph 12 of the appellant's Case. The first is: "Whether there was any evidence upon which the Court could find that the respondents had discharged the onus of proving that Raqiyeh Ad-Dasuki had not consented to the sale to the appellant of the said four shares in each parcel", that is to say, of the four shares sold to the appellant.

Their Lordships do not think that the case can be dealt with satisfactorily by considering questions of onus of proof. They are satisfied that in the Land Court the question of consent was dealt with after consideration of all the evidence which the parties desired to bring before the Court, and, further, that the Court was justified in coming to the conclusion to which it did come that there had been no consent by Raqiyeh.

The next question is: "Whether some only of her heirs were entitled to exercise the right of Awlawiyeh, which is provided for by the Article of the Code already referred to". In other words, is it necessary that all the heirs should join in claiming this right? That is one of the points which is not dealt with expressly or, it would seem, at all, in the judgment of the Court of Appeal, but their Lordships think that the right answer to the question is that it is not necessary that all the heirs should join. "The basis of Awlawiyeh is," as is truly said in Paragraph 13 of the appellant's Case, "the right of a co-owner not to have a stranger forced upon him by reason of the act of another co-owner." If it were necessary for one co-owner to obtain the consent of all the other co-owners before exercising the right, an heir or other co-owner who required the protection of this provision of the Ottoman law would in many cases be altogether deprived of it. On principle, therefore, their Lordships agree with the submission of respondents' counsel that those heirs who claimed the right in the present case were not to be defeated because all their co-heirs did not join in the claim.

No doubt it is desirable in the majority of cases of this kind that all the co-owners should be brought before the Court. In the present case, however, no object would be served by making an Order now that the other heirs should be joined as parties. There are obvious reasons which make it impossible for them to establish any claim and moreover they are now barred by the lapse of time. No injustice has been done by

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reason of the fact that they were not brought on to the Record at any stage.

The third question is put in this way: "If so, whether they were entitled to claim ownership of the whole of the four shares in each parcel bought by the appellant as aforesaid or only 6/20ths thereof". As to this, their Lordships are of opinion that the respondents were entitled to claim ownership of the whole of the four shares; that is to say, those heirs who asserted their right are entitled to share among themselves the whole of the property which was conveyed to the appellant.

Finally, there is a question as to the price ordered to be paid. Article 41 provides that on claiming restitution of the property transferred the person jointly interested must pay its value at the time of his claim to the transferee. It was, of course, for the Land Court to assess that value. The two Judges of the Land Court have agreed in a judgment in the sense that they have both signed the judgment as the judgment of the Court. In the judgment they assess the value of the shares at the figure which has been mentioned already. It is true that there had been, as the judgment states, some difference of opinion between the two Judges, one being prepared to put a higher value than the figure ultimately arrived at upon the land, and it is said that both the Judges of the Land Court and the Judges of the Court of Appeal appear to have thought that in those circumstances the Court was bound as a matter of law to accept the lower valuation. That may or may not have been the view of the Court of Appeal, but their Lordships are by no means satisfied that it was the view of the Land Court. The judgment, as has been said, was the judgment of both members of the Court, and the fact that there it was frankly stated that there had been an initial difference of opinion does not invalidate the judgment finally pronounced.

The last group of questions, compendiously stated as "certain questions as to the conduct of the proceedings", does not now arise because learned counsel for the appellant has relied solely on the points to which allusion has already been made; but their Lordships are in full agreement with the Court of Appeal, that it is necessary to treat the official record of the proceedings in the Land Court as accurate, and that this record shows no irregularity to which objection can properly be made.

For these reasons, their Lordships will humbly advise His Majesty that this appeal should be dismissed and the judgment of the Court of Appeal affirmed. The appellant must pay the respondents' costs of the appeal.

Civil Appeal No. 391 of 1946.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Abdulhadi J.

JAMAL QASSEM. . . . . *Appellant.*

v

1. SALEH ABU HIJLEH
2. AHMAD ABU HIJLEH. . . . . *Respondents.*

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de Comarmond J.
and
Abdulhadi J.

CA 391/46
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and another

Immovable property — Awlawiyeh — What has a claimant of right of awlawiyeh got to do with regard to the value of the land claimed by awlawiyeh — Ottoman Land Code, Article 41.

In this appeal against the judgment of the Land Court of Jaffa given in Land Case No. 26/44 which concerned a claim of awlawiyeh and which the Court dismissed on the ground that the plaintiff had failed to establish properly the value of the shares claimed by awlawiyeh, the Court of Civil Appeal,

HELD that a claimant of the right of awlawiyeh is not required to prove the value of the whole land claimed by awlawiyeh, and where such claimant establishes the value per unit of the land claimed and the area of the land is known, this is sufficient and it should be possible for a Court to arrive at a decision.

Discussed: CA 134/46, 14 P.L.R. 323.

E. Georges Elia and Joseph Marto for appellant.

Nejib Germanus for respondents.

Judgment: This is an appeal from a decision of the Land Court, Jaffa, given on the 28th November, 1946, in Land Case No. 26/44. The learned President of that Court dismissed the action which was for the restitution of shares in land under Article 41 of the Ottoman Land Code.

The learned President took the view that the plaintiff had failed to establish properly the value of the shares which are the subject matter of the claim, and in so doing he followed Haifa Land Case No. 11/44 (1946 Selected Cases p. 279).

The decision in the aforesaid Haifa Land Case was set aside by this Court on the 13th June 1947 and the case was remitted to the Court below (see C.A. 134/46 A.L.R. 1947 p. 415). The Judges who decided Civil Appeal 134/46 refused to consecrate the view that the plaintiff in an awlawiyeh case must establish the correct value of the shares or fail. We need not elaborate this point further because it is obvious that the plaintiff should not lose his right simply because he and

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his experts have mentioned too low a value. The decision of the appellate court in C.A. 134/46 did not go so far as to lay down that the plaintiff need make no effort to enlighten the court as to the value of the shares. The question whether it is sufficient for the plaintiff to prove, or attempt to prove, the value per dunam and not the value of the whole land, was touched upon in C.A. 134/46 but no definite pronouncement was made. We are of opinion that where the value of the unit is established and the area is known it should be possible for a court to arrive at a decision. It may be, of course, that the whole area of a plot of land is not of uniform value, but in such cases an average has to be taken.

In the present case, there are four plots of land, and the values of the share claimed in each of the four plots must therefore be added together. In the statement of claim the plaintiff set at LP. 300 the total value of the shares in claim but both in that document and in his evidence he made it clear that he was prepared to pay the indemnity fixed by the Court. The two valuers called by the plaintiff were agreed on the figure of LP. 25 per dunam in all the plots; maps were produced showing the plots and their respective areas. The defendant called evidence tending to establish a much higher value than that indicated by the plaintiff's witnesses. It was for the court of trial to fix the value after hearing the conflicting valuations of the experts and other witnesses. This, in our opinion, did not present any insuperable difficulty and we do not consider that the learned President should have dismissed the case because, as he put it, "a badl il misl is the value of a whole thing, not a value per unit of that thing". We however think that the statement of claim was drafted in a rather unsatisfactory manner and leaves much to be desired; this fact we will bear in mind when considering the question of costs.

The learned advocate for the appellant has submitted that we might under rule 350 of the Civil Procedure Rules, 1938, give final judgment on the merits. Much as we would like to do so in order to avoid further delay we do not consider that such a course would be suitable in the present case. We deem it better to set aside the judgment of the court below and to remit the case back for determination of the value of the share at the time of the claim and for fixing the time within which such value will have to be paid by the plaintiff. The court below will be at liberty to hear the parties and to allow further evidence of value to be given.

The appellant has been successful, but for the reason above indicated, we allow appellant LP. 10 inclusive costs only.

Civil Appeal No. 118 of 1947.

In the Supreme Court sitting as a Court of Civil Appeal.

Before: de Comarmond J. and Abdulhadi J.

KHORSHID DARWISH WAHBEH. . . . *Appellant.*

v

NAJLA YUSEF ASMAR. . . . . *Respondent.*

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de Comarmond J.
and
Abdulhadi J.

CA 118/47
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Immovable property — Awlawiyeh — Right of awlawiyeh applies to miri land planted with trees prior to 1331 A.H. — Ottoman Land Code, Article 41.

In allowing this appeal from the judgment of the Magistrate's Court of Ramleh sitting as a Land Court, whereby that Court dismissed a claim of awlawiyeh to miri land planted with trees prior to 1331 A.H. made under Article 41 of the Ottoman Land Code on the ground that such claim did not lie because there were trees on the land planted prior to 1331 A.H., the Court of Civil Appeal,

HELD that Article 41 of the Ottoman Land Code applies to claims of awlawiyeh to miri land planted with trees prior to 1331 A.H.

Rashad Maswady for appellant.

Nejib Germanus for respondent.

Judgment: This is an appeal from a decision of the Magistrate's Court of Ramleh sitting as a Land Court. The learned Magistrate dismissed the claim made by the plaintiff-appellant under the provisions of article 41 of the Ottoman Land Code.

The only point for us to consider is whether the learned Magistrate was right in dismissing the claim on the ground that it did not lie because there were trees on the land planted prior to 1331.

The land is miri land, and according to the kushan there are trees on it which were planted prior to the year 1331 Hejira. It is true that trees planted on miri land prior to 1331 were the mulk property of the person who did the planting. In the present case, it is important to notice that there is no evidence as to whether trees were planted by the registered owners of the land or by a stranger.

We do not agree with the submission that article 41 does not apply in the present case. Article 41 confers on a co-owner of miri land the right of prior purchase; article 45 confers a similar right on certain inhabitants of the village in which the land is situated if the owner thereof sells it to an inhabitant of another village; finally, article 44 confers on the

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owner of the mulk trees growing on miri land which does not belong to him a right to acquire such miri land when the owner sells the land.

It was pointed out by Nedjib Chiha in his Treatise on Immovable Property in Ottoman Law (1906 Ed. p. 296) that the Land Code is silent as regards the order in which the right of prior purchase must be exercised as between claimants under article 41, 44 and 45 respectively. Chiha's opinion, based on that of Halis Eff. Echref, p. 314, is that a co-owner of miri land has first claim to the right of prior purchase when another co-owner sells to a stranger; then come the inhabitants of the village who are in need of land, and the owner of mulk trees on such land comes last (Chiha pages 297 and 298).

We might call attention to article 49 of the Land Code which completes article 44 by providing that where the owner of miri land himself plants it with trees, he cannot sell the trees separate from the land. As already stated, no issue was raised as to whether the co-owners had themselves planted the trees or whether the trees belong to a third party. We have not, therefore, to decide a conflict between persons claiming under article 41 and article 44.

We are of opinion that the learned Magistrate was in error when he dismissed the claim under article 41 on the ground mentioned above. We, therefore, allow the appeal and set aside the decision of the lower Court because we hold that the right of prior purchase does exist. We remit the case back to the lower Court for determination on the other issues.

Costs of this appeal shall be costs in the cause and in order to facilitate final arrangements, we direct that the costs be assessed on the lower scale together with attendance fee of LP.5 for the advocate of the party who will ultimately be successful.

Special Tribunal No. 1 of 1947.

In the Special Tribunal.

Before: The Chief Justice, Weldon Ag. J. and Rev. Ayad.

EMILE MEO. . . . . *Applicant.*

v

PHILOMENE MEO. . . . . *Respondent.*

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FitzGerald C. J.
Weldon Ag. J.
and
Rev. Ayad

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Personal status — Will — Religious Court — Confirmation of a will by a religious Court can only be made after death of testator.

The confirmation of a will by a religious Court can only be made after the death of the testator.

Anton Atalla for applicant.

Ohannes Merguerian for respondent.

Order: This is a submission under Article 55 of the Palestine Order-in-Council.

Because of certain arguments adduced before us, we deem it necessary to emphasize at the outset that this Tribune is not concerned with the merits of the case or the contention of the plaintiff in the Ecclesiastical Court. We are here solely to decide which Court had jurisdiction, the Latin Ecclesiastical Court or the District Court.

The facts are that in May, 1936, one Anton Salim Meo made a will under which the wife, who is the plaintiff in the Ecclesiastical Court, and his brother, who was the defendant in that Court, were beneficiaries. In accordance with the prevailing practice this will was during his lifetime submitted to the Ecclesiastical Court and the following attestation appears on it under the seal of the Court.

> "On examining the said will it was found to have been properly made. We therefore declare it and confirm it so that it may be executed".

The testator died in January 1937, and in January 1938 the Ecclesiastical Court issued an order of succession in accordance with the will. Mr. Atalla's argument that the Ecclesiastical Court had no jurisdiction can be briefly summarised. It is based on a consideration of Article 54 of the Palestine Order-in-Council and section 7 of the Succession Ordinance. Article 54 vests the Courts with the power of confirmation of wills. That, says Mr. Atalla, is the only power in respect of wills which is vested in the Ecclesiastical Court, and their

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authority is strictly confined to the exercise of that power and that power only.

He then turns to section 7 of the Succession Ordinance which, he says, is an authority for the proposition that once a will is confirmed it is conclusive and the Ecclesiastical Court, after confirmation, is *functus officio* in regard to any further action in connection with that will. He has quoted us the Ottoman Law which he argues was to the effect that wills can be, in fact should be, confirmed before death. He submitted that the object of Article 54 of the Order-in-Council was to give legal sanction under the British administration to the practice prevailing in Ottoman times. In our opinion the argument is unsound for the following reason: It is a settled principle that expressions used in the Order-in-Council are to be interpreted in accordance with their ordinary English meaning, unless a contrary intention clearly appears. Now under English Law the question of confirmation or otherwise of a will does not arise until after the testator's death. As a testator can alter his will at any time during his lifetime, it follows that no confirmation could be conclusive unless it were pronounced after the death of the testator. Indeed, it seems to us that in regard to this document issued by the Ecclesiastical Court in May 1946, the word "confirmation" was loosely used. It was not in fact a confirmation in the generally accepted legal sense of the term at all. The declaration by the Ecclesiastical Court merely took the place of what under English law would be the attestation clause. This being so, the Court was not *functus officio* in regard to this will, and after the death of the deceased, that Court was in our opinion fully cloaked by Article 54(i) of the Order-in-Council with jurisdiction to confirm or refuse to confirm the will.

DECEMBER

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محامي القومية العربية
للمحامي الدولي
لصاحبه : محمد محمد الدقاق
غزة - فلسطين - شارع عمر المختار

