COLLECTION OF JUDGMENTS

OF

THE COURTS OF PALESTINE

1919 — 1933

INCLUDING
CIVIL AND CRIMINAL JUDGMENTS OF THE PRIVY COUNCIL, COURT OF APPEAL, HIGH COURT, SPECIAL TRIBUNAL, DISTRICT COURT, LAND COURT, CRIMINAL COURTS, ETC.

VOL II.

ARRANGED
ACCORDING TO SUBJECTS
IN ALPHABETICAL AND CHRONOLOGICAL ORDER

WITH
COMPREHENSIVE AND DETAILED INDEX

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1935.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 71/30.

BEFORE:

The Chief Justice, Baker, J. and Jarallah, J.

IN THE CASE OF:

Israel M. Tenenbaum — APPELLANT.

vs

Abdullah Bey Chedid for himself and on behalf of all the other heirs of the late Comte Selim de Chedid — RESPONDENTS.

Action and counterclaim for damages for breach of contract — Excuse for non-fulfilment of contract — Original contract supplemented by contract with heirs of original party — Exchange of Notarial notices requiring presence in Land Registry—Certificate of Inheritance issued by Maronite Patriarchate at Cairo produced as evidence of title — Rights of heirs to complete contract in place of ancestor—Guarantee of title not implied by consent of Government to transfer — Sections 2, 4, 5, 8, 12, Land Transfer Ordinance, 1920 — Succession to estate of miri land — Articles 38, 46, 47, 51, 54, 58, 59, Palestine Order-in-Council, 1922 — Sections 2, 3, 21, Succession Ordinance, 1923 — Jurisdiction of Religious Courts — Article 1642, Mejelle—Inability of party to produce funds as affecting question of willingness to perform.

Appeal from the judgment of the District Court of Haifa, dated the 18th day of March, 1930.

JUDGMENT.

The facts of the case the subject of the appeal are as follows:—

On the 14th July, 1925, one Count Selim Chedid, a resident of Egypt entered into a contract of sale with one Israel Tenenbaum whereby Count Chedid undertook to sell to Israel Tenenbaum a certain plot of land consisting of some 130 dunams at £E. 260 a dunam.

£E. 4000 was paid by Tenenbaum to Count Chedid in part consideration of the purchase price upon the signing of the contract. Clause 5 of the contract prescribed the payment of £E. 10,000 as liquidated damages by the defaulting party in the event of either party failing to fulfil his part of the agreement, the £E. 4000 paid by Tenenbaum in part consideration to be taken into account, in case of any default.

By Clause 4 of the contract it was agreed that, "no excuse whatsoever from any of the parties will be accepted nor any ground will be considered as impediment for the execution of the contract between the parties".

By virtue of two further agreements made respectively on the 23rd June, 1926, and the 18th November, 1927, between the heirs of Count Chedid who had died and Israel Tenenbaum, expressed to be supplemental to the original contract of 14th July, 1925, it was mutually agreed that:

1. The agreed liquidated damages of £E. 10,000 contained in Clause 5 of the original contract should be reduced to £E. 7,000.

2. The deposit made by Israel Tenenbaum should be increased from £E. 4,000 to £E. 6,500.

3. The 30th November, 1928, was fixed as the date of completion of the sale at the Land Registry.

Each of the parties some days prior to the date fixed for completion served the other with a notarial notice each requiring the other to attend at the Land Registry in Haifa to complete the sale on the date fixed thereto and to carry out the undertakings contained in the agreement, failing which they would render themselves liable for the damages fixed in the said agreement.

On the day appointed both parties attended the Land Registry. The heirs of the late Count Chedid produced as their title to convey a Certificate of Inheritance issued by the Maronite Patriarchate at Cairo which indicated certain persons as heirs of the late Count Chedid in whose name the land was still registered at the time.

It would appear that the Land Registrar, Haifa, was prepared upon the instructions of the Director of Lands to accept the Maronite Certificate of Succession as proving a good title in the heirs to the land. Israel Tenenbaum refused, however, to complete claiming that the heirs were not in a position to pass a good title and that the Maronite Certificate of Succession was defective.

Subsequently, Israel Tenenbaum commenced an action in the Haifa District Court against the heirs of Count Chedid for breach of contract claiming £E. 13,500, £E. 6,500 being return of the deposit and £E. 7000 the agreed liquidated damages in case of default. The heirs of Count Chedid sued for breach by Tenenbaum and claimed £E. 500 and an order that they be entitled to retain the deposit of £E. 6,500, making in all £E. 7,000 the agreed liquidated damages in case of default.

The Haifa District Court in a judgment dated the 18th day of March, decided —"The Defendants (the heirs of Count Chedid)

were ready to effect the transfer on the fixed date and that the Land Registry had agreed to that, and that it was the Plaintiff Israel Tenenbaum who had refused to accept the transfer pretending that the said Certificate was given by a Court which has no jurisdiction. The question as to whether the Certificate of Inheritance is an illegal one or not, is not before the Court, as the Land Registry accepts it and was prepared to transfer the land from the name of vendors to the name of purchaser. Section 4 of the original agreement provides that no excuse whatsoever is accepted from any of the parties and no reason whatsoever is considered to be a prohibitive cause to stop the enforcement of the agreement".

This is as far as the Plaintiff is concerned.

With regard to the claim of the Defendant to the sum of £E. 500 there is no such indication in the agreement that such amount is to be paid as a fine over the £E. 6,000.

Therefore the following judgment is given:—

The Plaintiff's claim and the Defendant's counter-claim are both dismissed.

Both parties to bear their own costs.

Israel Tenenbaum appealed and the heirs of Count Chedid cross-appealed. Tenenbaum's grounds of appeal were:—

(a) The fact that the Land Registry had agreed to accept the certificate is of no importance at all, the Land Transfer Ordinance, 1920-21 providing in Section 8, "No guarantee of title or of the validity of the transaction is implied by the consent of the Government and the registration of the deed".

(b) It was a matter for the Court to decide as to whether Appellant should have accepted the transfer on the certificate, i.e. whether the certificate as such was valid in Palestine and good for passing title thereon.

(c) That the certificate was of no validity at all in Palestine is clear from the Palestine Order-in-Council, the Courts Ordinance and the Succession Ordinance which all limit the jurisdiction in any matter affecting property in Palestine to the Courts having proper jurisdiction in Palestine, and which do not recognise any foreign judgment unless it has been resealed by a Court having jurisdiction in Palestine.

(d) The provisions of the agreement that no excuse whatever is to be accepted from any of the parties mentioned in the judgment are irrelevant since the objection to the transfer goes to the root of the performance of the obligation and cannot be called an excuse.

For these reasons Appellant asks to have the judgment of the Lower Court set aside and judgment given for his original claim.

The heirs of Count Chedid in their reply and cross-appeal state:—

(a) That Appellant's refusal to accept the transfer when tendered a registered title was a breach of contract.

(b) That the original agreement provided for no special warrant of title and that Clause 5 thereof specifically stops Appellant from raising any excuse for not completing.

(c) That the determination of the question of the sufficiency or otherwise of the said Inheritance Certificate or of the title offered to purchaser by vendor was not a matter within the jurisdiction of the District Court.

(d) That under Section 25 (2) and (3) of the Succession Ordinance, 1923, the Director of Lands is the authorised person to determine the sufficiency or not of a certificate of inheritance for the purpose of registration or at his discretion to refer the matter to the competent Court.

(e) That when each heir named in the certificate had become a duly registered owner of the land, and each such heir was willing to join in the transfer to Appellant, then he (Appellant) obtained the highest type of legal title available in Palestine, viz: registered ownership of land under the Land Transfer Ordinance, 1920.

(f) That still less can Appellant utilise his own refusal of such title as a ground for evading his obligations under a contract or for claiming any damages for alleged breach.

(g) That the true fact was that Appellant had no intention of taking the land and failed to produce and did not possess the money and merely used the Inheritance Certificate as a pretext for evading his obligations under the agreement and for an attempt to recover liquidated damages from the Respondents.

(h) That the Appellant having committed a breach of the agreement is bound to pay liquidated damages agreed upon in the contract less the amount already paid by him, that is to say, to pay the balance of £E. 500 to the Respondents.

The issues arising out of the appeal would appear to be—

1. Whether the Certificate of Succession issued by the Maronite Patriarchate in Egypt and produced by the heirs of Count Chedid was a valid document of title to miri land in Palestine.

2. Whether the acceptance of the beforesaid Certificate by the Land Registrar binds a purchaser to accept the document as a good title deed.

3. Whether the refusal to accept a transfer based on the before mentioned Certificate of Inheritance amounts to an excuse or reason to stop the enforcement of the agreement within the meaning of Section 4 of the original agreement.

1. With regard to the first issue I am satisfied that the Certificate of Succession issued by the Maronite Patriarchate of Cairo cannot be considered as a valid document of title to miri land in Palestine.

The Succession Ordinance of 1923, Section 6, provides that certain Religious Courts (of which the Maronite Court is one) shall have jurisdiction in matters relating to intestate succession upon death to persons who at the date of their death were members of their Community.

When referring to Religious Courts the Section refers to Religious Courts of Palestine and cannot be considered to refer to any other Religious Courts other than those in Palestine.

The Certificate of Succession issued by the Maronite Patriarchate Court of Cairo was a foreign judgment, and as such in its original form could not be accepted as a document of title to land in Palestine.

Further the Certificate of Inheritance purports to determine the right of succession to miri land in Palestine, which by virtue of Section 19 of the before-mentioned Succession Ordinance can only be determined in accordance with the provisions of the Ottoman law set forth in the Second Schedule thereto. Accordingly, I find that the said Certificate of Inheritance was not a valid document of title to miri land in Palestine.

2. The acceptance of the Certificate by the Land Registrar does not in any way improve or alter the document. A bad root of title must necessarily remain so. The vendor has no guarantee of title and cannot be compelled to accept a doubtful one.

The Land Transfer Ordinance, 1920-21, Section 8 (3) provides:

> "No guarantee of title or of the validity of the transaction is implied by the consent of Government and the registration of the Deed".

I am therefore satisfied that the acceptance of the Certificate by the Land Registrar does not in any way affect a proposed purchaser's position or bind him to accept the document as a good root of title.

3. I am of opinion that the refusal to accept a defective title is not an excuse as described in Article 4 of the original contract for the non-fulfilment of the contract.

It has been submitted by the Cross-Appellant that Israel Tenenbaum was never in a position to complete, and that he at no time possessed the money to fulfil his part of the contract, i.e. to pay the purchase money. Whether this be true or not it does not affect the issues before us.

Accordingly, the judgment of the Haifa District Court must be quashed, and judgment entered for Israel Tenenbaum for the sum of £. 13,500, i. e. (£E. 7,000, the penalty agreed upon and £E. 6500 the ratum of deposit given by Tenenbaum). The heirs of Count Chedid to pay legal interest on £E. 6500 from the date of action together with costs of this Court and the Court below and advocate's fees assessed at £P. 6.

Delivered the 28th day of May, 1931.

Privy Council Appeal.

P. C. No. 47/32.

PRESENT AT THE HEARING:

Lord Tomlin, Lord Wright, Sir George Lowndes.

(Delivered by Lord Tomlin).

IN THE CASE OF:

Abdullah Bey Chedid and Others — APPELLANTS.

vs

Israel M. Tenenbaum — RESPONDENT.

FROM THE SUPREME COURT OF PALESTINE.

Judgment of the Lords of the Judicial Committee of the Privy Council, delivered the 9th October, 1933.

Comte Selim de Chedid (who will hereafter be referred to as the intestate) died on the 22nd February, 1927, domiciled in Egypt, and a member of the Cairo Maronite Community, without leaving any testamentary disposition of his property.

On the 14th July, 1925, the intestate had entered into a contract with the Respondent whereby the intestate agreed to sell and the Respondent agreed to purchase certain miri land known as Um-ez-Zibale, situate at Haifa in Palestine. The purchase under the contract had not been completed at the death of the intestate, and this appeal arises out of a dispute in relation to the contract between the Appellants (who are children of the intestate) and the Respondent.

The price fixed by the contract, which was made between the intestate of the first part and the Respondent of the second

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part was £E. 260 per dunum. £E. 4,000 was paid on the signing of the contract, and the balance of the price was to be paid on the transfer into the name of the Respondent.

The intestate had purchased the land from one Abela, and the transfer from Abela to the intestate was not completed at the date of the contract.

By Article 3 of the contract there was reserved to the Respondent the right to delay the transfer of the land into his own name for a period of one year from the date of the transfer from Abela to the intestate.

The contract contained also the following clause:—

> "5. If the 1st Party commits breach of any terms of this contract, he shall return to the 2nd Party the £E. 4,000 received by him and shall pay to him £E. 10,000 as liquidated damages and penalty for the non-carrying out of this contract, and if the 2nd Party commits breach of any terms of this contract, he shall pay to the first Party £E. 10,000 as liquidated damages and penalty after deduction of the £E. 4000 paid."

By two other documents, dated respectively 2nd October, 1925, and the 23rd June, 1926, the parties in effect amplified and varied the contract in the following respects: that is to say:—

1. The area of the land to be sold was agreed at 130 dunums and 634 pics, and the total price was fixed at £E. 33,903.

2. Further sums by way of deposit were paid by the Respondent, making up the total amount of the deposit paid to £E. 6,000.

3. Provision was made for payment of interest on the unpaid part of the purchase price, and the balance of the purchase price with interest capitalised up to 26th June, 1926, was agreed at £E. 28,600.500 m/ms., and this sum was to carry interest at the rate of 9 per cent per annum from the 20th June, 1926, until full payment.

4. The prescribed period for the transfer after the payment of the price was postponed with the consent of both parties to 30th November, 1927, with a proviso that the terms of Article 3 of the contract should not be affected.

At the death of the intestate the land in question had been transferred to the intestate by Abela and stood registered in his name. The time for the completion of the sale under the contract of the 14th July, 1925, had not arrived.

The intestate had nine children, namely, the seven Appellants, who survived him, a son, Neghib, who predeceased him leaving two

sons and three daughters, and a daughter Mary, who also predeceased him, leaving one son.

On the 23rd February, 1927, the day after the death of the intestate, the Court of the Patriarchate of the Maronite Community in Egypt, at the instance of the first three Appellants, issued a certificate to the effect that the Appellants were the lawful heirs of the intestate and that all his estate devolved upon them to the exclusion of any others. No reference was made in this certificate to the fact that the estate included land in Palestine, the succession to which would be governed by the lex loci.

On the 5th June, 1927, a deed of arrangement was executed, to which the Appellants and the grandchildren of the intestate, being the children of his two deceased children, were parties. One of the grandchildren was an infant. The effect of the deed (which contained no reference to the Palestine land) was that each of the grandchildren was expressed to renounce any interest in the estate of the intestate and was given certain benefits by the Appellants. According to this deed, under the law applicable the estate was divisible between sons and daughters to the exclusion of the children of deceased children of the intestate, sons taking shares double those of the daughters.

On the 18th day of November, 1927, an agreement in writing was entered into between the Respondent and the first Appellant, who was expressed to be acting for himself and on behalf of the heirs of the intestate. It was thereby recited that the Respondent would have to pay £E. 28,600.500 m/ms to the heirs of the intestate by the 30th November, 1927, in addition to the annual interest at 9 per cent. per annum as from the 20th June, 1926, in consideration for this transfer into his own name of the land, but that as he did not have the said sum owing to the then present conditions, he asked the first Appellant (who accepted) to give a year's period to the 30th day of November, 1928, under the conditions therein contained.

The conditions in effect provided (1) for the payment then made of an additional deposit of £E. 500, (2) for the extension of the time for payment of the balance to 30th November, 1928, and (3) for the reduction of the penalty under clause 5 of the original contract from £E. 10,000 to £E. 7,000.

On the 8th day of September, 1928, a certificate was obtained at the instance of one of the intestate's grandchildren from the Maronite Ecclesiastical Court at Haifa to the effect that in the

succession to miri land in Palestine the intestate's grandchildren took between them per stirpes the shares of the deceased children.

On the 19th day of November, 1928, the Respondent, being apparently aware that a title was proposed to be made without regard to the rights of the grandchildren of the intestate, caused a notarial notice to be prepared and served on the first Appellant. The notice was addressed to the first Appellant "for himself and on behalf of the heirs" of the deceased.

By this notice the Respondent notified the first Appellant that he was prepared to accept a transfer of the land on the 30th day of November, 1928, and that he should be present at 10 a.m. on that date at the Land Registry of Haifa, Palestine, for the above purpose, and for the payment of the consideration for the transfer and asked the first Appellant to produce all the documents necessary for this transfer. By the same notice the Respondent, warned the first Appellant that should he fail to comply with the Respondent's demand on the date fixed, he would be liable for payment to the Respondent of the agreed amount of damages, viz., £E. 7,000, together with certain expenses and costs.

A counter notarial notice was served on the Respondent by the first Appellant, requiring him to attend at the Land Registry office at Haifa at 10 a.m. on the 30th day of November, 1928, to pay the balance of the purchase price and to accept a transfer of the property.

Both parties attended at the time and place specified in the notices and exchanged written documents, by which it was in effect recorded:—

(1) That the first Appellant offered à transfer from the Appellants only supported by the certificate of the Egyptian Maronite Court.

(2) That the Director of Lands had ordered that the Certificate might be accepted and acted upon.

(3) That the Respondent refused the proffered transfer on the grounds that cases were pending as to the ownership of the land and that there were other heirs not included in the Certificate.

(4) That the first Appellant alleged that the Respondent pretended to come to accept the transfer and to pay the balance of the price, but that his possession of the price was a pretence, and that when challenged to produce the money, or a cheque for it, he refused.

The purchase was not completed.

On the 29th day of December, 1928, the Appellants procured themselves to be entered on the register in the Land Registry at Haifa as the successors in title of the intestate in accordance with the Certificate of the Egyptian Maronite Court, but the shares of sons and daughters were entered as equal, although under Article 12 of the deed of arrangement it was stated that under the law applicable the shares of the sons were double those of the daughters.

On the 21st June, 1929, the Respondent launched an action in the District Court, Haifa, against the first Appellant for himself and on behalf of all the other heirs of the intestate, claiming £E. 13,500, being the deposit of the £E. 6,500 and the damages or penalty of £E. 7,000 under Clause 5 of the contract as subsequently modified.

The first Appellant put in a defence and counterclaim, in which he alleged (inter alia) in effect that (1) the Land Department had accepted the certificate of the Egyptian Court and that the Respondent was in default in not accepting a transfer in accordance with it, and (2) the real reason of the refusal of the Respondent to accept the transfer was that he had no money to pay the balance of the purchase price and he was himself in default, and the first Appellant counterclaimed to keep the £E. 6,500 deposit and to be paid a further £E. 500 to make up the damages or penalty of £E. 7,000.

The suit was tried on the 18th March, 1930. No witness gave evidence on either side. Both claim and counterclaim were dismissed.

The Court held that as the Land Registry was ready to act upon the Certificate of the Egyptian Court, the Respondent was bound to accept a transfer in accordance with the Certificate, and that his claim must fail. The reason for the dismissal of the counterclaim does not clearly appear in the reasoned judgment.

The Respondent appealed to the Supreme Court at Jerusalem, and there was a cross-appeal by the first Appellant, in which it was alleged that the Respondent failed to pay the purchase price, alleging as a pretext that the Egyptian Certificate accepted by the Registrar wae defective and that the true fact was that the Respondent had no intention of taking the land and failed to produce and did not possess the money, and merely used the Certificate as a pretext for evading his obligation under the contract and for an attempt to recover liquidated damages from the Appellants.

The appeal was heard in March, 1931, by the Chief Justice, Mr. Justice Baker, and Mr. Justice Jarallah. Judgment was delivered on the 28th May, 1931. The Chief Justice and Mr. Justice Baker concurred in one judgment, in which they held that the Egyptian certificate was of no validity in Palestine and that the acceptance of the certificate by the Land Registrar did not improve matters, and that the title was defective, and that the first Appellant was in default and was liable to return the deposit of £E. 6,500, with legal interest from the date of action, and to pay liquidated damages of £E. 7,000. These two Judges held that it did not affect the issues before them whether or not the Respondent was in a position to complete. On these findings the cross-appeal necessarily failed. Mr. Justice Jarallah gave a judgment to the same effect, in the course of which he said that he did not find that what the first Appellant said concerning the attempt by the Respondent to avoid the contract was far from being true, but that he found that the steps taken by the Respondent to cause the Registrar to accept the Egyptian certificate, with the resulting failure on the Respondent's part to accept the transfer, had created an opportunity for the Respondent to safeguard his interests, meaning, as their Lordships apprehend it, that if once the Respondent established the first Appellant's default, his own readiness and willingness to perform his part was immaterial.

On appeal to His Majesty in Council all the children of the intestate, by special leave, appear as Appellants.

Before stating what their Lordships consider to be the real issues in this case it will be convenient to refer to the provisions of the law applicable.

By the Palestine Order-in-Council, 1922, His Majesty, by virtue and in exercise of the powers in that behalf, by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, was pleased by and with the advice of His Privy Council to make provision for the government of the territories to which the Mandate for Palestine applied.

By Clause 38 of the Order it was provided that the Civil Courts thereinafter described were subject to the provisions of the part of the Order in which Clause 38 appeared to exercise jurisdiction in all matters and over all persons in Palestine.

Clause 46 of the Order was as follows:—

> "46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on the 1st day of 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, 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. 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".

The following further provisions of the Order are material, that is to say:—

"47. 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.

Where in any civil or criminal cause brought before the Civil Court a question of personal status incidentally arises, the determination of which is necessary for the purposes of the cause, the Civil Court may determine the question, and may to that end take the opinion, by such means as may seem most convenient, of a competent jurist having knowledge of the personal law applicable".

51. Subject to the provisions of Articles 64 to 67 inclusive jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this Part by the Courts of the religious communities established and exercising jurisdiction at the date of this Order. For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors,

inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

54. The Courts of the several Christian communities shall have:—

(i) Exclusive jurisdiction in matters of marriage and divorce, alimony, and confirmation of wills of members of their community other than foreigners as defined in Article 59.

(ii) Jurisdiction in any other matters of personal status of such persons, where all the parties to the action consent to their jurisdiction.

(iii) Exclusive jurisdiction over any case concerning the constitution or internal administration of a Wakf or religious endowment constituted before the Religious Court according to the religious law of the community, if such exists.

58. The Civil Courts shall exercise jurisdiction over foreigners, subject to the following provisions:—

59. For the purpose of this Part of the Order the expression "Foreigner" means any person who is a national or subject of a European or American State or of Japan, but shall not include:—

(i) Native inhabitants of a territory protected by or administered under a Mandate granted to a European State.

(ii) Ottoman subjects.

(iii) Persons who have lost Ottoman nationality, and have not acquired any other nationality.

"The term 'subject' or 'national' shall include corporations constituted under the law of a foreign state and religious or charitable bodies or institutions wholly or mainly composed of the subjects or citizens of such state."

The relevant provisions of the Succession Ordinance, 1923, are as follows:—

"2. In this Ordinance the following words and expressions shall have the following meanings: —

(b) Immovable property includes Miri land and Mulk land as herein defined;

(j) "Civil Court" means a Court established by and sitting under the authority of the Government of Palestine but does not include a Religious Court;

(k) "Court of a Community" means a Court sitting in virtue of the jurisdiction conferred upon the authorities of a Religious Community but does not include a Moslem Religious Court;

(l) "Religious Community" and 'Community' mean a community specified in the First Schedule to this Ordinance or such other Community as may from time to time be specified by the High Commissioner;

(m) "Foreigner" means any person who is a foreigner within the meaning of Article 59 of the Palestine Order-in-Council, 1922;

(n) "The Ottoman Law" shall mean the provisional law relating to the Succession to Immovable Property dated the 3rd day of Rabi El Awal 1331 A.H. as set forth in the Second Schedule hereto.

3. (1) The Civil Courts shall have exclusive jurisdiction in all matters relating to the succession to, and the confirmation of wills, of every Palestinian citizen and any other person not being a foreigner within the meaning of this Ordinance, provided that such citizen or other person was not at the time of his death either a Moslem or a member of one of the Religious Communities specified in the First Schedule hereto and of such other communities as may from time to time be specified by the High Commissioner.

(3) Thay shall have jurisdiction concurrently with the Courts of the specified Religious Communities in matters relating to the succession to members of the specified Religious Communities other than foreigners, except where exclusive jurisdiction is by this Ordinance conferred upon the Courts of the Community.

(4) Subject to the provisions of Section 21 hereof a Civil Court shall distribute successions within its jurisdiction according to the rules set forth in this section:—

(c) Where the deceased was either a foreigner or, not being a foreigner within the meaning of this Ordinance, was neither a Palestinian citizen nor a member of one of the specified Religious Communities, the following rules shall apply:—

(i) Mulk land and movables of the deceased shall be distributed in accordance with the National law of the deceased;

21. Every Court having jurisdiction in matters of succession shall, in all cases, determine the rights of succession to Miri land in accordance with the provisions of the Ottoman Law set forth in the Second Schedule hereto, and the said provisions shall be

applied notwithstanding any disposition made or power of attorney given by the deceased intended to take effect after death, whether by way of will or otherwise.

THE FIRST SCHEDULE.

The Eastern (Orthodox) Community.
The Latin (Catholic) Community.
The Gregorian Armenian Community.
The Syrian (Catholic) Community.
The Armenian (Catholic) Community.
The Chaldean (Uniate) Community.
The Greek Catholic Melkite Community.
The Maronite Community.
The Jewish Community.

SECOND SCHEDULE.

Provisional Law relating to Inheritance of Immovable Property.

Article 2.— The heirs of the first degree are the descendants of the deceased, i. e., his children and grandchildren. The right of succession within this degree belongs in the first place to the children and then to the grandchildren who are their descendant and then to the children's grandchildren. Therefore, when a man dies, the descendants of his surviving descendants lose their right of succession, as it is through this surviving descendant that they are related to the deceased. If a descendant dies before the deceased, his descendants represent him and take the share which he would have taken. If all the children of the deceased die before him the share of each will pass to his descendants who are through him related to the deceased. If any of the children of the deceased have died without descendants the right of succession will be conferred upon the other children and their descendants only. The same rules will be applied where there are several descendants. Sons and daughters, grandsons and granddaughters have equal rights.

The Transfer of Land Ordinance, 1920-21, contains the following relevant provisions:—

"2. In this Ordinance and in all regulations made hereunder, unless there is something repugnant in the context:—

"Disposition" means a sale, mortgage, gift, dedication of waqf of every description, and any other disposition of immovable property except a devise by will or a lease for a term not exceeding three years and includes a transfer of

mortgage and a lease containing an option by virtue of which the term may exceed three years;

"Court" includes any Civil or Religious Court competent to deal with actions concerning land, as well as any Land Settlement Court which may be established.

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

5.-(1) Any person wishing to make a disposition of immovable property must first obtain the written consent of the Government.

(2) In order to obtain this consent, a petition must be presented to the Director of Lands through the Land Registry Office of the District in which the land is situated, setting out the terms of the disposition intended to be made, and applying for his consent to the disposition. The petition must be accompanied by proof of the title of the transferor, and must contain an application for registration of a deed to be executed for the purpose of carrying into effect the terms of the disposition. The petition may also include a clause fixing the damages to be paid by either party who refuses to complete the disposition if it is approved.

8.-(1)

(2) After the title has been examined and the consent of the Government has been obtained, a deed shall be executed in the form prescribed by rules made hereunder, and shall be registered in the Land Registry.

(3) No guarantee of title or of the validity of the transaction is implied by the consent of the Government and the registration of the deed.

12. When any immovable property passes by operation of a Will or by inheritance, the legatees or heirs as the case may be shall be jointly and severally responsible for the registration of the immovable property in the name of the legatees or heirs within a year of the death of the registered owner. The registration shall be made upon the certificate of a competent Court stating that the persons acquiring registration are legatees or heirs, or upon a certificate signed by the Mukhtar or Imam and two notables."

Article 1642 of the Mejelle contains provisions as to action by and against the heirs of a deceased person, from which it appears that the original form of the action against one only of the heirs was justified.

Now the issues which appear to their Lordships to fall for determination in relation to the claim for damages on either side are:—

(1) In the action:—

(a) Whether the first Appellant made default in not presenting a transfer on the 30th November, 1928, which the Respondent was bound to accept.

(b) Whether the Respondent was at the same time ready and willing to perform his part of the contract; that is to say, to pay the balance due from him. And

(2) In the counterclaim:—

(a) Whether the Respondent made default in paying the balance due from him; and

(b) Whether the first Appellant was at the same time ready and willing to perform his part, namely, present a transfer which the Respondent was bound to accept.

There is therefore both in the action and counterclaim a common issue, namely, whether the transfer presented by the first Appellant was one which the Respondent was bound to accept.

Their Lordships without hesitation reach the conclusion that this question must be answered in the negative.

It is impossible to maintain that the Egyptian Maronite Court had any jurisdiction in the matter. The Religious Courts in Palestine are the only Religious Courts which have jurisdiction under the Succession Ordinance, 1923.

The intestate was neither a foreigner nor a Palestinian subject, nor a member of a Religious community within the meaning of the Ordinance, and as his land in Palestine was miri land, its descent was governed by Article 2 of the Second Schedule to the Ordinance. Under that Article the grandchildren of the intestate succeeded to the shares of the children who predeceased the intestate. This difficulty was not got over by any reference to the deed of arrangement, the validity of which, if it affected the land in Palestine at all, was in dispute between the children and grandchildren of the intestate.

The requirements of the Land Ordinance, 1920-21, were not complied with. The heirs did not, as they should have done, themselves obtain registration, nor did they obtain a certificate of a competent Court within the meaning of Section 12 of the last mentioned Ordinance.

The Director of Lands and the Registrar of Lands appear to have acted under a misapprehension as to the effect of this law,

and having regard to Section 8 (3) of the Ordinance, their action cannot have given any validity to a title which in point of law was bad.

It follows that, in their Lordships' opinion, the first Appellant did not on the 30th November, 1928, proffer a transfer which the Respondent was bound to accept, and to that extent the Respondent makes good his case and the first Appellant fails in his.

There remains the question as to the readiness and willingness of the Respondent to perform his part of contract.

Their Lordships' attention has not been directed to any provision of the Turkish law or any local ordinance which deals with the question whether in an action to recover damages for breach of contract the Plaintiff is bound to establish his readiness and willingness to perform his part. In the absence of any such provision their Lordships are of opinion that regard must be had to the English law applicable in the case of concurrent obligations.

Readiness and willingness to carry out his obligation has always been a condition precedent to the Plaintiff's right to recover damages in respect of breach of one of two concurrent obligations. It is true that to-day in England it need not be expressly pleaded, but the onus of proving it is nevertheless on the Plaintiff. That onus in the absence of any evidence to the contrary adduced by the Defendant may be easily discharged, nor is a tender of money necessary in the case of an obligation to pay money. Evidence of inability to discharge the obligation adduced by the Defendant may, however render it necessary for the Plaintiff to satisfy the Court that he was at the material moment in a position to discharge his obligation (see Jefferson vs. Paskell (1916) 1 K.B. 57 at p. 74, and British and Benningtons, Ltd. v. North Western Cachar Tea Co. (1923) A.C. 48.

The learned Judges of the Supreme Court were, in their Lordships' opinion, in error in regarding the issue of readiness and willingness as irrelevant.

Here there was, in their Lordships' judgment, no repudiation of the contract by the first Appellant, and the Respondent was insisting on the contract inasmuch as he was suing for the sum recoverable under Clause 5. To recover under that Clause it was, in their Lordships' judgment, necessary that he should establish his own readiness and willingness to perform his part of the concurrent obligations.

Throughout the litigation the first Appellant set up that the Respondent was not in a position to pay and that he utilized the

question of title to make for himself by means of damages a profit out of the transaction. To support this charge there was produced a certified copy of the execution minute in an action in the Haifa Court, in which a judgment for about £30 had been recovered in May, 1928, by a creditor against the Respondent.

From the certified copy it appeared that on the 12th July, 1928, a petition was presented by the Respondent's attorney, alleging that owing to hard times the Respondent was prepared to pay off the debt and interest by monthly instalments of £2; that eventually the attorney agreed to pay £2 down and £5 per month, beginning on the 15th September, 1928, and that these instalments of £5 were either not paid in full or at any rate were still being paid as late as July, 1929.

It was said on behalf of the first Appellant that this was some evidence which, if not displaced, pointed to the Respondent's inability on the 30th November, 1928, to pay a sum exceeding £E. 28,600.

The point was taken in the pleadings, but the Respondent did not himself give or adduce any evidence in respect of it, and their Lordships are satisfied that the proper conclusion is that the Respondent has failed to discharge the onus of proving his readiness and willingness to perform his part of the concurrent obligations, although he has established that the first Appellant failed to discharge his part.

The result must therefore be that the claim for damages on either side fails.

So far, however, as the Respondent is concerned he is entitled to recover the money paid as a deposit, as no title has been made to the land.

The appeal must therefore be allowed so far as it concerns the damages or penalty for £E. 7,000.

The order of the Supreme Court will therefore stand in regard to the deposit and the counterclaim, but will be set aside in regard to the £E. 7,000 claimed in the action, and in respect of that claim the action must be dismissed.

With regard to costs (1) in the Court of First Instance, the Respondent should receive half his costs of action and his costs of counterclaim and should pay the first Appellant half his costs of

the action with an appropriate set off; (2) in the Supreme Court the Respondent should receive half his costs of the appeal and his costs of the cross-appeal and should pay the first Appellant half his costs of the appeal with an appropriate set off, and (3) before their Lordships' Board the Appellants should receive two thirds of their costs and will pay the Respondent one-third of his costs with an appropriate set off.

Their Lordships will humbly advise His Majesty accordingly.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 31/30.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Khayat. J.

IN THE CASE OF:

Mussa El Borno — APPELLANT.

vs

Nachla Company, by Israel Avivi — RESPONDENT.

Construction of contract — Application for extension of time for transfer not considered as breach of contract.

Appeal from the judgment of the District Court of Jafta, dated the 29th day of December, 1929.

JUDGMENT.

The main point in this case is whether or not the Appellant is entitled to have extended the period prescribed in paragraph 6 of the contract. In our opinion this paragraph entitles the Appellant to extension should the Government refuse the transfer. The application for extension cannot be considered as a breach of contract.

The judgment of the Court below must therefore be set aside and the Respondent's action dismissed. He is at liberty to bring a fresh action on proof of breach of contract by the Appellant. Costs here and below will be paid by the Respondent.

Delivered the 11th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 89/30.

BEFORE:

Corrie, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

Jehoshua Hankin — APPELLANT.

vs

Ali Kassem Abdul-Kader — RESPONDENT.

Contract for sale of land — Legality of provision for delivery of possession before legal transfer — Action for return of purchase monies paid and for damages — Sec. 12, Land Transfer Ordinance, 1920 — Agreement for sale of land held not to be disposition of land — Proclamation No. 76 — Severability of contract.

JUDGMENT.

By a contract dated the 20th day of January, 1929, and two other contracts both dated 25th February, 1929, the Respondent Ali-Kassem Abdul-Kader agreed to sell the lands therein described to the Appellant, J. Hankin. The contracts were in substantially the same form, each containing a provision (Clause 12) that the transfer should be completed within one year of the date of the contract, and each providing a penalty for non-performance (Clause 13). In the case of the contract first mentioned, the period for completion was subsequently extended to the 31st of March, 1930. Each of the three contracts contained the following provision (Clause 5): "The first party must give possession of the land to the second party or to whomsoever the second party may nominate. Such delivery of possession should be lawful etc. and must be effected 15 days before the legal transfer". On the 5th May, 1930, the Appellant commenced action in the District Court alleging that the Respondent had failed to transfer in accordance with the contract, and claiming return of the monies paid by him to the Respondent and the penalties fixed by Clause 13. The District Court dismissed the claim for penalties on the following grounds: "In our opinion Clause 5 of the contracts is void inasmuch as it purports to compel the Defendant to perform an act which is contrary to Section 12 of the Land Transfer Ordinance. Clause 5 contains an obligation on the vendor to give possession of the land to the Plaintiff within 15 days before the official transfer. The vendor cannot carry it out without violation of the law. In our opinion, Clause 5 is a vital part of the contract seeing that it

relates to the giving possession of the lands contracted to be sold. It cannot be separated from the rest of the contract, and the whole contract must therefore be declared void. The claim for damages, therefore, fails, and judgment is given in favour of the Plaintiff for the amount of £P. 780.— being the amount paid by him to the Defendant on account of these contracts".

Against this judgment the Appellant appeals. In our opinion the appeal must succeed. An agreement for the sale of land is not a disposition of land within the meaning of Section 12 of the Transfer of Land Ordinance, 1920, though it was so within the Proclamation No. 76. Hence nothing contained in the Transfer of Land Ordinance prevents the vendor from agreeing to give possession to a purchaser before the date fixed for the registration of the transfer. We have not therefore to determine whether Clause 5 is severable from the remainder of the contract for sale, though we see no reason for holding that a provision as to the date of delivery of possession of land should not be severed from a contract for the sale of land.

The appeal is allowed, the judgment of the District Court is set aside, and the case remitted for completion.

The Respondent will pay the costs of this appeal.

Delivered the 31st day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 93/30.

BEFORE:

The Chief Justice, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Dov Drory — APPELLANT.

vs

Ali el Quasem — RESPONDENT.

Waiver by Notarial notice of clause in contract — Reasonable time for transfer set by Court — Purchase of undefined land from larger quantity.

Appeal from the judgment of the District Court of Jaffa, dated the 9th day of June, 1930.

JUDGMENT.

The Court below erred in holding that the non-transfer to Matalon rendered the contract void. The Appellant has waived, by

Notarial Notice, that part of the contract which requires that the land to be bought by him should be bounded by land sold to Matalon.

We therefore set aside the judgment of the lower Court and remit the case to it for it to give a reasonable delay in which the Respondent is to transfer to Appellant a plot of land of 1,000 dunams out of the land described in the contract. Costs to follow the event.

Delivered the 31st day of October, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 97/30.

BEFORE:

The Chief Justice, Frumkin, J. and Khaldi, J.

IN THE CASE OF:

Jacob Mizrahi — APPELLANT.

vs

Palestine Land Development Co. Ltd. — RESPONDENT.

Action for balance of purchase money—Registration never effected in Land Registry—Absence from country of purchaser as refusal to complete—Refusal by purchaser to pay price held to give rise only to right to damages—Action for price disallowed.

JUDGMENT.

This is an action on a contract dated the 13th June, 1924, between the Respondent as vendor, and the Appellant as purchaser, for the balance of the purchase money of land contracted to be sold.

The land in fact was never delivered to the purchaser, nor was there any registration of the sale in the Land Registry.

The case can be distinguished from Anglo-Palestine Co. vs Landau, C. A. No. 108/27*, in which it was held that the absence from the country of the purchaser could not be held to be such refusal of the contract as would entitle the vendor to damages.

In the present case the Appellant as purchaser refused to pay the price. There was no question of his absence abroad.

This refusal, since there has been no completion of the sale, does not entitle the Respondent to sue for the price, but only to claim damages for breach of contract.

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* Reported ante p. 385.

We therefore, by a majority set aside the judgment for the Appellant with costs in this Court and in the Court below and £P. 3 advocate's fee.

Delivered the 31st day of December, 1931, in the absence of both the parties.

In the Supreme Court sitting as a Court of Appeal.

C. A. of 1931.

BEFORE:

The Chief Justice, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Muhammad Musa El Husseini — APPELLANT.

VS

Ali El Mustakim — RESPONDENT.

Letter as evidence of extension of time of contract — Agreed and liquidated damages awarded for breach of contract.

Appeal from the judgment of the District Court of Jaffa dated the 8th day of June, 1931.

JUDGMENT.

We hold that the letter of Ali Mustakim of 27th February, 1931, was before the Court below and should have been taken notice of and read with exhibit "B" of the same date extracted from the execution file.

This being so we hold that the Court below erred in not taking into account the fact that by that letter the contract remained in force.

As Respondent admits that he has not delivered the 250 cases or alternatively as he alleges has not paid £P. 50 he has committed a breach of Clause 5 of the contract.

We therefore set aside the judgment of the District Court and substitute for it a judgment under which the Respondent is to pay Appellant £P. 300 as agreed compensation for breach of the contract.

£P. 2 advocate's fees.

Delivered the 1st day of February, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. 5/31.

BEFORE:
The Senior Puisne Judge, Jarallah J. and Frumkin, J.

IN THE CASE OF:

Ismail Muhammad Jibrail — APPELLANT.

VS

Ghazaleh bint El Sa'dah Sheikh Saleh — RESPONDENT.

District Court not to go behind written contract — Withdrawal of claim for damages.

Appeal from the judgment of the District Court of Jaffa dated the 11th day of December, 1930.

JUDGMENT.

The Court holds that the District Court was not entitled to go behind the contract which the Respondent admitted that she had executed.

The judgment of the District Court is set aside. Judgment will be entered for the Appellant for £P. 60 with costs, the Appellant having withdrawn his claim for damages.

Delivered the 6th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 9/31.

BEFORE:
The Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Saleh Muhammad Shibel — APPELLANT.

VS

Haj Khalil Taha — RESPONDENT.

Undertaking contained in letter — Lack of consideration for undertaking — Removal of buildings from land — Action for damages for non-removal of buildings.

Appeal from the judgment of the District Court of Haifa dated the 25th day of January, 1930.

JUDGMENT.

The Appellant is suing on an undertaking by the Respondent given in a letter dated 22nd July, 1929. There is however, no evidence before the Court that any consideration was given for the undertaking which consequently is unenforceable.

Further, the letter does not specify that the buildings already constructed upon the land at the date when the letter was written were to be removed forthwith. Even, therefore, if the undertaking were enforceable, no action for damages for non-removal of such buildings would lie until the termination of the Respondent's term of occupation of the land.

The appeal is dismissed with costs, including £P. 4 advocate's fees and expenses.

Delivered the 8th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 17/31.

BEFORE:

The Senior Puisne Judge, Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Joseph Albina — APPELLANT.

vs

Mrs. Karolin Batarsi — RESPONDENT.

Breach of contract—Transfer of debt—Contract read as a whole—Contract rendered impossible of performance by act of party—Burden of proof of breach.

Appeal from the judgment of the District Court of Jerusalem dated the 22nd day of December, 1930.

JUDGMENT.

We hold that the contract dated the 28th August, 1930 must be read as a whole, so that the Appellant is not entitled to sue the Respondent upon the transfer of debt effected by Clause 1 of the contract without having regard to the other terms of the contract.

In this Court the Appellant alleges that the Respondent, without calling upon him to fulfil his obligations under the contract, has mortgaged her property to another person, and has thereby rendered it impossible for her to carry out the terms of the contract.

The Respondent, while not denying that she has mortgaged her property, alleges that the Appellant refused to lend her the whole sum of £P. 721.896 mils agreed to be lent under Clause 4 of the contract but wished to retain part of it as interest.

There is no evidence in support of either of these allegations.

If the Appellant desires to sue the Respondent for breach of contract he must prove that it is she and not the Appellant who is in default.

The appeal is dismissed with costs.

Delivered the 14th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 24/31.

BEFORE:

Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Mustafa El Jubaheh — APPELLANT.

vs

Yacoub Yousef Abdel Wahed
Khadijeh Mustafa
Halimeh Bint 'Atof
'Aysheh Bint Atof
Zeinab 'Abdel Hadi
Safieh Bint 'Atof
Khadijeh Kasem Soutary
Izmokna 'Abdel Wahad
Ibrahim Muhammad Yusef
Safiyeh 'Ali Ibrahim
Wadhah Yusef 'Ilayan
Anneh Muhammed Hassan — RESPONDENTS.

Assignment of agreement for sale of land—Construction of agreement—Transfer of property by vendors into name of purchaser's nominee.

Appeal from the judgment of the District Court of Jaffa, dated the 6th day of January, 1931.

JUDGMENT.

The majority of the Court are of opinion that any construction placed on Clause 4 of the contract in the light of Clause 8 thereof that the intention of the assignment was to enable the

transfer to be made to whosoever the purchaser shall designate, is a complete abrogation of Clause 4. It would be more correct to give effect to the provisions of this Clause which imports the assignment of the contract. Such assignment, however, would be incomplete unless ratified by the person against whom the assignment is made. This being the case, the person against whom the assignment is made is entitled to call the assignor as a third party and to set up any defence against him as well as against the assignee. Such assignment would not preclude the assignor's financial liability to the person against whom the assignment is made.

The majority of the Court are, therefore of opinion that the appeal must be allowed and the case remitted for the District Court to go into the merits of the case and give judgment accordingly.

Dissenting judgment attached.

Delivered the 8th day of December, 1931.

JUDGMENT OF MR. JUSTICE BAKER.

This is an appeal from the Jaffa District Court. The Jaffa District Court was asked to determine the interpretation of a clause in a contract of sale of land made between the Respondents of the one part and one Hashem Abu Khadra of the second part and to decide if such clause enabled the second party to assign the said contract to a third party who was the Plaintiff in the case. The Judge of the District Court disagreed and accordingly judgment was given for Respondents.

1. The clause in question is as follows:—

> "4. The first party has accepted that the second party should have a right to transfer this subject matter of the sale or part thereof to any person he likes".

I am of opinion that such clause, in its plain, ordinary and popular sense can only have one meaning and can only be construed to mean "that the purchasers should be enabled to call upon the vendors to transfer the property to any nominee he cared to name".

2. I cannot agree that the clause can be interpreted as a right for the purchaser to assign all his rights or part of them under the contract. Had this been the parties' intention, why should the expression "the subject matter of the sale" and not the contract be used.

3. I am of opinion that the appeal should be dismissed with costs and advocate's fees.

If, as the majority of the Court have decided Section 4 of the contract means the transfer of the penalty clause, then I fail to understand why an agreement entered into between two parties to transfer the contract need be ratified by one of such persons, such person having already agreed to a transfer in the contract itself.

Delivered the 8th day of December, 1931.

In the Supreme Court Sitting as a Court of Appeal.

C. A. No. 25/31.

BEFORE:

Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

The Anglo-Palestine Bank, Jaffa	APPELLANT.
VS	
Bank der Tempelgeselshaft Ltd.	RESPONDENT.
Isaac Ichilov	THIRD PARTY.

Consruction of contract of Musaqaa — Consent to grant priority to other creditor over seized goods.

Appeal from the judgment of the District Court of Jaffa, dated the 11th January, 1931.

JUDGMENT.

The decision of the Lower Court that the contract between Appellant and the Third Party cannot be construed as a contract of Musaqaa must be upheld and the appeal against such judgment dismissed with costs and advocate's fees assessed at £P. 2.

With regard to the cross-appeal from the judgment that the Anglo-Palestine Bank Ltd. are entitled to priority in the sum of £P. 550, it is stated on page 7 of the Arabic Record that the Defendant expressed his consent in favour of Plaintiff, that the latter should have the right of priority of the price of the seized fruit in the sum of £P. 5000 only and Plaintiff agreed to the suggestion.

In view of this consent of the Bank der Tempelgesellschaft the cross-appeal must be dismissed with costs and advocate's fees assessed at £P. 2.

Delivered the 20th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 37/31.

BEFORE:
The Senior Puisne Judge, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Raphael Turjeman — APPELLANT.

vs

Saleh Salah Hamdan. — RESPONDENT.

Action for breach of contract for sale of land — Claim for return of monies paid as deposit — Civil procedure — Disagreement of two judges — Third judge called in for opinion — Discharge of burden of proving claim.

Appeal from the judgment of the District Court of Jaffa, dated the 10th February, 1930.

JUDGMENT.

The Appellant, Raphael Turjeman, and others entered into a contract to buy land from the Respondent and others.

The sale not having been carried out, the Appellant and the other intending purchasers brought an action in the District Court of Jaffa against the Respondent for the return of £E. 100 deposit paid to the Respondent in respect of the purchase money and £E. 5000 liquidated damages for failure to carry out the contract.

The Respondent filed a counterclaim for £E. 150 being £P. 250 liquidated damages prescribed by the contract, less £E. 100, the amount paid by the Appellant in respect of the purchase money.

At the first hearing, the Court was constituted by Judge Seton as President, and Judge Ragheb Eff. Khaldi and Judge Michael Eff. Mani. Subsequently, Judge Seton was unable to sit, and the hearing was concluded by the other two judges. As they differed in opinion, Judge Copland, who had by then succeeded Judge Seton as President of the District Court of Jaffa, was called in, and his opinion was taken upon the question upon which the other two Judges were unable to agree.

On appeal this Court held that the procedure adopted in the District Court was not in accordance with the law, and when two judges disagree "it must be held that the Plaintiff has failed to satisfy the Court with regard to his claim, and that therefore judgment should be entered for the Defendant".

The case was accordingly returned for a formal judgment to be entered for the Defendant.

Accordingly, on the 10th February, 1930, the District Court of Jaffa gave judgment formally dismissing the Appellant's action.

Against that judgment this appeal has been brought.

Upon referring to the judgment of the District Court of the 22nd August, 1926, it appears that while the Court was divided upon the question whether or not the Appellant had committed a breach of the contract, it was unanimous in finding that the Respondent had committed a breach.

It appears, however, from the separate judgments of the learned judges, that they were not agreed as to the nature of the breach committed by the Respondent, or even as to the obligations imposed upon the parties by the contract.

Under these circumstances, the Appellant cannot be held to have proved his case to the satisfaction of the Court.

The appeal must be dismissed and the judgment of the District Court dismissing the Appellant's action affirmed with costs.

Delivered in presence of Appellant and in absence of Respondent the 11th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 136/31.

BEFORE:
The Chief Justice, Baker, J. and Khayat, J.

IN THE CASE OF:

Meyer G. Shapiro — APPELLANT.

vs

Reuben I. Frankel — RESPONDENT.

Failure to pay instalments of purchase price stipulated in contract—Action for damages for breach—Disagreement of two judges constituting Court—Sections 11, 12, Land Transfer Ordinance, 1920—Validity of disposition of land — Agreement to sell distinguished from disposition of property.

Appeal from the judgment of the District Court of Jaffa, dated the 18th day of October, 1931.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa dated the 18th October, 1931, dismissing Appellant's claim for £P. 247.138 mils.

The appeal arises out of an agreement dated the 12th Shevat 5685 (approximately February, 1925) whereby the Appellant agreed to sell three plots of land to Respondent for the price and upon the conditions therein contained. The Respondent failed to pay the instalments of the purchase money stipulated in the contract and was sued by Appellant for the amount of the penalty which both parties agreed to pay if either party committed a breach of the terms of the contract.

The Jaffa District Court on the 13th day of February, 1928, gave judgment in favour of the present Appellant for the sum of £E. 1000 and costs, being the agreed penalty to be paid in case either party failed to fulfil his part of the contract. Against this judgment the present Respondent appealed, and the Court of Appeal in its judgment dated 30th September, 1929, set aside the judgment of the Jaffa District Court and decided that Appellant's remedy was under Clause 4 of the contract and not under Clause 5 of the contract as applied by the Jaffa District Court, the penalty claimed under which was reduced by the Appellant from £E. 2,000 to £E. 1,000 for which the District Court gave judgment.

Clause 4 of the contract reads as follows:—

> "If the 2nd party (the Respondent) will build a house on the land and fails to pay any of the promissory notes, the 2nd party as from today entitles the 1st party to take the rent of the said house until payment of the debt in full by the 2nd party."

In compliance with the before-mentioned decision of the Appellate Court the present Appellant pursued his action before the Jaffa District Court, claiming a certain sum of money under the said Clause 4 of the contract.

After hearing the parties the two Judges being of opinion:—

> "that as the claim was for the price of land sold outside the Land Registry, therefore no claim could be based on the bills given in consideration of the said price in accordance with Section 11 of the Land Transfer Ordinance, 1920-21 and the Proclamation of 30th day of August, 1919, and that accordingly the action should be dismissed".

The correct reference is to Section 12 of the Transfer of Land Ordinance, 1920 (Gazette of the 1st day of October 1920, p. 3). The other Judge did not agree that the transaction was a disposition of immovable properties effected outside the Land Registry and that the merits of the claim should be entered into.

The Appellant having failed to satisfy the Court, his claim was dismissed and against this judgment the Appellant now appeals.

The question, therefore, for this Court to decide is whether the contract in question is a disposition of land within the meaning of Section 2 of the Transfer of Land Ordinance, 1920, and whether having been made without the consent of the Administration, it is null and void by virtue of Section 12 of that Ordinance.

It is true that the contract in paragraph 1 thereof states that the first party sells and delivers and the second party buys and receives the plots of land. In paragraph 2, however, it is stated that the party "undertakes to pay the purchase money half on the signing of the contract and half by four instalments at intervals of 6 months". Again, in paragraph 8 it is stated that "the first party undertakes to confirm the sale through the Land Registry of Jaffa so that the second party shall be able to receive a kushan in his name"; and the following paragraph (par. 9) provides that "if the second party will pay in the course of the following days the remainder of the price in cash the first party undertakes to obtain the confirmation of the sale six months thereafter in the Land Registry". The whole of the purchase price has not been paid, neither has the land in question been transferred to the purchaser, the present Respondent.

Taking the whole contract in its plain, ordinary and popular sense, we are of opinion that the contract was an agreement to sell and not a disposition of immovable property within the meaning of Section 2 of the Transfer of Land Ordinance, 1920. It would also appear that this Court in its previously mentioned judgment No. 119/28 of the 30th September, 1929, impliedly held that the contract was valid.

Accordingly, we consider that the decision of one of the learned judges that the contract was void was wrong, and that the appeal must be allowed, the judgment of the Lower Court quashed, and the case remitted to the District Court for the Court to comply with the decision given in this Court's judgment of the 30th September, 1929, and to try such issue mentioned therein on its merits.

Costs to follow the event.

Delivered the 20th day of June, 1932.

Pub. Note: Followed in C. A. No. 82/33.

In the Supreme Court sitting as a Court of Appeal

C. A. No. 27/32.

BEFORE:

Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Ishak Gabrilovitch — APPELLANT.

vs

Dibeh Samburi & Others — RESPONDENTS.

Agreement to sell land to which consent of Government not obtained held to be void—Supplement to such agreement also void— Action for return of monies paid under contract.

JUDGMENT.

In a judgment of this Court, Civil Appeal 105/28, it was held that an agreement to sell property to Appellant to which the consent of the Government was not obtained was null and void, and that it follows that every clause contained in the contract was null and void.

Subsequently the present Appellant brought an action for the return of monies alleged to have been paid for the price of land the subject matter of the contract.

Respondent alleged that there was a supplement to the said agreement which provided inter alia that Appellant had no right to reclaim the price of the land paid to the Respondents, and the Lower Court held that inasmuch as the beforementioned supplement was not before the Court of Appeal when the contract was rendered null and void therefore they could not consider the same to be avoided and by virtue of the supplement to the agreement dismissed Appellant's claim.

Now this Court in the beforementioned appeal, C. A. 105/28, decided that the contract was void and whether the supplement to the contract (which was ancillary thereto) was before the Court or not, it must necessarily follow that such supplement is also void and that the Lower Court was wrong in deciding otherwise.

Respondents allege that land was actually conveyed by Appellant in satisfaction of the monies now claimed; accordingly the judgment of the Lower Court must be quashed and the case returned for the said Court to enter into the merits of Respondents' contention and to give judgment thereon.

Costs to follow the event.

Delivered the 11th day of July, 1934.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 53/32.

BEFORE:

The Acting Chief Justice, Khayat, J. and Khaldi, J.

IN THE CASE OF:

Saleh Mohammed Shibl — APPELLANT.

vs

Haj Khalil Taha — RESPONDENT.

Agreement for the sale of land to be transferred in three years held valid — Agreement varied by subsequent letter but penalty clause not varied — Interest not payable together with penalty unless expressly provided for.

JUDGMENT.

On the 9th day of February, 1929, an agreement was entered into between the Appellant, Saleh Mohammed Shibl and the Respondent Haj Khalil Taha, whereby the former agreed to sell 7,000 dunams of land to Respondent for LP. 14,564. In the second paragraph of the agreement the Appellant undertook to transfer these dunams to Respondent in accordance with the plans to be prepared within three years from the date of the contract. From this and the following paragraphs it is clear that this agreement is an undertaking to sell and not a security for a debt. The validity of this agreement was upheld by this Court on the 1st day of August, 1931.

As the Appellant did not carry out his obligation within the expiry of the period prescribed for the transfer he is liable to pay the penalty and the legal interest.

It is true that this Court has decided that a penalty and interest are not payable at the same time in the absence of any provisions to that effect in the agreement. As in this agreement, however, there is a provision for the payment of interest in addition to the penalty such interest becomes part of the agreed penalty for which the Appellant is liable.

On 22nd July, 1929, the parties varied this agreement by excluding from it three plots of land amounting to approximately half the land included in the agreement.

The District Court, has upon this ground reduced the amount payable and penalty by one half.

We are unable to see any justification for this course.

The letter of 22nd July, 1929, which embodies the variation

in the terms of the original agreement, contains no reference to any modification of the penalty clause, and in the absence of any such reference, we must hold that the clause remains in force as originally framed.

The appeal by the Appellant must therefore be dismissed and the Respondent's cross appeal allowed, and the judgment of the District Court varied accordingly.

The Appellant will pay the costs of the appeal.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 86/32.

BEFORE:

The Acting Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Eliezer Bernstein — APPELLANT.

vs

Yehuda Hayusman
Herzel Hayusman — RESPONDENTS.

Liability under contract—Interest held payable on amount due under agreement—Interest payable from date of commencement of action.

Appeal from the judgment of the District Court of Jaffa, dated the 10th day of May, 1932.

JUDGMENT.

In Clause 3 of the contract the sum due from the Appellant Bernstein to Isaac Hayusman on account of the latter's share in the Safria land transaction is agreed, for the purpose of the contract, to be £P.750. The last paragraph of Clause 3 makes it clear that the parties were alive to the possibility that when accounts were taken a question might arise as to whether such sum was actually due from Bernstein, and it was provided that any difference in that respect should not affect the mutual rights of Bernstein and the purchasers, whatever may be the position as between Bernstein and Isaac Hayusman under the contract. Bernstein further protected himself by obtaining a memorandum from Isaac Hayusman, whereby the latter undertook to repay any amount found to have been paid in excess.

We hold therefore that the Appellant is liable under the contract, so far as the purchasers are concerned.

With regard to the sum of £P. 119.600 for expenses, receipts were produced for the whole, except for a sum of £P. 10 travelling expenses, and no objection has been taken by the Appellant to this item.

Bernstein's appeal is therefore dismissed. With regard to the cross-appeal, we hold that the liability under Clause 8 of the contract is a liability to repay purchase money and expenses and is not an undertaking to pay damages; and accordingly the Respondents are entitled to judgment for interest thereon as from commencement of action to date of payment.

The judgment of the District Court will be varied accordingly.

Costs will be paid by the Appellant Bernstein including £P. 3 advocate's fees and expenses.

Delivered the 13th day of January, 1933.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 95/32.

BEFORE:

Baker, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Advocate Suleiman Abu Ghazale — APPELLANT.

vs

Nabla bint Awad Habab — RESPONDENT.

Penalty clause contained in contract for transfer of land—Construction of contract — Liquidated damages for breach of contract disallowed by trial Court but allowed by Court of Appeal—Return of purchase monies paid.

Appeal from a judgment of the District Court of Jaffa, C. D. C. Ja. No. 140/32.

JUDGMENT.

By virtue of a contract dated 28th November, 1931, entered into between the Respondent of the one part and Appellant of the other part, the Respondent agreed to transfer to Appellant certain lands for the consideration therein mentioned, and failing Respondent's transferring the said land or to comply with any of the other obligations entered into by him under the said contract, to pay a sum of £P. 200.— by way of penalty. By virtue of Clause 6 of the agreement, Appellant was enabled to call upon the Respondent to sign a power of attorney appointing any person

nominated by him to transfer the land on behalf of the vendor. Appellant called upon Respondent to attend at the Notary Public office to sign such power of attorney, but Respondent failed to comply, and Appellant brought this action suing for a return of the moneys paid, and the penalty contained in Article 9 of the agreement.

The judges of the Lower Court gave judgment in the Appellant's favour for the return of the purchase money but disagreed as the question of the payment of the penalty. We are satisfied that the Respondent failed to comply in accordance with the before-mentioned agreement, and that the Appellant is accordingly entitled to the penalty contained in Article 9 of the agreement.

The judgment of the Lower Court is accordingly amended to include judgment for the Appellant for the sum of £P. 200.— in addition to the sum of £P. 225.— awarded.

Costs of appeal to be paid by Respondent together with advocate's fees.

Delivered the 28th day of February, 1933.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 103/32.

BEFORE:

The Acting Chief Justice, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Bella Eisenmesser — APPELLANT.

vs

Raphael Shottland — RESPONDENT.

Agreement to transfer house — Provision for payment of liquidated damages — Action for refund of deposit paid — Attachments not removed and werko not paid on date set for transfer — Inability of party to complete treated as breach of contract.

JUDGMENT.

It is clear that the Appellant was entitled to prove that the Respondent was not in a position to effect the transfer owing to the existence of attachments upon the land and that there was a claim for werko outstanding.

That such attachments existed is not now denied and the letter from the Respondent to the Appellant dated March 9th, 1932, makes it clear that the Respondent had no intention of removing

these attachments except with the moneys to be paid by the Appellant on completion.

In view of that letter there was no reason why the Appellant should have gone through the form of attending in the Land Registry on March 21st.

On the evidence before us it is clear that the Respondent failed to fulfil the terms of the contract in that he was not in a position to complete on the date fixed.

The judgment of the Lower Court is therefore set aside and the case remitted for hearing of any further evidence and/or any arguments that the parties may desire to submit and for a fresh judgment to be given.

Costs will follow the event.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 128/32.

BEFORE :

Baker, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Nissan Katz — APPELLANT.

vs

Dr. Ing. W. Stross — RESPONDENT.

Breach of contract—Deposit of money guaranteeing due performance considered as provision to pay damages—Art. 106, Civil Procedure Code — Failure to send Notarial Notice demanding fulfillment of contract.

Appeal from the judgment of the District Court of Jaffa, dated the 26th February, 1932. Leave to appeal was granted by the President of the District Court on the following point of law:

> In the circumstances of the case, was it necessary in law for the Respondent to send a Notarial notice to the Appellant in accordance with Article 106 of the Civil Procedure Code?

JUDGMENT OF THE DISTRICT COURT.

In our opinion, the sum of £P. 40 which was given by the Appellant to the Respondent as a guarantee for the performance of the contract in question cannot be kept by the Respondent unless he has sent a Notarial notice to the Appellant asking him

to fulfill the terms of the contract, and that in accordance with Article 106 of the Civil Procedure Code, for it appears clearly from the contract and from the statements of the parties that the sum of £P.40 should be considered as liquidated damages for the Respondent in case the Appellant fails to fulfill the terms of the contract.

The judgment of the Magistrate's Court is therefore amended to the effect that the Respondent is to pay to the Appellant the sum of £P.40 with costs and £P.2 advocate's fees.

JUDGMENT OF THE COURT OF APPEAL.

We are satisfied that the sum of £P.40 which was given by the Respondent to Appellant as a guarantee for the performance of the contract was in fact intended to be damages for the non-performance of the contract and therefore cannot be retained by the Appellant unless he complies with Article 106 and sends a Notarial notice to Respondent requesting him to fulfil his contract. Accordingly the judgment of the Jaffa District Court of the 26th February, 1932, which reversed the Magistrate's decision in this case, is affirmed and the appeal is dismissed with costs and advocate's fees.

Delivered the 25th day of October, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 130/32.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Abu Ja'afar — APPELLANT.

vs

Mustapha Bitar and Another — RESPONDENT.

Action for damages for breach of contract — Failure to obtain consent of Government to transfer of waqf land — Section 2, Transfer of Land Ordinance, 1920—Binding authority of judgment of Court of Appeal.

Appeal from a judgment of the District Court of Jaffa affirming an award of damages for breach of contract made by the Magistrate. The contract, the subject matter of this appeal had been previouly declared by the Court of Appeal in C.A. 95/31 to

be a disposition of land within the meaning of the Land Transfer Ordinance, 1920, and therefore void for having been made without the consent of the Government. The relevant clauses of the contract are as follows:

"4. Both parties agree to go to the office of the waqf administration at Jaffa to complete the sale and transfer the said orange grove to the name of the second party according to the procedure adopted in the said administration. This transaction should be done at once on the demand of the party concerned.

6. Both parties hereby agree to hold themselves liable against each other for the payment of £P. 100 in the event of non performance of the stipulations or infringement of one of the conditions, by way of liquidated damages."

JUDGMENT.

While if the question of the validity of the agreement dated the 16th January, 1931, were left to this Court for determination, we should undoubtedly hold that it was valid as an agreement for sale, which is not a disposition of land within the meaning of Section 2 of the Land Transfer Ordinance, 1920, we are bound to follow the judgment of this Court in Kemal Abu Ja'afar and Another vs Rajat Mustapha Bitar and Another (C.A. 95/31) in which the agreement was held to be void.

The appeal must therefore be allowed, the judgments of the District Court and the Magistrate's Court set aside, and the Respondent's action dismissed with costs here and below including £P. 2.500 advocate's fees and costs.

In the District Court of Jaffa.

C. D. C. Ja. No. 142/32.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

Hashem Abu Khadra — PLAINTIFF.

vs

Dimitri Tadros — DEFENDANT.

Agreement made before Notary Public — Bankruptcy of party to agreement—Waiver of rights arising on breach of contract—Variation of agreement by letter.

JUDGMENT.

This is an action for the sum of £P. 6000 later reduced to £P. 2000, brought by Plaintiff Hashem Abu Khadra against the Defendant, Dimitri Tadros.

The claim is based on a series of transactions, agreements and letters, in which the parties were respectively concerned. In order to understand the position, I propose shortly to go into these various transactions.

On the 5th November, 1929, the Defendant obtained judgment against the heirs of Ramadan Abu Khadra which included the Plaintiff, Hashem, for the sum of £P. 15,000. The Defendant, I presume, being doubtful whether he would recover the £P. 15,000 entered into negotiations with the heirs of Ramadan Abu Khadra and on the 14th April, 1930, the parties entered into an agreement which was reduced into writing and duly executed before the Notary Public. By this agreement the heirs of Ramadan Abu Khadra agreed to execute a mortgage within three months for £P. 12,000 on their Barka lands in favour of the Defendant, and so the Defendant agreed to compromise his judgment from £P. 15,000 to £P. 12,000; £P. 11,000 on the mortgage and a further cash payment of £P. 1000 to be paid to the heirs of Ramadan Abu Khadra, making a total of £P. 12,000.

On the same day, i.e. 14th day of April, 1930, the Defendant gave a letter to Hashem Abu Khadra, and this letter has been the cause of all the trouble in this case.

Written possibly without the knowledge of his lawyers, the Defendant wrote to Hashem Eff. that in consideration of this mortgage he would pay certain debts of Hashem Eff. amounting to £P. 6000. I will deal with this letter later.

On the 15th day of June, 1930, the Plaintiff in this case was declared bankrupt, and it therefore became impossible for him to carry out the terms of this agreement. Barclays Bank, a few days later, intervened and put in a claim for £P. 4000, which further complicated the transaction. Negotiations have taken place between all the parties concerned, and on the 4th August, 1930, a second agreement was signed. This agreement was entered into between the heirs of Ramadan Abu Khadra, with the exception of Hashem, who being bankrupt could not be a party, Achooza Aleph Co. of New York and the Defendant. This agreement provided that Barclay's Bank's claim should be paid, that a mortgage for £P. 12,000 on Barka lands, excluding Hashem's share, should be executed in favour of the Defendant, and that the sale of the property by the

heirs of Ramadan Abu Khadra other than Hashem should be effected to the New York Co. subject to the mortgage. There was a further clause in this agreement by which the Defendant agreed to release the plaintiff upon the guarantee of the co-heirs that at least 4600 dunams should be available.

On the day fixed for completion of this mortgage the parties were not ready. Notarial Notice was sent, which was not complied with, but finally on the 9th day of February, 1931, the heirs of Abu Khadra executed this mortgage in favour of the Defendant for £P. 12,000, and so they carried out the terms of the agreement which they have contracted to do. It is true that the mortgage was executed many months after the date fixed for completion, but the Defendant by accepting it, has waived his right to rescind.

These are the facts which are not disputed.

We now have to decide whether the Defendant is liable to pay to the Plaintiff the sum of £P. 2,000 in accordance with the letter of 14th day of April, 1930. The Plaintiff contends that the force of this letter did not expire on the declaration of bankruptcy of Hashem Abu Khadra, nor did it expire on the execution of the second agreement with regard to the mortgage. The Defendant, on the other hand, says that the undertaking in the letter had expired on the declaration of bankruptcy of Plaintiff, since the Plaintiff could no longer carry out this agreement, and on the execution of the second agreement, the letter certainly ceased to have any effect. The grounds on which he relies are that the second agreement is of a different nature from the first agreement and the Defendant has on many occasions asked for the return of this letter which has never been granted.

Now, as to this letter of the 14th day of April, 1930, so far as I can see, there was no reason whatsoever that its terms should not have been included in the terms of this first agreement. It was a perfectly simple matter to do so, and had it been done there would have been no dispute between the parties. The only reason I can see for not including it is this morbid passion which is so common in this country of persons to endeavour to complicate even the most simple transaction or to describe a transaction as something other than it really is. They will not of their own accord throw their cards on the table, and when they do not do so, they should not be surprised if there will be something wrong.

I say quite frankly that this case has given me a great deal of trouble in deciding whether or not this letter of the 14th day of April, 1930, was a part, and had effect together with the second

agreement. Taking all the circumstances into consideration I am of opinion that it did. The Defendant got the security, though not quite the same, which he would have got under the first agreement. It was the best which he could get under the existing circumstances.

We must remember that when the Plaintiff's bankruptcy was annulled he himself threw his share into the mortgage, though not asked to do so, thereby increasing the Defendant's security.

The Plaintiff had agreed to mortgage his share to the Defendant under the first agreement, and the moment he was capable of doing so, he transferred his share to the Defendant.

We are, therefore, of opinion, though as I have said before the case was a difficult one to decide, that this letter of the 14th day of April, 1930, still holds good.

Judgment against the Defendant for the sum of £P. 2,000 with costs and £P. 6 advocate's fees.

Dated the 20th day of December, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 176/32.

BEFORE:

The Acting Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Heirs of Habib Raji Aijub — APPELLANTS.

vs

Sheikh Suleiman Taji Farqui — RESPONDENT.

Agreement for the sale of land — Payment of purchase monies by instalments — Agreement altered by letter — Failure to pay werko and tithe as breach of contract.

Appeal from the judgment of the District Court of Jaffa dated the 22nd November, 1932.

JUDGMENT.

On the 12th November, 1929, the Appellants, the sons and daughter of the late Habib Raji Aijub, entered into an agreeement with the Respondent, Sheikh Suleiman Taji Farqui, for the sale by the Appellants to the Respondent of four plots of land therein specified. Clause 2 of the agreement provided that the transfer should be registered within 12 months from the date of the agreement. Clause 4 contained provisions for payment of

the purchase money by instalments. Clauses 7 & 8 prescribed penalties for non fulfilment of the contract, the provisions of Clause 8 being as follows:—

> "The second party (the Respondent) shall pay to the first party (the Appellant) £P. 2,500 as liquidated damages without the necessity for a notice if he commits a breach of all or part of his undertaking under this agreement, and shall not be entitled to recover the advance received by the first party".

On the 6th August, 1930, the terms of the agreement were modified; the alterations being embodied in letters exchanged by the parties. The letter signed by the Respondent is in the following terms:

> "I beg to bring to your notice that I am willing that your transfer in the Land Registry of the land sold to me by you situated at Idnibbeh village in accordance with an agreement dated 12th November, 1929, be effected on 13th February, 1932, in lieu of 13th November, 1930. Moreover I declare that I am compelled and required to pay to you the sum of £P. 400 by the end of February, 1931, out of the price of the land sold. On transfer, I will pay a third of all the remaining price of the land sold. The balance will be paid after the expiry of a year from 13th February, 1932, which is the date fixed for effecting the transfer with the understanding that the remaining stipulations of the agreement remain in force".

The Respondent failed to pay the sum of £P. 400 by the end of February, 1931, as required by this letter.

By Notary Public notice dated the 2nd March, 1931, the Appellants called upon the Respondent to carry out his obligation in the following terms:

> "(1) to pay £P. 400 within three days from the date of this notification, otherwise you will be considered as having violated your obligation and we shall hold you liable to pay £P. 2,500 as liquidated damages; and
>
> (2) you shall not be entitled to recover anything of the advance as provided by Clause 9 of the agreement because yon will be regarded as having retired from and violated the sale".

The Respondent having failed to comply with this notice, the Appellants brought an action in the District Court claiming

£P. 2,500 on the ground that the Respondent had committed a breach of the agreement: (a) by failing to pay the sum of £P.400 by the end of February, 1931; and (b) failing to pay the tithe and werko due from him after 1929 under the terms of the original agreement.

By its judgment dated 22nd of November, 1932, the District Court dismissed the Appellants' action on the ground that (1) as regards the payment of werko, the date for payment was not fixed; and (2) as regards non-payment of the £P. 400, the penalty clause in the original contract did not apply, as the payment of the sum of £P. 400 was not a term of the original agreement.

Against this judgment the Appellants are now appealing.

Taking first the question of non-payment of the sum of £P. 400 payable under the letter of the 6th August, 1930, it seems to us clear that the words of that letter "with the understanding that the remaining stipulations of the agreement remain in force", mean that failure to fulfil this obligation under the letter is to render the Respondent liable to payment of the penalty prescribed by Clause 8 of the original agreement.

We hold, therefore, that the appeal must be allowed, the judgment of the District Court set aside and judgment entered for the Appellants for £P. 2,500 and costs, including £P. 3 advocate's fees.

In the District Court of Jaffa.

C.D.C.Ja. No. 335/32.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

Meyer Shapiro — PLAINTIFF.

vs

Reuben Frankel — DEFENDANT.

Agreement for sale of land – Acceleration clause in contract—Default in payment of purchase price—Meaning of word "pics"—Rules of Mejelle applied to agreements for sale—Estoppel by conduct—Right of rescission of contract – Counterclaim barred by laches.

JUDGMENT.

This is an action arising out of an agreement dated February, 1925, whereby the Plaintiff agreed to sell three plots of land to the Defendant for a certain price.

Half of the purchase price was to be paid in cash on signing the contract, and was in fact so paid, and the balance was to be paid in four unequal payments by means of four promissory notes at intervals of six months. One of the promissory notes was paid, but default was made on the other three. There was the usual clause in the contract that if one of the promissory notes is not paid when due, all the others will fall due at once.

Now, the case has already been twice in the District Court and twice before the Court of Appeal, and it is now for the third time before this Court.

By the last judgment of the Court of Appeal* the case was sent back to us to be tried on the basis that this agreement was a valid agreement for sale and was not a disposition of immovable property within the meaning of the Transfer of Land Ordinance.

It was agreed on the 27th day of December, 1929, by the Defendant that he should pay to the Plaintiff the sum of £P. 11 per month on account of the rent, which under Clause 4 of the contract, the Plaintiff was entitled to receive.

It is admitted that two such instalments of £P. 11 each were paid. Nothing has been paid since, though in May, 1930, tender of £P. 8.690 was made to the then attorney for the Plaintiff who returned the amount referring the Defendant to Plaintiff in person. In any case whether calculated on the promissory notes or on the instalments, the total balance of the purchase price named in the contract has been long overdue.

Now, the terms of the agreement for sale are very important. The agreement is for the sale of three plots of land designated by numbers, said to contain 1272¼ pics, the price being 55 PT. per pic, and the total purchase price payable being £E. 699.740.

The defence now argues that the actual area is wrong. They claim that it only comes to 1174 pics. They also claim that these pics in the contract must be the normal pics and not as claimed by the Plaintiff, Tel-Aviv pics, the land being situated in Tel-Aviv. In our opinion this point is unimportant. The question of deficiency only arises, as argued by the Plaintiff, when the land comes to be transferred. Even supposing we are wrong in that view, we still hold that the actual area which has been transferred cannot now

* Reported ante p. 431.

be queried. This land has been in possession of the Defendant since the date of the contract or shortly after, i.e. 1925. He has built a house on it and has been in occupation of that house since then. He cannot now be held to say "I am not going to pay the price which under the contract I had to pay".

We see no reason why the rules of the Mejelle should not be applied to agreements for sale as well as to actual sales. If the Defendant found that the area was less than that which he had to have, he had the option to rescind. He did not rescind, but has proceeded to enjoy the property as if it were his own. He is, therefore, now estopped from denying the area.

The amount due has been queried by the Defendant. He argues that there were certain taxes which he had to pay, which were properly payable by the vendor. What other claims the Defendant may have is a matter for a counterclaim. There is no counterclaim in this action. For six years, since this litigation began, there has not been any counterclaim. We therefore see no reason why at this late period of these proceedings we should grant the Defendant's request in adjourning this case to enable him to enter a counterclaim. He, of course, has his remedies, but not by means of a counterclaim now.

In conclusion we are of opinion that the defence has no merits.

We therefore give judgment for the Plaintiff for the amount of the claim namely, £P. 247.138 together with interest on the full amount from the date of contract, the full amount being £P. 289.138, interest of 9% on the amount of £P. 247.138 from 27th day of December, 1929, together with all costs incurred both at the original hearing in this Court and in the Court of Appeal, and of the second hearing of this present case in this Court, and £P. 10 advocate's fees in respect of all appearances, the interest not to exceed the capital.

Dated the 24th day of March, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 12/33.

BEFORE :

The Chief Justice, Baker, J. and Khayat, J.

IN THE CASE OF :

Nathan H. Gordon
Asher Pierce — APPELLANTS.
vs — RESPONDENTS.
Nissan Aaronovitch
Menucha Valero — RESPONDENTS.
——— — APPELLANTS.

Liability for damages and interest—Art. 1146, French Civil Code—Art. 106, Civil Procedure Code — Difference between French and Ottoman law re service of Notarial notice — Jurisdiction of Courts to decide re reasonableness of time given by Notarial notice — Finding of fact not disturbed by Court of Appeal—Liability of aval giver—Limitation of actions re bill of exchange—Secs. 56, 57, 58, 95 (1), Bills of Exchange Ordinance, 1929—Absence of delivery of bill not a defect of form.

JUDGMENT OF THE CHIEF JUSTICE AND BAKER, J.

Article 1146 of the French Civil Code runs as follows:—

"Les dommages et intérets ne sont dûs que lorsque le débiteur est en demeure de remplir son obligation, excepté néanmoins lorsque la chose que le débiteur s'était obligé de donner ou de faire ne pouvait etre donné eou faite que dans un certain temps qu'il a laissé passer".

This I translate as follows:—

"Damages and interest are ony due when the debtor is in delay in fulfilling his obligation, except nevertheless when the thing which the debtor contracted to deliver or to do could only have been given or done within a fixed time which he has allowed to pass".

Article 106 of the Ottoman Code of Civil Procedure runs as follows:—

"A claim for damages on account of the non-performance or the delay in performance by a party to a contract of a condition in the contract to do some specific act or to deliver a specific quantity of goods at a place fixed shall not be allowed unless the party making the claim have first duly served upon the other party through the proper channel a

protest, that is, an official notice requiring such party to perform the said condition".

It is obvious that the Ottoman legislator made a marked departure in his article from the text of the French Civil Code and that it is useless, therefore, to consider commentaries upon the French Code in connection with the interpretation of this article of the Ottoman Code.

Inasmuch as by the latter, the Public Notary notice requires the party in default to perform the condition in the contract which he has failed to perform, in Civil Appeal No. 80/27, Meyer Shapira v. Moshe Shvilli, the Court clearly held that it was within its competence to decide whether the delay given by a notarial notice for fulfilment of the condition was reasonable or not.

In Civil Appeal No. 83/32, Yusuf el Sherif v. Sami el Huseini, the District Court held that the period of the notice was unreasonable and insufficient for completing one of the conditions of the contract, namely, the registration of the transfer. It is, therefore, clear that in the present case the District Court was right in holding that it must decide whether the time given by the Notarial notice was reasonable or not. This was a question of fact; the finding of the District Court upon which it is not for this Court to disturb unless there is evidence that the finding was perverse.

This being so, the question of damages and interest must fail, and the appeal must be dismissed with costs to include £P. 6.- advocates' fees.

As to the cross appeal by Mrs. Menuha Valero on her own behalf and on behalf of the estate of Menuha Valero, Mrs. Valero was sued as the giver of an aval and claims that in that capacity she is an indorser of the bill, an action against whom is barred by Section 95 (1) of the Bills of Exchange Ordinance after the expiration of one year.

She bases her case on Section 56 which provides that a person signing a bill otherwise than as a drawer or acceptor incurs the liabilities of an indorser to a holder in due course.

Now by Section 57 an aval may be written on a bill or given by a separate document; and if the cross-appellant's argument is correct, an aval, if written on a bill, renders the guarantor liable as an indorser whose liability is statute barred after the expiration of one year, while an aval given by a separate document does not involve similar consequences, and leaves the period of prescription at five years. The fact is that Sections 56 and 58 of our Ordinance

are taken directly from Sections 56 and 57 of the Act of the Imperial Parliament entitled the Bills of Exchange Act, 1882, and that the Legislature of Palestine, so as to continue in this territory the continental practice of guaranteeing par aval, interpolated what is numbered in our Ordinance as Section 57 between the reproduction of the English Sections 56 and 57 which we number 56 and 58.

Inasmuch as the stranger who under the English Act becomes liable as indorser by signing the bill, does not include an aval-giver because no such person is provided for in English law, it cannot be said that the mere interpolation of Section 57 in our Ordinance has the effect, in the cases where the aval-giver's guarantee is written on the bill itself, of importing the consequences contemplated by Section 56 which is taken from an Act which makes no provision for guarantee by aval.

Finally I hold that the absence of delivery is not a defect in form within the contemplation of Section 57 (3) and so is not a good defence available for the giver of the aval. For these reasons the cross appeal must be dismissed with £P. 6.- advocate's fee and costs.

JUDGMENT OF KHAYAT, J.

The circumstances in Civil Appeal No. 80/27 are quite distinguishable from those in our present case. In that case no period was fixed in the contract within which the registration was to be effected as is evident from the appeal judgment of this court.

Again, in Civil Appeal No. 83/32 no definite period for the transfer was agreed upon. See the judgment of the District Court in this regard.

The Court in both cases had to consider whether the time limit fixed by one party without the consent of the other was or was not in the circumstances reasonable and sufficient, inasmuch as the other contracting party put up the plea that the period fixed by the notice was insufficient for effecting the transfer owing to certain difficulties known to his opponent at the date of the contract.

Thus in the former case, no time was fixed in the agreement within which the registration was to be effected and in the latter the agreement contained a provision for the registration of originally unregistered land and there was no time limit in the contract for such registration to be effected by the Defendants' predecessor in title.

In the present case, there is a period fixed in the contract itself and the notice which gives a delay of 48 hours is merely an act of grace.

The two judgments cited can, therefore, in my opinion, have no application to the appeal under review.

Delivered the 4th day of March, 1935.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 34/33.

BEFORE:

The Chief Justice, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Ismail Abu Lifta — APPELLANT.

vs

Sami El Husseini and Others — RESPONDENTS.

Action for breach of contract — Failure to complete sale in Land Registry within time prescribed by contract — Absence of Land Registry file good cause for non-completion — Cause outside of party's control — Article 108, Civil Procedure Code.

JUDGMENT.

We are satisfied that there was evidence before the District Court upon which it could come to the conclusion that failure to complete the transaction was due to the file being in Jerusalem,— a cause outside the control of the Respondents as contemplated by Article 108 of the Civil Procedure Code.

The appeal is, therefore, dismissed with costs to include £P. 3 advocate's fees.

Delivered the 13th day of December, 1933.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 35/33.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Selim Shuhaiber and Others — APPELLANTS.

vs

Baruch Naeh, Administrator of the Estate of Iskandar Fiani — RESPONDENT.

Contract — Offer to complete not accepted — Action for breach of contract for the sale of land—Failure to complete in Land Registry

within time limited by agreement — Notarial notice served although waived by agreement — Both parties in pari delicto —Recovery by purchaser of amounts advanced to vendors — Land Registrar not the agent of the parties.

JUDGMENT

The agreement dated the 1st day of May, 1925, between the Appellants and Fiani provided for the completion of the transfer on the 1st of August, 1925. Neither party made any attempt to complete on that date.

Subsequently Fiani served two notarial notices on the Appelants and the Appellants served one such notice upon him, calling in each case for completion upon the dates named in the notice.

Each of these notices was an offer to complete the sale upon the terms therein mentioned, but none of these offers was accepted by the party to whom it was addressed. The Respondent appears to have informed the Land Registrar in writing that he intended to accept the offer contained in the Appellants' Notarial notice. But he never made any written communication to the Appellants, and the Land Registrar was not their agent for the purpose of receiving an acceptance of their offer.

It follows that the service of these notices in no way affects the rights of the parties, which are governed by the agreement dated 1st May, 1925.

Neither party fulfilled the obligations imposed upon him by that agreement and hence neither party is entitled to recover under the penalty clause.

The Respondent, however, is entitled to treat the agreement as annulled and to recover the amount paid by him or his predecessor in title in respect of the agreement.

As the agreement imposes no joint liability upon the Appellants, the order of the District Court making the Appellants jointly and severally liable to repay to the Respondent the amount paid by him in respect of the agreement cannot stand, and each Appellant is only liable to repay to the Respondent the amount actually received by him.

The judgment of the District Court is, therefore, set aside and the case remitted for the Court to determine the amount received by each Appellant and to give judgment accordingly.

No order is made as to costs.

Delivered the 1st day of March, 1934.

CO-OPERATIVE SOCIETIES.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 69/25.

BEFORE :

The Chief Justice, the Senior British Judge and Frumkin, J.

IN THE CASE OF :

Joshua Gordon — APPELLANT.

vs

Ephraim Schneiderman
Yehoshua Sorkin — RESPONDENTS.

Failure to pay debts — Cessation of payments as a state of bankruptcy—Application for bankruptcy order—Association consisting of more than 10 persons carrying on business while not registered — Cooperative Societies Ordinance, 1920—Illegal society unable to sue for debt in own name — Principal and agent — Joint and several liability of individual members signing on behalf of Association — Sec. 2 (1), Companies Ordinance, 1921 — Arts 142, 148, Ottoman Commercial Code.

Appeal from the judgment of the District Court of Jaffa, dated 23rd January, 1925, whereby the Appellant's application for an order declaring the Respondents bankrupt was refused.

JUDGMENT OF THE CHIEF JUSTICE.

The Plaintiff, a contractor, applied to the District Court for an order of bankruptcy against the Respondents on a debt resulting from two unpaid negotiable instruments signed by them on behalf of an association of persons engaged in building work, for the supply of building materials. The Association called "The Organization of Artisans of Tel-Aviv", was an Association of more than 10 persons carrying on business for the profit of its members and not registered under the Co-operative Societies Ordinance, 1920.

We are of opinion that the Appellants, when they supplied the building material did so intending to give credit to the Association and not to the persons who signed the instruments on its behalf personally. The debt, therefore, in ordinary circumstances would be the debt of the Association and the liability of the Respondents would arise from their being members of the Association. But this Association was illegal and consequently had no legal existence as a partnership. It could not sue for a debt in its partnership name.

The questions which remain are:—

1. Can the members be held liable as members of an illegal partnership which partnership possessed and purchased materials through its agents although it cannot bring an action because it is not a legal person, yet may not be able to escape liability for its just debts?

2. If not, can those members, who are proved to have authorised the transaction in respect of which the debt arose, be held liable? In my opinion the rule about illegality of partnerships for the purpose of gain of over 10 persons not registered, is borrowed from English law; and that is evident when you look at the form and character of the English law in order to find out the effect of such a partnership, it being on the one hand illegal and on the other a number of associated persons carrying on business and purchasing goods.

It might be supposed that such an Association although not entitled to enjoy the advantages of a legal partnership might nevertheless be made liable for debts. I am, however, unable to find any authority for that position. There remains the second question.

In my opinion, the persons who can be shown to have authorised the purchase of the materials may be made liable but that would be the second liability and not a joint and several liability as would be the case where the contract of purchase was made with a legal partnership.

There was no evidence in the case to show what might be the amount of such liability, and the judgment refusing to give an order of bankruptcy should be confirmed and the appeal dismissed.

JUDGMENT OF FRUMKIN J.

The Association of Artisans in Tel-Aviv had conformed with the requirements of the Association Law of 2nd August, 1325, and Public Notice 131 of 26th August, 1919. Nothing in the Statutes of the Association as submitted to the administrative authorities points to any object of distributing profits among its members. On the contrary, Article 8 of the Statute says that the Association does not intend to make profits and pays no dividends to its members.

The Respondents explain and there is nothing to prove the contrary, that on getting contracts the Association used to transfer the contract to some of the members who got all the profits of it, the Association only getting a percentage of it for its running expenses.

I do not, think we need at this stage go into the question of the legal position of the Association under the Ordinances relating to partnerships, companies and co-operative societies, nor if the transaction giving rise to this action was or was not within the scope of the Association as registered. All that we have to decide now is, whether the Respondents are personally liable for the amount in dispute.

The Respondents did not sign in their private capacity but put their signatures under the seal of the Association. It is clear that credit was given to the Association, which as such could be sued under Article 8 of the Law of 2nd August, 1325. The Respondents can only be liable as members of the Association or directors if they exceed their power, which is not alleged.

The appeal must, therefore, be dismissed.

DISSENTING JUDGMENT OF THE SENIOR BRITISH JUDGE.

The bills upon which this action was brought were signed by the Respondents as agents for the Association of Artisans of Tel-Aviv, and it is clear that it was the Association and not the Respondents personally that the Appellant gave credit.

The Association was registered under the Public Notice No. 131 of 26th August, 1919. Though its objects are stated to include certain cultural purposes, it is clear that its main object was to trade for the benefit of its members; failure to register under the Co-operative Societies Ordinance did not affect its position. The Association remained what it had been before the Ordinance, a collective partnership carrying on business as a co-operative society.

The Association not having been registered under the Companies Ordinance, 1921, Section 2 (1) of which prohibits any association or partnership of more than 10 persons to carry on business unless it is registered, is illegal. Failure to register under that Section rendered it illegal for the Association, which was one of more than 10 persons, to carry on business.

It had in consequence no power to purchase materials from the Appellant, or to draw bills on his behalf. It follows that the Respondents had no authority to sign the bills on the Association's behalf.

Now, in Ottoman law a person who enters into a contract as an agent for a principal who has not authorised him to do so, is himself personally liable on the contract unless the principal afterwards ratifies it, which in the present case is impossible. Hence I hold that the Respondents are liable on the bills unless they had some other defence.

Article 142 of the Commercial Code constitutes inability of a trader to pay his debts a state of bankruptcy and from Article 148 it is clear that cessation of payments is a state of bankruptcy. But the fact that the trader refuses to pay a particular debt on the ground that he is not liable to do so, cannot be regarded as necessarily equivalent to a general cessation of payment of debts.

I hold that the judgment of the District Court must be set aside and the case remitted for the Court, after hearing such evidence as may be necessary, to decide whether the Respondents are in a state of bankruptcy or not.

The decision of this question may involve the further question of the rights of the Respondents against the assets (if any) of the Association but that is not a question which arises on this appeal.

JUDGMENT.

The Court after hearing the advocate of the Appellant, and the Respondents in person, holds by a majority that the judgment of the District Court dated 23rd January, 1925, refusing to make an order of bankruptcy against the Respondents, should be confirmed and the appeal dismissed.

Delivered in absence of the Appellant and in presence of the Respondents this 26th day of November, 1925.

In the District Court of Jaffa.

C. D. C. Ja. No. 178/28.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

Histadruth Mitiashvim Co-operative Society PLAINTIFF.

vs

Adib Bamieh DEFENDANT.

Validity of power of attorney given by Co-operative Society—Proper persons to sign on behalf of Society—Election of officers and council of Society held to be void—Non-observance of Rules of Co-operative Society—Papers remitted by Court to Attorney-General to consider prosecution.

JUDGMENT.

A preliminary point has again been taken by the defence that the power of attorney of the Plaintiff's advocates is invalid because

it is not signed by persons entitled to act for the Society. Various points were raised and we have heard evidence from Mr. Rojansky an accountant who examined the books of the Society and various other witnesses including the gentleman who is acting as Secretary and we have come to the conclusion that the contention of the defence is correct.

Article 4 of the Rules of the Society lays down the conditions for the admission of members. Every Applicant for membership must submit a petition in writing accompanied by a letter of recommendation signed by two members of the Society. The Board shall then advertise the application publicly within the quarter and in the Board Offices for 7 days. The Board will then consider any objections, and decide as to the admittal or otherwise of the Applicant. If they decide to admit him then the Applicant becomes a temporary member but must within one week pay such sums as may be demanded from him and sign a guarantee whereby he undertakes certain liabilities. We have it in evidence that in no case have these conditions been complied with and that no members therefore have been regularly admitted. In fact it would seem that the only members of the Society are the ten original signatories of the application for registration. The minute books have no record of the admission of one single member. This being so it follows that the meeting of 145 persons who were present and purported to elect the present Council were not members and had no power of election and their proceedings are void.

But even supposing that the proceedings had not been void on the above ground yet we are faced with a further difficulty. Article 21 of the Rules determines the manner of election of members of the Council. The Council is elected by the general meeting for the period of two years from amongst members of the Society only. If a vacancy occurs in the Council from any reason whatsoever the Council shall be entitled to appoint a temporary member as a substitute from the list of candidates for the Council nominated for election at the last general meeting. It would appear that 3 or 4 members of the Council who were elected on the 29th May, 1926, had resigned and there were therefore vacancies. The exact number of vacancies cannot be determined for nothing appears in the minute books and the Secretary says that he thinks that there were 3 or 4 vacancies. The proper procedure would have been for the remaining members of the Council to have appointed temporary substitutes in accordance with Article 21 but this they did not do. Instead a general meeting was called and an entirely new Council

elected on 1st November, 1927, some 7 months before the terms of office of the first Council had expired. There was no power under the Rules to do these things and the new Council therefore was not validly elected and has no power to act as Council of the Society.

It follows that the election of the Council being void on both the grounds stated above the election of President and a Secretary is also void and the gentlemen who were so elected have no power whatsoever to represent the Society.

The Plaintiffs have argued that the Rules are directory and not peremptory and should be regarded in a broad spirit, in effect their arguments amount to this that the Rules which have not been complied with should be disregarded and treated as non-existant. This is an argument to which we cannot listen for otherwise there would be no use for any Rules if they could be disregarded whenever it was convenient to do so, or when they have been forgotten. It is in our opinion owing to the complete disregard of all the Rules of the Society by those who have been responsible for its management that its affairs have got in their present appalling state and one only has to look at the history of this Society to see how essential it is that Rules should be complied with.

It has also been argued that it is not open to a person who is not a member of the Society to intervene in or query the internal affairs of the Society and that by taking the money of subscribers the Society are estopped from denying that such subscribers are members of the Society. Whether there is estoppel or not is not a point upon which we are called to deliver a judgment at the moment, but a third person who is being sued is entitled and indeed compelled to satisfy himself that the persons suing him are entitled to do so.

We, therefore, find that the power of attorney produced by the Plaintiff's advocates is not valid inasmuch as it is signed by persons who are not entitled to represent the Society and the action must therefore be struck out with costs.

Owing to the state of affairs which has been disclosed before us in the course of the case we order that the papers shall be sent to the Attorney General for him to consider the prosecution of those responsible.

Delivered the 2nd day of July, 1928.

In the District Court of Jaffa.

C. D. C. Ja. No. 64/31.

BEFORE:

Sherwell, J. and Nimmer, J.

IN THE CASE OF:

In the matter of Halvaa Vehisachon of Petach-Tikvah, a Cooperative Society in Liquidation

and

In the matter of an application by the Liquidators for instructions, the said application dated the 8th day of November, 1931, and registered at the District Court of Jaffa under No. 12483 of 9th day of November, 1931.

Application by liquidators of Society to the Court for directions—Authority given to liquidators to employ advocate—Section 166 (c), Companies Ordinance, 1929.

ORDER.

After hearing the liquidators in person and after reading their application and the reply of the Official Receiver dated the 15th day of November, 1931, No. O. R. 1/31,

The Court hereby orders as follows:—

That all cheques or any other documents or correspondence shall be signed by both the liquidators;

Further that the said liquidators may and are hereby empowered in accordance with the provisions of Section 166(c) of the Companies Ordinance, No. 18 of 1929 to employ Mr. Nissan Ruda (in addition to his duties as Liquidator) and or any other advocate (who is entitled to employ one or more stagiaires) in their joint discretion to assist the said liquidators in the conduct of any cases and executions concerning the liquidation of the Society herein;

It is further ordered that the remuneration in respect of the services rendered or to be rendered by such advocate or advocates in the circumstances above stated shall be in accordance with the scale of fees set out in Rules of Court of the 1st of October, 1918, but in any particular cases where the liquidators deem the circumstances sufficient, the liquidators may refer to this Court for an order for payment of additional remuneration to the said advocates if it thinks fit so to grant.

Dated the 23rd day of November, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 3/32.

BEFORE:
The Senior Puisne Judge, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Halvaa Vehissachon, Jaffa-Tel-Aviv
Co-operative Society, Ltd. — APPELLANT.

vs

Moshe Yankelevitz
Isaac Yankelevitz — RESPONDENTS.

Exemption from stamp duty—Promissory note given by member to Co-operative Society—Exemption 8, Clause 6 of Schedule to Stamp Duty Ordinance, 1927.

Appeal from the judgment of the District Court of Jaffa, dated the 23rd day of November, 1931, holding that promissory notes given by members of a Co-operative Society in respect of loans granted to them by the Society, attract stamp duty under the Stamp Duty Ordinance, 1927.

JUDGMENT.

It is clear that the bill in this case comes within the terms of Exemption 8 to Clause 6 of the Schedule to the Stamp Duty Ordinance, 1927.

Accordingly, the appeal is allowed, the judgment is set aside and the case remitted for hearing.

Costs will follow the event.

Delivered the 1st day of April, 1932.

In the High Court of Justice.

H. C. No. 64/32.

BEFORE:
The Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Joseph Marshak — PETITIONER.

vs

The Chief Execution Officer, Jaffa
The Liquidator of the Halvaa
Vehissachon Cooperative Society Ltd.,
Petah-Tikvah, in Liquidation — RESPONDENTS.

Liquidation of Co-operative Society—Liability of member—Collection of calls enforced through Execution Office—Civil Procedure—Service of copy of judgment on Liquidator as representative of members—Substituted service by publication in the press — Stay of execution refused — Knowledge by debtor of existence of judgment not material — Art. 326, Civil Procedure Code, and Art. 17 of Amendment thereto.

Application for an Order to issue to the Chief Execution Officer, Jaffa, directing him to show cause why his order dated the 19th August, 1932, should not be set aside.

JUDGMENT.

The Petitioner, Joseph Marshak, a member of the Halvaa Vehissachon Co-operative Society Ltd., now in liquidation, and of which the Second Respondent is the Liquidator, is applying to this Court to set aside an Order made by the first Respondent the Chief Execution Officer, Jaffa, for the execution of a judgment of the District Court of Jaffa.

By that judgment, which is dated the 26th May, 1932, the District Court—

> "Ordered that a call of £P. 3 on each £P. 1 paid in respect of each contributory be made and the said call is passed to the Execution Office for collection in accordance with the attached list of contributories which is duly confirmed by the Court. This order to be published in the local press".

The liquidator obtained a copy of this judgment which was given ex parte upon his application; and without serving it upon the Petitioner or notifying him of it in any way other than by publication in the press, as directed in the judgment, lodged it in the Execution Office for execution against the Petitioner.

The Petitioner applied to the Chief Execution Officer for stay of execution, which was refused, the Chief Execution Officer holding that "the order for a call was lawfully served on the contributories, that each contributory knew the order had been made, and the amount which he was called upon to pay and has known this for nearly three months".

It is this Order, which is dated the 19th August, 1932, that the Petitioner is now seeking to have set aside.

With the question whether the Petitioner in fact knew of the judgment, we are not concerned, the only question before us being

whether the proper procedure was adopted to bring the judgment to his notice.

The address of the Petitioner was known to the Liquidator, as is clear from the fact that a notice informing the Petitioner of the call had been served upon the Petitioner at a date prior to the application to the Court.

Hence the Court could not order, in the case of the Petitioner, substituted service by way of publication in the press.

Nor does the Liquidator in opposing the petition, rely upon such publication. His argument is that the Liquidator complied with the rule as to notification by obtaining a copy of the judgment. In so arguing he relies upon Article 17 of the Law dated 26th March, 1327, amending the Code of Civil Procedure and Article 26 of that Code.

Article 26 provides that if the party "be a member of a society (shirket) and the society is still in existence, the summons may be delivered to the director of the society or to one of the members at the place of residence of the society. If the society be bankrupt, the summons may be delivered to one of the Syndics".

The argument is that by virtue of this Article, the Liquidator, having provided himself with a copy of the judgment, has served it upon all the members.

It is clear, however, that the procedure prescribed in this Article can only be followed when the action is brought by some person outside the society against a member, in a matter in which the society can be regarded as representing the members' interests.

It cannot, however, be suggested that in the circumstances under consideration the Liquidator in any way represented the interests of the society which were adverse to those of the members.

It is fantastic to suggest that in a matter in which the interests of the society represented by the Liquidator and those of the members are diametrically opposed, the necessary procedure of notification has been properly carried out when the Liquidator takes a copy of a judgment obtained in ex parte proceedings and takes no step to inform the members of the fact.

The Petitioner's application must be allowed and the Order of the Chief Execution Officer, dated the 19th August, 1932, is set aside with costs and £P. 2.500 mils advocate's fees and expenses.

Delivered the 28th day of November, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 91/32.

BEFORE:

The Senior Puisne Judge, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Co-operative Bank
Bne Binyamin Ltd. — APPELLANT.

VS

Abraham Aaron Spector — RESPONDENT.

Claim against co-operative society as Guarantor — Letter by Bank as constituting guarantee of payment of promissory note—Necessity of proper signature to bind co-operative society.

Appeal from the judgment of the District Court of Jaffa, dated 8th May, 1932, holding that a letter in the following terms was a guarantee:

> "At the request of Messrs Habab Brothers of Jaffa we beg to inform you that we shall withhold for you £P. 150 from the monies which we are to pay on account of the Safrieh Lands, after that Habab Brothers would comply with the terms of the contract dated the 7th June, 1928, between them and the purchasers of the Safrieh Lands".

JUDGMENT OF THE SENIOR PUISNE JUDGE AND MR. JUSTICE KHAYAT.

We hold by a majority that the letter of the 30th July, 1928 addressed to the Respondent and signed by J. D. Drori and sealed with the seal of the Appellant Bank cannot be constituted a guarantee by the Appellant of payment to the Respondent of the amount of a promissory note signed by Awad Habab and Sons.

We further hold unanimously that in view of the requirements of Rule 21 of the Bank's Rules that all documents purporting to be signed on behalf of the Co-operative Bank shall be valid only if signed by at least two members of the Bank and by a member of the Committee of Management and the Secretary, the letter in question being signed by one person only cannot impose any liability upon the Bank towards the Respondent.

On these two grounds the appeal is allowed, the judgment of the District Court set aside and the Respondent's action dismissed as against the Appellant.

Costs here and below will be paid by the Respondent including £P. 2.500 advocate's fees and expenses for appearance in this Court.

JUDGMENT OF MR. JUSTICE FRUMKIN.

I do not express any opinion on the first point having decided the case on the ground that the document in question was not sufficiently signed to bind the Appellant Bank.

CORROBORATION.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 39/26.

(Reprinted from O. G. of 16.7.26.)

BEFORE:

The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Isaac Leib Goldberg — APPELLANT.

vs

The Attorney General — RESPONDENT.

Corroboration of evidence — Conviction for robbery set aside — Criminal procedure — Sufficiency of evidence — Identification of accused—Section 5, Law of Evidence Amendment Ordinance, 1924.

Appeal from the judgment of the District Court of Jerusalem.

JUDGMENT.

The Appellant was convicted together with another person by the District Court of Jerusalem under Article 218 of the Ottoman Penal Code for robbery and sentenced to two years' imprisonment. The proof so far as the conviction of Goldberg was concerned consisted of the evidence of the complainant who stated that he knew the Appellant by sight before the night of the robbery, but not by name, that the man in the dock was the robber and that he had identified him, while under arrest, in the police station. Evidence was given of the identification and it was sought to corroborate the evidence of the complainant by proof that he had before the arrest described accused as a man with a tear under an armhole of the jacket, and that in fact, when arrested, it appears that the Appellant had a tear in his coat (not a jacket), at the place mentioned.

The law requires the evidence of a single witness, for judgment in a criminal case, where the accused pleads not guilty, to be corroborated by "some other material evidence which in the opinion of the Court is sufficient to establish the truth of it".

Held that this proof was sufficient, that the evidence of the torn coat was only a part of the identification by the complainant, and not otherwise connected with the case, and was not such "other material evidence" as to be corroboration within the meaning of Section 5 of the Law of Evidence Amendment Ordinance, 1924.

Appeal allowed.

Delivered the 1st day of April, 1926.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 9/28.

BEFORE:

The Chief Justice, Baker, J., Jarallah, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Abdel Rahim Jamil el Haj Saleh — APPELLANT.

vs

The Attorney General — RESPONDENT.

Conviction for premeditated murder quashed — Repetition of the evidence of a single witness not corroboration — Different findings by Judges—Majority required by Section 42, Trial Upon Information Ordinance — Motive as material corroboration — Section 5, Law of Evidence Amendment Ordinance, 1924.

Appeal from the judgment of the Court of Criminal Assize sitting at Tulkarem dated the 19th day of April, 1928, whereby the Appellant was convicted under Article 170 of the Ottoman Penal Code and condemned to death.

JUDGMENT.

The Court is of opinion that the Court of Criminal Assize erred in recording the fact that the Court by a majority found that the murder was committed by premeditation and then sentencing accused to death. Two Judges found the accused guilty of premediated murder, one of unpremeditated murder and one acquitted. There was therefore not the majority required by Section 42 of the Trial Upon Information Ordinance to justify conviction of premeditated murder, although as the greater is included in the less there was a majority for a conviction of unpremeditated murder.

The conviction, however, was based on the assumption that the evidence of the deceased was corroborated. Her statement in the village was testified to by two witnesses and supported by her statement to the Magistrate in hospital in the absence of the accused, but we hold that such repetitions of the evidence of a single witness are not the corroboration by some other material evidence which Section 5 of the Evidence Ordinance requires, and we further do not think that the refusal by the deceased or her family on her behalf, of the hand of the younger brother of the accused as a second husband is a sufficient dishonour or affront to the accused or the whole of his family to be a motive which will suffice to provide the necessary material corroboration.

For these reasons the conviction must be quashed and the accused discharged.

Delivered in presence this 16th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 2/30.

BEFORE:

The Chief Justice, Baker, J. and Kermack, J.

IN THE CASE OF:

Simha Hinkis — APPELLANT.

vs

The Attorney-General — RESPONDENT

Conviction for premeditated murder quashed and substituted— Corroboration of evidence — Law of corroboration compared to English law—Sec. 5, Law of Evidence Amendment Ordinance, 1924— Criminal law—Art. 170, Ottoman Penal Code—Premeditated murder defined — Sufficiency of evidence.

JUDGMENT OF THE CHIEF JUSTICE.

Three arguments of importance were addressed to us by Dr. Eliash in this case: the first was that there was only one witness that the cartridge case was found by Mr. Riggs, the Police Officer, on the scene of the crime, the second that the proof that the cartridge case came from the rifle of the accused was based on the uncorroborated evidence of Mr. Baker, the Government analyst, and the third was that if the killing of the deceased persons was committed by accused with other persons, it was done without premeditation.

As to the question of corroboration of a single witness which is required by Section 5 of the Law of Evidence Amendment Ordinance, 1924, the law in force in this respect in Palestine is similar to that applicable in England, where corroboration of the evidence of an accomplice is required, as to which I would quote two decisions of the English Courts:

> "The kind of corroboration required is not confirmation by independent evidence of everything the accomplice relates, as his evidence would be unnecessary if that were so. R. v. Mullins (1848), 3 Cox, 526, 531.
>
> "What is required is some independent testimony which affects the accused by tending to connect him with the crime; that is, evidence, direct or circumstantial, which implicates the accused, which confirms in some material particular not only the evidence given by the accomplice that the crime has been committed, but also the evidence that the accused committed it. R. v. Baskerville (1916) 2 K.B. 658".

It is not necessary, therefore, that every single thing deposed to by a witness should be corroborated by other evidence.

I hold that there was sufficient corroboration of the evidence of Mr. Riggs by Dr. Mikhalaki's statement that bullets and empty cases were collected in the house and handed to the police.

Mr. Baker's evidence is concerned with the correspondence between the pin impression on the cartridge case picked up by Mr. Riggs with the firing pin in accused's rifle, also with the correspondence between the extractor mark on the same cartridge case with that on another case fired from accused's rifle, and finally with the correspondence between one of the dents on the panel of the door of the house attacked and a dent produced by a rifle of the pattern used by accused.

In addition to this, the presence of Brasso on the cartridge case is evidence that it had been in the possession of a policeman. There is no evidence of any other policeman having been at the crucial time in the house in question, and there is the statement of Inspector Schiff that the accused, who was standing bareheaded at the cross-roads when Schiff came up with Mr. Lucie Smith, disappeared at some time before the arrival of the troops.

Much stress has been laid by the defence on paragraph 33 of the judgment of the Court below. The meaning of this paragraph of the judgment of the Court of Assize is clearly not that the evidence of Khalifi Khalil Abdel Nebi and Ahmed Mohamed

Fleis is disbelieved, but that without it there is sufficient corroboration by the other witnesses of each other's testimony so that even were Ahmed Mohamed Fleis and Khalifi Abdel Nebi disbelieved, the Court would have come to the same conclusion.

We come now to the more important point of the question whether premeditation was an element in the murders committed by the accused.

The crime was committed during the interval which the Assize Court found was some 15 or 20 minutes between the arrival of Mr. Lucie Smith, the District Seperintendent of Police, and Inspector Schiff and the return of Mr. Lucie Smith with troops.

The Court held that the case was not distinguishable from Criminal Assize 29/29 and Criminal Assize 32/29 and that the fact that the attackers had to break into Sheikh Abdel Ghani's house in order to kill the occupants is sufficient to show that each of them had conceived and resolved upon in his mind the act of killing before committing it.

In my opinion this case is distinguishable inasmuch as the rifle which was used by the accused was an instrument with which he had not specially armed himself for the purpose, but which he was carrying in the ordinary course of his duty. In R. v. Telemachos Agathocles, 8 Cyprus L. R., at p. 98, Tyser C.J. said:—

> "When a person carries lethal arms for use against others and uses them with fatal result it is strong evidence that he carried those weapons after consideration and that he had formed a design to use them as he has used them and if the circumstances are not such as to justify their use in the manner they were used, his life will be demanded by the law for the life which he himself has taken".

In the present case the accused was armed not in consequence of a previous design against the victims or others, but purely in the discharge of his functions as a Police Constable.

In the other cases which have come before the Courts in connection with the recent riots, bands of armed persons have shown their premeditated design by cries and exclamations directed against those whom they subsequently attacked.

Further, there is evidence, as the Court below states, that wounded Jews were coming at the very time of Mr. Lucie Smith's first visit from the direction of Saknet Abu Kebir, where was situated the house which was attacked.

In Goadby's Commentary on Egyptian Criminal Law, 1925, the writer in Part III, p. 648, sets out the Egyptian law of premeditated homicide which is the same Ottoman Code based on the French Penal Code with which we are concerned. He says there that something more than an intention previously formed is connected by the words used in the French original and the Arabic of the Egyptian Code. The words be says "indicate that the act must have followed upon a considered resolution to accomplish it. Acts are sometimes done, as we say, 'on the spur of the moment' i.e., without any reflection. Premeditation implies that the resolution has been weighed and considered. If this is so it would seem that an appreciable interval of time must have elapsed between the formation of the resolution and the act itself. The interval may be short; but if the Court is to be satisfied that the resolution was considered, it is not likely to treat a murder as premeditated if the evidence only proves an intent formed immediately before execution"

The same writer, speaking of the French Code, says that the commentators "basing their interpretation upon the words 'intention formed previously to the act' have maintained that the definition requires that the act should be done when the mind is cool. It is this element in the notion of premeditation, coolness of blood (sangfroid) which is dominant in the jurisprudence and which gives real value to it as an aggravating circumstance".

As was said by Tyser C. J., in R. v. Shaban, 8 Cyprus L. R., p. 84:—

> "The question of premeditation is a question of fact.
>
> A test often applicable in such cases is whether in all the circumstances a man has had sufficient opportunity after forming his intention, to reflect upon it and relinquish it.
>
> Much must depend on the condition of the person at the time—his calmness of mind, or the reverse.
>
> There might be a case in which a man has an appreciable time between the formation of his intention and the carrying of it into execution, but he might not be in such a condition of mind as to be able to consider it.
>
> On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intention and its execution might be sufficient for premeditation".

In this case we are concerned with a short interval of time in which the accused covered but a short space of ground. Even if it is considered in this case that an appreciable time elapsed between the formation of the intention and the carrying it into execution, can it be assumed that the condition of the mind of accused was such as to enable him to consider it? Can there have been the coolness of blood in the circumstances as we know them which would enable the accused to recover his calmness of mind so as to bring the offence within the section which deals with premeditation?

In my opinion the facts do not justify an answer to these questions in the affirmative, and the law being as it is, I am compelled, notwithstanding the brutal nature of the crime, to quash the conviction of killing with premeditation under Article 170 of the Ottoman Penal Code and to substitute for it one of killing wilfully without premeditation and sentence the accused to fifteen years' penal servitude and to pay the costs of the appeal.

JUDGMENT OF MR. JUSTICE BAKER.

I am satisfied that there is ample evidence upon which the Court of trial could lawfully find that the accused with other persons unknown did kill in the house of Sheikh Abdel Ghani five persons and did with other persons unknown wound with intent to kill two other persons.

The question now arises whether there was evidence on which Hinkis could be found guilty of killing with premeditation. The basis for the finding of premeditation by the Court of trial is stated in paras. 35 and 36 of Mr. Justice Corrie's judgment in which Judge Copland concurred, which is as follows:—

> "The defence has argued that even if the accused is convicted of killing, he is not to be convicted of killing with premeditation. In support of the argument the defence relies upon the fact that earlier in the afternoon an omnibus containing 14 or 15 Jews was fired upon by Arabs at Saknet Abu Kebir, four of the occupants being killed and the remainder escaping to the cross-roads, five of them being wounded on the way. There is evidence that wounded people were coming in from the direction of Saknet Abu Kebir at the time of Mr. Lucie Smith's first visit to the cross-roads.
>
> What is alleged by the Defence is that the sight of these wounded Jews and news that others had been killed, produced violent excitement in the groups of Jews near the

cross-roads, and that it was while under the influence of this excitement that they moved southwards across the Salameh Road and attacked Sheikh Abdel Ghani's house as an act of reprisal. It is argued that as a matter of law the existence of this condition of violent excitement prevented the murders from being premeditated within the meaning of Articles 169 and 170 of the Penal Code.

(36) I am unable to accept this view. This case is not in my opinion distinguishable from that of the murders of Toledano and Afriat of Safad. The fact that the attackers had to break into Sheikh Abdel Ghani's house in order to kill the occupants is, I hold, sufficient to show that each of them had "conceived and resolved upon in his mind the act of killing before committing it". The killing of the occupants of Sheikh Abdel Ghani's house therefore comes within Article 170 of the Penal Code".

Premeditation is defined in Article 169 of the Ottoman Penal Code as follows:—

"To kill premeditatedly is for a person to have conceived and resolved upon in his mind the act of killing before committing it".

In connection with the definition of premeditation the judgment of Tyser, Chief Justice of Cyprus, in R. v. Halil Shaban, 8 Cyprus Law Reports, 1908, p. 84, is noteworthy: —

"The question of premeditation is a question of fact. A test often applicable in such cases is whether in all the circumstances a man has had sufficient opportunity after forming his intention to reflect upon it and relinquish it.

Much must depend on the condition of the person at the time, his calmness of mind or the reverse. There might be a case in which a man has an appreciable time between the formation of his intention and the carrying of it into execution, but he might not be in such a condition of mind as to be able to consider it.

On the other hand, a man might be in such a calm and deliberate condition of mind that a very slight interval between the formation of the intention and its execution might be sufficient for premeditation".

French writers and French jurisprudence lay stress upon the mental state of the actor and premeditation is treated as calm resolution.

The definition in the Penal Code exhibits as an essential element an interval between the resolution and the exercise of the will, but it is silent as to the mental state, the cool reflection. The commentators have filled the gap and, basing their interpretation upon the words "conceived and resolved upon in the accused's mind before the act," have maintained that the act should be done when the mind is cool, Garraud IV, 1618, and it is this element which gives real value to premeditation as an aggravating circumstance. Goadby (Commentary on Egyptian Criminal Law, part 3, page 649) states:—

> "The jurisprudence shows that so long as the passion lasts, premeditation is excluded. If enraged by some circumstance the murderer runs off to get a weapon and returns to use it, the Court must consider as a fact whether during the whole period of his absence he was under the influence of a passion which mastered him and had not yet recovered the calmness of mind. If this was so, the murder was not premeditated. Garraud (296) 13".

I do not agree with the learned Puisne Judge, Mr. Justice Corrie, that the present case is not distinguishable from that of the murders of Toledano and Afriat at Safad. The circumstances in both Safad cases were similar, "a crowd of Arabs having previously armed themselves with sticks, knives, and in some cases firearms, descended on Jewish quarters and committed murder there. There was no previous provocation from the persons attacked, and it is noteworthy that as they approached they shouted "We are coming to kill you".

There is no doubt that in these two cases the crowd at the time of assembling had conceived and resolved in their own minds the intention of murdering Jews. There is some evidence that the Arabs of Safad had received rumours from Haifa the morning of the murders which had caused considerable excitement among them. I am of opinion, however, that if the news was such as to cause them to form an intention to kill Jews, they had sufficient opportunity after forming such an intention to reflect upon it and relinquish it before the actual killing took place at or about 5.30 p.m. I have no doubt that the accused in the two Safad cases had conceived and resolved upon in their own minds the act of killing before committing it and that they in cold blood resolutely armed themselves, proceeded some considerable distance and without any

provocation did break into the house of deceased and committed premediated murder there.

The circumstances in the case before us are entirely different and are such that in my opinion they exclude premeditation. The Trial Court made, *inter alia*, the following findings:—

(a) Accused was a policeman and was armed with a rifle.

(b) For some time prior to the murder he was at the cross-roads some 100 metres away from the scene of the murder.

(c) There was firing from Arab olive groves adjacent to the cross-roads directed against the Jews who were congregated thereabout and near to the accused.

(d) The Jews were returning the fire with revolvers.

(e) Mr. Lucie Smith upon arrival at the cross-roads, in view of the seriousness of the situation, went back for troops; prior, however, to leaving, a bus came up containing people either wounded or dead.

(There was evidence before the Court that an omnibus containing 14 or 15 Jews was fired upon by Arabs at Saknet Abu Kebir some 200 metres further south of the scene of the murder, four of the occupants being killed and the remainder escaping to the cross-roads, five of them being wounded on the way).

(f) That it was during the interval between the arrival of Mr. Lucie Smith and his return with troops some 15 or 20 minutes later that the murders took place.

We are therefore faced with the fact that the murders were committed within 15 to 20 minutes of dead and wounded Jews arriving at or approximate to the place where accused was stationed, and in all probability a very considerable time less.

Considering all these circumstances and the fact that accused was lawfully in possession of a rifle, I am of opinion that the accused did not possess the requisite calmness of mind, neither was there the time to afford him the opportunity after forming his intention to kill of reflecting upon it and relinquishing it which are necessary in order that premeditation may be proved. These two elements of cold blood and time to reflect, I am satisfied, did exist in the two before mentioned Safad cases and are therefore distinguishable from the present case. The breaking-in establishes resolute intention but cannot, standing alone, establish premeditation. It was a brutal crime and I am of opinion that there is something lacking in the laws of a country where the death penalty exists

which allows so brutal a crime to be committeed and yet allows the perpetrator to escape the death penalty.

The judgment of the Trial Court must be quashed and accused must be convicted of wilful murder without premeditation under Article 174 (1) of the Penal Code and sentenced to serve a term of fifteen years' penal servitude and to pay the costs of this appeal.

JUDGMENT OF MR. JUSTICE KERMAK.

The conviction is attacked on the ground that there was not sufficient evidence to support the conviction. The victims were killed by persons who broke into the house. The motive was revenge for attacks which had been made on the Jews by the Arabs in the course of the day. The point at issue is whether the accused was one of those who entered the house. The evidence that the accused was in the house is:—

1. The finding of the cartridge case in the house. In this piece of evidence there are several steps, each of which was questioned:—

(a) Exhibit No. A W R 1 was found in the house. Mr. Riggs and Dr. Mikhalawi spoke of going to the house and both mention the collecting of cartridges there. Mr. Riggs identifies the cartridge as one of those he found there, and there is no suggestion that he collected cartridges in any other place. In these circumstances it is not possible to hold, as suggested, that Mr. Riggs may have accidentally mixed this cartridge with others.

(b) It was fired from the accused's rifle. It is proved that the impression of the firing-pin of accused's rifle corresponds with the impression of the cartridge in question and that the impression did not correspond with that of the firing-pin in any of twelve otherwise similar rifles whose firing-pin impressions were each totally distinct. No information was provided to the Court from either side as to scientific opinion on the variability of such impressions. While such information might have been of assistance, the Court was entitled to hold on this evidence, coupled with the fact of its being a police cartridge, as shown by the polishing, that the cartridge was fired from the accused policeman's rifle.

(c) It had been fired in the house. The point is taken that it is possible that the cartridge was picked up by someone and dropped in the house by accident, on the ground that other cartridges were picked up, apparently out of curiosity,

by other persons in the neighbourhood that day, that this cartridge was not found till the next morning, and that many people were about the house before then. The Court were entitled to exclude this possibility in view of the facts that there is no evidence of persons dropping, as distinct from picking up, cartridges, that there were many other cartridges found on the floor, that there is no evidence of the *locus* having been disturbed, and that fragments of 303 bullets were found in the house.

2. The disappearance of the accused from the cross-roads at the time of the commission of the crime spoken to by Mr. Schiff, which is inconsistent with the story told by the accused on the following day.

3. The elimination of other policemen as having gone into the house.

4. The evidence of Ahmed Mohamed Fleiss and Khalifi Abdel Nebi that they saw a policeman, whose description corresponded with that of the accused, enter the house. It was claimed that this evidence must be excluded in view of Article 33 of the judgment. It is difficult to think that the Court attached literally no importance to evidence which they believed, which was direct evidence, and to the credibility of which they devoted a page of their judgment. They are to be understood as meaning that they consider that there is a complete case without this evidence. The Court of Appeal, even if it had differed from this view, would have been able to take this evidence into account, as a finding had been made on it, or to remit the case to the Assize Court to make a fresh finding.

There is, therefore, no reason to disturb the finding of the Court that the accused was one of the persons who took part in the murders.

The finding that the murders committed by the accused were premeditated is also attacked. On the one hand it is clear that they were committed with great resoluteness, as evidenced by the breaking down of the doors, that the persons killed had not done anything in provocation, and that these murders are of a nature exemplifying a prevalent theory, held in cold blood, that violence amounting to "frightfulness" is the best method of putting a stop to racial attacks. On the other hand it is not claimed that the idea of these murders occured to the accused more than a very few minutes

before they were committed. It is also clear that there was intervening provocation a few minutes before and that there had been continuous provocation by attacks for several hours. There is further no evidence that the accused acted in cold blood. The accused was legitimately in possession of firearms. He had acted throughout the day in an efficient and commendable manner. He did not go more than a hundred yards to find his enemy. In these circumstances it is not possible to hold that premeditation was present in the case of the accused. The mistake the Court below has made is in confusing resolute intention with premeditation. In the cases cited by the Court as necessitating a finding of premeditated murder most of the circumstances detailed above were absent. In fact almost the only point of similarity is the resolute nature of the murders. The finding of premeditation must be quashed.

The Court therefore alters the conviction of murder with premeditation to one of murder without premeditation, which falls under Penal Code Article 174, and sentences the accused to fifteen years' kyurek. The accused to pay the costs of the appeal.

Delivered the 19th day of March, 1930.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 21/31.

BEFORE:

Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Mustafa Abdallah El Masri — APPELLANT.

VS

The Attorney General — RESPONDENT.

Conviction under Article 179 Ottoman Penal Code—Leave to appeal granted on point of law—Necessity of corroboration of evidence of single witness—Section 5, Law of Evidence Amendment Ordinance, 1924.

Appeal from the judgment of the District Court of Haifa, dated the 13th day of June, 1931, dismissing the appeal from the judgment of the Magistrate's Court, whereby the Appellant was convicted under Article 179 of the Penal Code and sentenced to one month's imprisonment.

JUDGMENT.

Leave to appeal from the decision of the Haifa District Court sitting in its appellate capacity was granted in accordance with Articles 4 and 5 of the Magistrates' Courts Jurisdiction Ordinance by the President of the said Court. The point of law upon which leave was granted is:—

"Can a Magistrate base his judgment on the uncorroborated evidence of a complainant."

The law is perfectly clear on the point and is contained in Section 5 of the Law of Evidence Amendment Ordinance which reads as follows:—

"No judgment shall be given in any case on the evidence of a single witness unless such evidence is, in a civil case uncontradicted, or, in a criminal case, is admitted by the accused person, or whether in a civil or criminal case, is corroborated by some other material evidence which, in the opinion of the Court, is sufficient to establish the truth of it."

The case is accordingly returned for a fresh judgment to be given.

Delivered the 25th day of November, 1931.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 86/31.

BEFORE:

The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Seoud Ahmed Saleh and Others — APPELLANTS.

vs

The Attorney General — RESPONDENT.

Corroboration of evidence of single witness—Offence committed in prosecution of common purpose — Sentence reduced on appeal — Articles 174(3), 220, Ottoman Penal Code—Sections 3, 4, 9, Criminal Law Amendment Ordinance, (No. 2) 1927.

JUDGMENT.

We are satisfied that the Court below was entitled to hold that there was corroboration of the evidence of the informer.

So far as the first accused is concerned the evidence of Saleh Said is that half way to the village the first accused went back to the quarry as he was known in the village.

He was therefore, not present at the firing by his comrades as required by Section 4 of the Criminal Law Amendment Ordinance, (No. 2) 1927, in order to enable him to be found guilty of an offence committed in the prosecution of a common purpose, and is in consequence entitled to have his conviction under Article 174 (3) of the Ottoman Penal Code and Sections 3, 5 and 9 of the Criminal Law Amendment Ordinance, (No. 2) 1927, set aside.

The conviction under Article 220 of the Ottoman Penal Code and Sections 3 and 9 of the Criminal Law Amendment Ordinance, (No. 2) 1927 must stand. The sentence must be reduced to one of 5 years penal servitude. The appeal of accused Numbers 2 and 3 is dismissed and their convictions and sentences are affirmed.

CORROBORATION—

SEE ALSO CRIMINAL PROCEDURE, EVIDENCE.

COSTS.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 21/32.

BEFORE:

The Acting Senior Puisne Judge, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Moredechai Zeptor — APPELLANT.

VS

Abraham Shermet — RESPONDENT.

Guardian Eastern Assurance Co. Ltd. — THIRD PARTY.

Civil procedure — Appeal filed out of time — Question of time of appeal raised by Court itself — No costs or advocate's fees allowed to Respondent.

Appeal from the judgment of the District Court of Jaffa, dated the 17th January, 1932.

JUDGMENT.

The appeal being out of time, it must be dismissed.

Respondent and Third Party made no reply to the appeal and the question of the time of the appeal was raised by the Court itself. Therefore, no costs or advocate's fees are allowed to Respondent and the Third Party.

Delivered the 25th day of July, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 11/33.

BEFORE:

The Senior Puisne Judge, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Heinberg — APPELLANT.

vs

Heinberg — RESPONDENT.

Civil procedure — Judgment directing costs of action to be paid by other party — "Costs" include advocate's fees and expenses — Application by successful party to fix amount recoverable as fees and expenses.

JUDGMENT.

Where a judgment directs that the costs of a party to the action shall be paid by another party, the term "costs" in the absence of express provision to the contrary, includes advocate's fees and expenses.

Where, therefore, a judgment does not fix the amount payable in respect of such fees and expenses the successful party (the Respondent) is entitled to apply to the Court to fix such an amount.

Accordingly the amount is fixed at £P. 2.- in the present case.

COURTS

In the District Court of Jerusalem.

C. D. C. Jm. of 1922.

BEFORE:

Baker, J.

Conflict of laws — Undertaking to pay money either in Paris or London — Jurisdiction of Courts limited by agreement — Venue of action brought against partnership — Document required to be presented for payment — Article 1, para. 5, Appendix to Civil Procedure Code — Articles 119, 130, 144, 145, Commercial Code.

JUDGMENT.

This is an action on a document whereby the Defendant Firm, Ja'ar Cousins and Company, undertook to pay the sum of either 115500 Frs. or this sum in sterling i.e. £.4330 and 16s., the sum to be paid to the Plaintiffs in Paris or London.

The Defendants do not dispute the debt, but contend that the action is one not within the jurisdiction of this Court and this is one of the main issues before the Court.

The Defendants contend that as the document contains the paragraph "the debtor society accepts the jurisdiction of the French or English Courts according to the wish of the creditor in all litigation and therefore renounce our domicile". This Court is of opinion that the said clause was intended to give the Plaintiff the right to bring an action in the Courts of England or France in addition to any other place the law would enable him to sue. However, we are satisfied that in accordance with the laws now in force here, he is precluded from suing here for the following reasons:

The Defendants state that the partnership which existed at the time of the contract is still in existence and has not been dissolved and Plaintiffs have not satisfied us that the case is otherwise. Article 1 of paragraph 5 of the Appendix to the Code of Civil Procedure lays down that suits brought by third persons against a partnership will be heard in the Court where the Head Office was situated up to one year after the date of dissolution. The Head Office of the Defendant firm is in Paris, the partnership not having been dissolved. And whereas Palestine is not specifically mentioned as a place where Defendants might be sued (to take it out of the meaning of the said Article), we hold that by virtue of such Article Plaintiff is precluded from suing here.

The question of due presentation and protest has been lightly touched upon by the Defendants, but as it has ben raised it is only proper that the Court shall deal with it.

The document, the subject matter of this action, states that the money is payable in London or Paris and must be considered as a promissory note within the meaning of Article 145 of the Commercial Code and as such, all provisions relating to bills of exchange necessarily apply. (Article 144 of the Commercial Code).

One primary provision is due presentation for payment in the place mentioned in the document and after presentation, if payment is refused, such refusal must be recorded by the legal form of protest in accordance with Article 119 of the Commercial Code. No protest complying with the above mentioned Article has been presented to this Court and the Court therefore concludes that due presentation was not made either in Paris or London, and therefore, that the Plaintiff cannot sue here until this has been done. (See note to Article 130 of the Commercial Code).

Therefore, for these reasons, the Court dismisses the action with costs against the Plaintiff. The attachment to remain until the time for appeal has expired or providing an appeal is entered, until a final decision is given.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 20/23.

IN THE CASE OF:

Hassan bint Haj Mohamad
Abu Arb-El-Akkad, Nablus — APPELLANT.

vs

Mohamed Ibn Soffaka
Mustafa Abdul Tawad — RESPONDENTS.

Constitution of Court — Disagreement of Judges of Land Court — Third Judge called in — Witnesses to be heard by whole Court — Validity of judgment.

JUDGMENT.

It would appear that after the case was heard the President and members disagreed afterwards. In accordance with the Land Courts Ordinance, Rules of Court (of 15th May, 1921) Article 1, a third judge Abdul-Aziz was called in who after reading the

Court proceedings concurred with the President's opinion and judgment was given in accordance with this. The third Judge, Abdul-Aziz heard none of the witnesses or the proceedings but read the same. It has been held by the Court that before an additional judge can give a judgment it is necessary for him to hear the whole of the proceedings together with the other two Judges ab initio. Therefore the case is returned to be re-heard by the three Judges concerned.

Costs to be costs in the cause.

Delivered the 30th day of June, 1923.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 61/23.

BEFORE:

The Senior British Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Khadra Bint Ahmed Lutfi & Another APPELLANT.

vs

Fadieh Bint Saleh Hussein RESPONDENT.

Binding authority of judgment of Court of Appeal — Trial Court not to insist on previous judgment set aside by higher Court — Civil procedure—Court to decide preliminary point before entering into merits of action—Limitation of actions.

Appeal from the judgment of the Land Court of Nablus, dated the 15th day of March, 1923.

JUDGMENT.

The Court holds:—

1. That where upon appeal from a Land Court, a judgment of this Court is given remitting the case to the Land Court, no such right of insistance upon its previous judgment, as is claimed by the Land Court, exists.

2. That until the question whether the Respondent's action is or is not barred by lapse of time has been determined in accordance with the previous judgment of this Court, it is not for the Court to take into consideration any other question affecting the merits of the case.

3. The judgment of the Land Court is set aside and the case remitted to be heard in accordance with the previous judgment of this Court.

Delivered the 10th day of October, 1923.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 67/23.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Yousef Abd El Karim Abd El Hadi — APPELLANT.

vs

Wajih Abd El Karim Abd El Hadi & Partners — RESPONDENTS.

Title deed rejected by Court of Appeal not to be relied upon by Court of first instance on remittal of case — Binding authority of judgment of Court of Appeal.

JUDGMENT.

The Court finds that the Court of first instance cannot, after the documents are returned to it, rely upon a legal title deed which the Court of Appeal had disconsidered in its judgment, but it, the Land Court, had to rely upon the Shari'a title deed which could not be contradicted by evidence and to investigate the properties which were possessed by the deceased until it could know whether the admission in the deed is incumbent on the said properties or not. Therefore, it is decided to set aside the judgment and to return the documents in order to stay the proceedings in accordance with the judgment of the Court of Appeal.

Delivered the 28th day of February, 1924.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 67/25.

BEFORE:

The Chief Justice, the Senior British Judge and Khayat, J.

IN THE CASE OF:

Isaac Trachtingott — APPELLANT.

vs

Elizabeth Matross — RESPONDENT.

Civil procedure—Functions of Judges of Court—Judgment of Court to be given on findings on the evidence heard—Opinion of majority of Court binding—Judgment given for Defendant when Court equally divided in opinion—Introduction of third Judge—Action for breach of promise of marriage—Promise to marry not proved.

Appeal from the judgment of the District Court of Jaffa dated the 17th day of April, 1925.

JUDGMENT.

The claim on which the action was based was a breach of promise of marriage.

The Judges who heard the evidence and read the documents found that the promise had not been proved.

It was thus the duty of the Judges to give judgment on that finding and dismiss the action. That is the opinion of the majority of the Court. If the Court was then entitled to consider the question of damages as arising from invitation only (as finally found) it could not have given judgment otherwise than for the Defendant because they were divided in opinion. If the law permits of the introduction of a third Judge, which we do not decide in such cases, he would not be entitled to give judgment on the facts without hearing evidence except by consent of the parties.

The result is that the appeal is allowed and the judgment of the District Court set aside and judgment directed to be entered for the Defendant by judgment of the majority of the Court. The dissenting Judge will write his own judgment. The question whether an action for breach of promise of marriage can be heard in this country by a Civil Court has not been raised in this case and we express no opinion.

Delivered in presence the 9th day of November, 1925.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 10/26.

BEFORE:
The Chief Justice, Webb, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Khalil Ibrahim Hamdeh — PETITIONER.

VS

The Attorney General — RESPONDENT.

Jurisdiction of Courts of Palestine in criminal matters—Jurisdiction in Occupied Territory held to pass with such territory.

JUDGMENT.

As to the jurisdiction of the Court, no authority has been produced on either side to throw light on the question, but we are satisfied that when one Government takes over territory till then under the jurisdiction of the other, the criminal jurisdiction concerning acts committed within the ceded territory passes with the territory. This rule has been followed by the Palestine Courts since the British Occupation.

The judgment of the Court below is confirmed.

Dated the 5th day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 193/26.

BEFORE:
The Chief Justice, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Bedawy Haj Bakir Sha'ban — APPELLANT.

VS

Abdel Latif Sawan — RESPONDENT.

Party not allowed to appeal against judgment in his own favour — Competence of Court after having refused jurisdiction — Parts of judgment held by Court of Appeal to be obiter dicta.

JUDGMENT.

The District Court declared itself incompetent to hear the case. The Plaintiff did not appeal. The Defendant cannot appeal against a judgment in his own favour. The District Court having

refused jurisdiction was not competent to make any finding of fact or law on the merits and anything that may appear in any part of the judgment on such a question as prescription is *obiter dictum* and outside the case and is open to re-argument.

Both appeal and cross-appeal are dismissed.

No costs.

Delivered the 13th day of January, 1927.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 15/27.

BEFORE:

Corrie, J., Litt, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

'Ayesh Mustafa El-Asstal — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Killing of three policemen on Egyptian soil— Jurisdiction of Court of Criminal Assize in offences committed outside Palestine — Arts. 5, 6 & 7, of Ottoman Code of Criminal Procedure — Sec. 73 (ii), Trial Upon Information Ordinance, 1924 — Offence committed by one Palestinian citizen against another — Acquisition of Palestinian citizenship—Art. 1. Palestinian Citizenship Order, 1925—"Habitually Resident" in Palestine — Offence committed before Trial Upon Information Ordinance—Sec. 16, Courts Ordinance, 1924—Objection to jurisdiction of Trial Court raised by Court of Appeal of its own motion--Presumption in law that all persons found in Palestine are Palestinian citizens until the contrary is proved—Plea in confession and avoidance.

JUDGMENT.

This appeal raises a question of jurisdiction.

The Information charges the accused with certain offences committed in the sub-district of Beersheba, but the prosecution stated at the trial that the offences in question were in fact committed on Egyptian soil.

The authority of the Court to try offences committed outside the boundaries of Palestine and its territorial waters is contained in Articles 5, 6 and 7 of the Ottoman Code of Criminal Procedure as modified by Section 73 (ii) of the Trial Upon Information Ordinance, 1924.

Articles 5 and 6 of the Code of Criminal Procedure have no relevance.

Article 7 reads as follows: (Young, Vol. VII, p. 227) "Tout Ottoman qui, hors du territoire de l'Empire, s'est rendu coupable d'un crime contre un autre Ottoman, est puni, conformément à la loi, s'il rentre en Turquie et s'il est prouvé, qu'il n'a pas subi sa peine à l'étranger".

Section 73 (ii) of the Trial Upon Information Ordinance, 1924, is as follows:

> "The remaining Articles of the Ottoman Code of Criminal Procedure shall be read and interpreted subject to the provisions following:
>
> "Reference to the Empire or Turkey shall be deemed to refer to Palestine; reference to Ottoman subjects to Palestinian citizens".

There can be no question that "Ottoman" in Article 7 means Ottoman subject; and thus by virtue of Section 73 (ii) must be replaced by "Palestinian citizen".

Hence for the Court of Criminal Assize to have extra-territorial jurisdiction, the offence must be one committed by one Palestinian citizen against another.

The acquisition of Palestinian citizenship is governed by the Palestinian Citizenship Order, 1925.

By Article 1 (1) of that Order, Turkish subjects habitually resident in the territory of Palestine upon the 1st day of August, 1925, who did not opt to the contrary, were declared to be Palestinian citizens. Their status having thus been determined, it may be the true view of the law that their citizenship dated back to the day when the Treaty of Lausanne took effect; but however that may be, it was essential to the acquisition of Palestinian citizenship that the ex-Ottoman subject should be habitually resident in Palestine on the 1st day of August, 1925.

The offences with which the accused is charged were committed on the 2nd May, 1924.

The witness Hassan Ibrahim Bali, whom the accused is charged with having attempted to kill, may be taken to have acquired Palestinian citizenship. Clearly, however, the three members of the Police Force who were killed on that date cannot possibly have done so. It follows that an offence against any one of them was not an offence against a Palestinian citizen.

Further, the accused himself has, since the date of the offences with which he is charged, been a fugitive from justice; and though

his former place of residence may have been Khan Younis within the boundaries of Palestine, it cannot be held that on the 1st August, 1925, the accused was habitually resident in Palestine.

The accused therefore is not a Palestinian citizen and the Sections quoted do not confer upon the Court of Criminal Assize jurisdiction to try him for an offence committed outside the territory of Palestine.

It has been argued by the prosecution, however, that in determining the question of jurisdiction, the Court must not have regard to the Trial Upon Information Ordinance, 1924, which was not enacted until after the offences were committed but must be governed by the law in force at that date.

This view might have been maintainable had it been the case that the Court of Criminal Assize was in existence at the date when the offences were committed, and had then jurisdiction to try an ex-Ottoman subject for an offence committed outside the boundaries of Palestine and of the former Ottoman Empire.

But unfortunately for this argument, the Court of Criminal Assize only came into existence by virtue of the Courts Ordinance, 1924, on the 1st September, 1924, the day upon which the Trial Upon Information Ordinance came into force.

Hence, the rule as to extra-territorial jurisdiction as determined by Section 73 of that Ordinance is the only rule that has ever prevailed in the Court; and we cannot consider whether a Court which is not now in existence would have jurisdiction to try the accused.

A possible exception to the rule is to be found in the case of a person against whom on the 1st September, 1924, a criminal prosecution in respect of an offence punishable with death was pending before a District Court. Section 16 of the Courts Ordinance, 1924, provides that any such criminal procedure shall be transferred to the Court of Criminal Assize: and it may be that in such a case its jurisdiction would be determined by the law of jurisdiction of the old District Courts.

In the case of the present accused, however, there was no committal until the Order of the 4th August, 1927, when the old District Courts had ceased to exist.

We are therefore bound to hold that the Court of Criminal Assize had no jurisdiction to try the accused for the offences with which he was charged and the judgment of the Court and the sentence passed upon the accused must be set aside.

DISSENTING JUDGMENT OF MR. JUSTICE LITT.

It would appear that the law is that for an Assize Court to have extra-territorial jurisdiction an offence punishable by the laws of Palestine, and unpunished elsewhere must have been committed by one Palestinian citizen upon another.

The Majority of this Court has quashed the conviction on both counts of the indictment on the ground that in the murder count neither Appellant nor victims were Palestinian citizens, and that in the attempted murder count the Appellant was not a Palestinian citizen. Therefore, says the Majority, the Assize Court had no jurisdiction.

In raising these questions of its own motion the Majority appears to have considered that it was taking an objection to jurisdiction.

I do not concern myself as to whether an Appellate Court is entitled of its own motion to raise a question of jurisdiction of the Court below, but I do say that even if it is entitled to consider the question of jurisdiction the questions the Majority raised were not matters of jurisdiction at all but were pleas in confession and avoidance. I say frankly that I have never considered that it was the duty of any Court, whether original or appellate, to raise such pleas.

Let us see what these pleas in confession and avoidance really were. They were:—

1. "If I committed the murder I was not a Palestinian citizen, nor were the people murdered Palestinian citizens, and therefore the Assize Court had no jurisdiction".

2. "If I committed the attempted murder I was not, nor was the person I attempted to murder, a Palestinian citizen and therefore the Assize Court had no jurisdiction.

It was surely for the Appellant or his advocate, and there was an advocate, to raise these pleas and until they were so raised both Appellant and his victims should have been considered Palestinian citizens in law.

Neither the Appellant nor his advocate raised these pleas and accordingly the Majority had no right to go into the questions of fact involved. And I do not hesitate to say that it was not until the preliminary questions of fact were decided in favour of the Appellant that any question of jurisdiction could possibly arise.

For the above reasons I am of opinion that the Majority was wrong in quashing the convictions on both counts of the indictment on the ground of want of jurisdiction in the Assize Court.

But even if the Majority could raise such pleas in confession and avoidance of its own motion it could surely only find the facts necessary to support such pleas upon evidence.

Upon what evidence did the Majority find as a fact that the Appellant was not a Palestinian citizen? The only evidence was, that the Appellant was a fugitive offender, and upon that and that alone the Majority found that the Appellant was not habitually resident in Palestine upon the 1st of August, 1925, and was in consequence not a Palestinian citizen.

And even this paltry bit of evidence, which at most could raise only a slight suspicion, was more than negatived by the facts that the Appellant's home is in Palestine, and that he was arrested in Palestine.

Accordingly, I hold that the Appellant, or perhaps I should rather say, the Majority of this Court, failed to establish the fact that he was not habitually resident in Palestine upon the 1st of August, 1925. If that preliminary fact failed to be established then in law the Appellant was a Palestinan citizen, for the whole tenor of the Palestine Order-in-Council regarding foreigners makes it abundantly clear that there is a presumption in law that all persons found in Palestine are Palestinian citizens until the contrary is proved.

I admit that there was evidence that the murdered persons were not, and never could become, habitually resident in Palestine on the 1st of August, 1925. So that if the Majority of this Court could properly raise such a plea, which I deny, that Majority was entitled to find as a fact that these persons were not habitually resident in Palestine on the 1st of August, 1925, and that in law they were not Palestinian citizens, and accordingly that the Assize Court had no jurisdiction in the murder count.

Far otherwise is it with the count of attempted murder, for here even the Majority of this Court held that the person whom it was attempted to murder was a Palestinian citizen.

Accordingly, in the attempted murder count there was a crime punishable by the laws of Palestine committed by one Palestinian citizen upon another Palestinian citizen, and the Assize Court had full jurisdiction in the matter.

To sum up, in my opinion the Majority of this Court was wrong in quashing both convictions on the ground of want of jurisdiction in the Assize Court, pleas in confession and avoidance not having been raised by the Appellant. I am further of opinion

that even if such pleas had been properly raised in the attempted murder count they ought not to have succeeded by reason of the failure to prove the necessary preliminary facts.

Delivered the 8th day of February, 1928.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 61/27.

BEFORE:

The Chief Justice, the Senior British Judge and Frumkin, J.

IN THE CASE OF:

Jawdat Said El-Dajani — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Section 22, Animals' Diseases Ordinance, 1926 — Conviction by District Officer holding Magisterial Warrant—Validity of appointment to act as Magistrate — Constitutionality of Court — Articles 14, 39, 60, 61, Palestine Order-in-Council, 1922 — Article 2, Ottoman Magistrate's Law — Section 12, Courts Ordinance, 1924 — "Public Officer" defined—Appointment of Judges—Section 2, Establishment of Courts Order, 1924—Dormant warrant to administrative officer of Government to act as Magistrate — Section 72 (c) Trial Upon Information Ordinance, 1924—Section 2, Magistrates' Courts Jurisdiction Ordinance, 1926.

JUDGMENT.

This is an appeal from a conviction under Section 22 of the Animals' Diseases Ordinance, No. 3 of 1926, which was imposed by Mr. Bailey, a District Officer, holding a Magisterial Warrant, who purported to sit in and constitute the Magistrate's Court of Hebron.

The Appellant argues that a District Officer holding a Magistrate's Warrant is not a Magistrate, that even if a public officer holding a Magisterial Warrant is a Magistrate the document purporting to confer authority on Mr. Bailey was not a Magistrate's Warrant, that the Court in which he purported to sit was not one established by an order of the High Commissioner under Article 39 of the Palestine Order-in-Council, for by the Establishment of Courts Order, 1924, only one Court is established in Hebron, while two having concurrent jurisdiction are established in Jerusalem and Jaffa. Hence, if as was the case, there was an existing Magistrate at Hebron, the power of constituting a Court in that place was

exhausted. Finally, the Appellant urges that Article 14 of the Palestine Order-in-Council as to the appointment of public officers of the Government does not apply to Magistrates and that by virtue of Article 2 of the Ottoman Magistrates' law, the appointment of Magistrates must be in accordance with the rules for the appointment of Judges or in other words in conformity with Section 12 of the Courts Ordinance, 1924, and that therefore Mr. Bailey's appointment was void.

Article 14 of the Palestine Order-in-Council empowers the High Commissioner, subject to the direction of the Secretary of State, to appoint or authorise the appointment of such public officers as he may think fit, and says further that all such public officers, unless otherwise provided by law, shall hold their offices during the pleasure of the High Commissioner.

Best C. J. in Henley vs Lyme Corporation (1828) 5 Bing., p. 91 defined a "public officer" as "everyone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise," a definition which is in direct conflict with Dr. Eliash's contention that a Magistrate is not a public officer.

Superimposed upon the power conferred upon the High Commissioner by Article 14 of the Order-in-Council we find in Section 12 of the Courts Ordinance, 1924, a provision that every Judge of the Supreme Court or of a District Court shall . . . . be appointed by an instrument in writing under the Public Seal of Palestine by the High Commissioner in accordance with such instructions as he may receive from His Majesty and shall hold office during the pleasure of His Majesty.

In our opinion, but for that provision, Judges would be appointed like all other public officers under Article 14:—

(a) subject to the direction of the Secretary of State, and not in accordance with instructions from His Majesty;

(b) not necessarily by an instrument in writing under the Public Seal;

and they would

(c) hold office during the pleasure of the High Commissioner, and not during that of His Majesty.

The deliberate restriction of Section 12 of the Courts Ordinance to Judges of the Supreme Court or of District Courts and the omission from its ambit of Magistrates, satisfies us that the legislature intended to leave the appointment and terms of tenure

of office of Magistrates to be governed by Article 14 of the Palestine Order-in-Council.

Again, reading the provisions of Article 60 and 61 of the Order-in-Council, together with Article 39 of the Order-in-Council and Section 2 of the Establishment of Courts Order, 1924, it is clear that the Order-in-Council contemplates the trial and investigation of charges against foreigners by a British Magistrate; that is to say, it contemplates in a place such as Hebron, where there is only one Magistrate's Court, that if the Magistrate is a Palestinian he should in such cases be replaced *pro hac vice* by a British Magistrate, and we can find nothing to prevent the appointment by the High Commissioner of what the Government Advocate has styled a part-time Magistrate or, as I should prefer to put it, his giving a dormant warrant to an administrative officer for use in such cases as those contemplated in Articles 60 and 61 of the Palestine Order-in-Council.

We cannot therefore agree that any distinction can be drawn between the status and powers of Magistrates and "officers of the Government holding Magisterial Warrants" or of Magistrates and "public officers holding Magisterial Warrants" who are named in juxtaposition in Section 12 (3) of the Courts Ordinance, 1924, and Section 72 (c) of the Trial Upon Information Ordinance, 1924, respectively, and possibly elsewhere in the statute books of this territory; and we cannot agree with the contention that because in the latter of these Ordinances *ex abundanti cautela* a Magistrate was defined to include public officers holding Magisterial Warrants, therefore, in cases not covered by such definition, the two categories of officers are distinguishable.

When, however, we come finally to the point as to whether the document under which Mr. Bailey purported to exercise Magisterial functions was a valid appointment to act as a Magistrate, we come to a more difficult point.

The warrant in question ran as follows:—

"I authorise you to try

(1) offences committed by the inhabitants of Palestine connected with the property and personnel of the Army and Administration;

(2) contraventions against Articles 179 and 254—265 of the Ottoman Penal Code, and

(3) contraventions against any Regulations, Ordinances and Public Notices issued by the Administration since the Occupation. You may impose a sentence up to six months' imprisonment or a fine of £E. 50, or a combination of these two penalties.

An appeal from your judgment will lie to the District Court, where the sentence exceeds one month's imprisonment or a fine of £E. 10.

(Sgd) Herbert Samuel,
High Commissioner."

In other words, the document gives the holder power summarily to try only certain minor offences and, in spite of the provisions of Section 1 of the Magistrates' Courts Jurisdiction Ordinance, 1924, now replaced by Section 2 of Ordinance No. 2 of 1926, which gives to Magistrates' Courts a jurisdiction to pass a sentence of one year's imprisonment and a fine of £E. 100, the document under review limits the holder to the power of imposing six months imprisonment and a fine of £E. 50.

Since this is the whole tenor of the document we cannot interpret it as a Magisterial Warrant containing an executive direction from the High Commissioner — not binding in law — to the effect that it is his wish that the holder should try only the minor contraventions and inflict only the light penalties specified.

In the absence of any provision of the law authorising the High Commissioner to appoint Magistrates of limited jurisdiction, we hold that this document is void as a Magisterial Warrant, as would be in similar circumstances an instrument under the Public Seal appointing a Judge of the Supreme Court to try, let us say, all cases other than capital.

Judgment is therefore given for the Appellant and the conviction will therefore be quashed, and the case remitted to the competent Court for trial.

Delivered the 29th day of December, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 62/27.

BEFORE:

The Chief Justice, Frumkin, J. and Aziz Daudi, J.

IN THE CASE OF:

Palestine Agudath Netaim Co. Ltd. APPELLANT.

vs

Salvador Abarbanel RESPONDENT.

Jurisdiction of Courts re confirmation ot award — Competence of District and Land Courts.

Appeal from the judgment of the District Court of Jaffa refusing to confirm an award of arbitrators on the ground that it had no jurisdiction to confirm an award relating to land purchase.

JUDGMENT.

The judgment of the District Court, to the effect that it has no jurisdiction, is set aside and the matter remitted to the District Court to decide on the merits.

Delivered the 5th day of October, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 5/28.

BEFORE:

Corrie, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Muhammad Mattari APPELLANT.

vs

Haj Ali Abdel Hadi Ramadan RESPONDENT.

Leave to appeal granted by President of District Court — Point of law on which leave to appeal granted not stated—Sec. 4, Magistrate's Court Jurisdiction Ordinance, 1924.

Appeal by leave from a judgment of the District Court of Jaffa sitting as a Court of Appeal from the Magistrate's Court.

JUDGMENT.

Adjourned for Petitioner to apply to the President of the District Court to state in accordance with Section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1924, the point of law upon which leave to appeal is granted.

Delivered the 3rd day of April, 1928.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 51/28.

BEFORE:

The Chief Justice, Baker, J. and Khayat, J.

IN THE CASE OF:

Barthie Woolman — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Conviction by Magistrate for assault—Appeal made to District Court by Attorney General—Notice of appeal not served in time to enable accused to be heard in his own defence—Leave to appeal to Court of Appeal granted by President on question of sentence—Section 4, Magistrates' Courts Jurisdiction Ordinance, 1924 — Leave to appeal to be only on point of law—Remittal of sentence of imprisonment by High Commissioner on recommendation of Court of Appeal.

JUDGMENT.

The Appellant in this case was convicted by the Magistrate of assault and sentenced to pay a fine of 250 mils.

The Attorney-General appealed to the District Court which varied the sentence to seven days' imprisonment with costs.

It later came to light that notice of the appeal had not been served on the Respondent in time for him to reply, should he so desire.

The President of the District Court was then approached and ordered as follows:—

> "Whereas it appears that the Respondent had no sufficient notice to enable him to defend himself against the appeal of the Public Prosecutor requesting an increase of sentence, and whereas the District Court did in its judgment dated 23rd May, 1928, increase the sentence, leave to appeal to the Court of Appeal is hereby granted on the question of sentence solely".

Section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1924, runs as follows:—

> "The decision of the District or Land Court in any Appeal from a Magistrate's Court shall be final; but the President of the Court may, if he considers it proper so to do, grant leave to appeal to the Supreme Court on a point of law."

It appears, therefore, that leave to appeal "on a question of sentence solely" was *ultra vires* the President of the District Court, as would have been any leave save "on a point of law."

The appeal must, therefore, be dismissed on this purely technical point.

Whether or not one may agree with the District Court that the penalty of 250 mils fine was quite disproportionate to the gravity of the offence of kicking a man between the thighs so as to disable him for two days, one cannot be blind to the fact that the appeal at which the fine was changed to imprisonment was by an error tried without the accused being able to be heard in his own defence.

Since this Court cannot remedy this wrong we propose to report the matter to His Excellency the High Commissioner with a recommendation that he remit the sentence of imprisonment on the accused, on condition that he pay the fine of 250 mils, and in view of this the execution of the sentence of imprisonment will be respited for a period of one month.

Delivered the 26th day of October, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 67/28.

BEFORE:

Baker, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Rizkallah Ibn Yusef Shahin, Nimetallah Ibn Yusef Shahin, and Zahiyeh Shahin — APPELLANTS.

vs

'Azar Yusef El-Hayek — RESPONDENT.

Sec. 2, Transfer of Land Ordinance, No. 2 of 1921—Right of appeal from decision of President of District Court—Article 43, Palestine Order-in-Council, 1922—Constitution of Court.

JUDGMENT.

The appeal or application must be dismissed as being ultra vires.

The President of the District Court sitting in applications under Section 2 of the Transfer of Land Ordinance, No. 2 of 1921, does not constitute a Court within the meaning of Article 43 [of the Palestine Order-in-Council, 1922, from which there is an appeal to the Court of Appeal.

Therefore the appeal must be dismissed with costs.

Delivered the 5th day of February, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 74/28.

BEFORE:

The Presiding British Judge, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Raphael Turjuman — APPELLANT.

vs

Saleh Salah Hamdan — RESPONDENT.

Constitution of District Court — Disagreement of two Judges constituting Court —Third Judge called in improperly—Judgment to be entered for Defendant on equal division of Members of Court—Burden of proof.

Appeal from the judgment of the District Court of Jaffa, dated 25th August, 1928.

JUDGMENT.

Upon the trial of this case before the Jaffa District Court, the Court was constituted by the two Learned Members. The two Members disagreed and gave two different judgments. The Learned President was then called in as third Member and gave a judgment similar to that of one of the Learned Members which was considered the judgment of the Court.

There is no provision in the law with regard to the trial of civil cases for a third Judge to be brought in subsequent to the Court having retired for consideration of their judgment.

We are, therefore, of opinion that when two Judges disagree, it must be held that Plaintiff has failed to satisfy the Court with regard to his claim and that, therefore, judgment should be entered for Defendant.

The case must accordingly be returned for a formal judgment to be entered for Defendant.

Delivered the 20th day of February, 1929.

In the Land Court of Jerusalem.

L. Jm. No. 78/28 *.

BEFORE:

Grieve, J., Abdel Hadi, J. and Aziz, J.

IN THE CASE OF:

Issa Ibrahim Eljedi of Bethlehem — PLAINTIFF.

and

Jirius Jacoub of Bethlehem — DEFENDANT.

Disagreement of two Judges of Land Court—Third Judge called in for opinion—Dispute under Land Courts Ordinance, 1921, referred by Land Court to arbitrators—Failure by Court to authenticate award owing to absence of Judge — Relief not given for damage suffered because of default of Court — Sec. 5 (1), Land Courts Ordinance, 1921 — Unauthenticated award set aside.

JUDGMENT.

In this case, on the preliminary point tendered, I regret I must find for the Defendant, for although the Plaintiff did all he possibly could to get the award authenticated, the fact remains that the Court failed to authenticate it within the time required by the Land Courts Ordinance, 1921, namely, six months from the date of issue. It may seem hard that the Plaintiff should suffer through a dereliction of the Court—for such dereliction there would appear to be—but hard cases make bad law. The wording of Section 5 (1) is clear and unambiguous, that before an award can have the effect of a judgment, it must be authenticated by the Court within six months of its date of issue. In the present case, there was no such authentication, therefore I reluctantly rule that the award cannot stand and must be considered as null and void. The learned Judge, Magid Bey agrees with me in what I have just said, but His Honour Aziz Bey disagrees and dissents.

There are to be costs for Mr. Samuel in £P. 3 in respect of the point argued. Leave is also given to appeal from our finding within one month.

Delivered the 19th day of May, 1928.

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* Confirmed on Appeal — See L. A. No. 58/28.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 14/29.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Zeineh and Hilweh Muhammad Mizyed ; APPELLANTS.

vs

Malakeh Hoobie on behalf of the Estate of Hanna Hoobie RESPONDENT.

Jurisdiction of Courts — Appeal remitted by Ottoman Court of Cassation but not presented to Ottoman Court of Appeal at the time of the British Occupation—Palestine Order-in-Council, 1922—Section 16 (2), 23, Courts Ordinance, 1924—Case commenced before Ottoman Court of First Instance heard de novo by Land Court.

JUDGMENT.

The question raised by this appeal is whether this Court has jurisdiction to hear and determine an appeal which had been remitted by the Ottoman Court of Cassation but had not again been presented to the Ottoman Court of Appeal at the time of the British Occupation.

The jurisdiction of the Courts set up under the Palestine Order-in-Council, 1922, with regard to cases then pending is defined by Sections 16 (2) and 23 of the Courts Ordinance, 1924.

These Sections give the Courts thereby established power to hear and decide cases pending in the then existing Courts, but do not authorise the hearing of a case pending in the Ottoman Courts with regard to which no application to the Court has been made since the British Occupation.

This Court has already held on more than one occasion that it had no jurisdiction to hear an appeal from an Ottoman Court of First Instance (Land Appeal No. 145/26 and Civil Appeal No. 45/25).

Those judgments were based upon the Sections already quoted and we have no doubt that these Sections govern the present appeal, and that neither this Court nor the Land Court can continue the proceedings commenced in the Ottoman Courts.

The Land Court, however, can hear the case *de novo*, and we therefore allow the appeal and set aside the judgment of the Land Court and remit the case to the Land Court for hearing.

Costs will follow the event.

Delivered the 28th day of May, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 29/29.

BEFORE:

Webb, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

Isa Morcos — APPELLANT.

vs

Emilie Morcos — RESPONDENT.

Action by indorsee of promissory note — Forgery alleged during course of trial—Action struck out pending investigation of criminal charge — Competence of Investigating Magistrate to sit as Judge of District Court in civil matter arising out of the same transaction — Statement made before Examining Magistrate given as evidence before Civil Court—Direct evidence preferred to secondary—Irregularity of procedure not affecting result of case not considered—Effect of endorsement of promissory note—Admission of evidence to prove real nature of transaction between husband and wife—Art. 82 Civil Procedure Code—Admissibility of oral evidence.

JUDGMENT

This case was brought by the Plaintiff, Emilie Morcos, against her husband, Isa Morcos, for the sum of £E.810 and interest, due upon a promissory note dated 20th July, 1921, and payable on demand to the order of Habid Samaan. On 30th November, 1921, Habid Samaan indorsed the note for value to the Plaintiff. On 24th February, 1923, Habid Samaan gave to the Plaintiff a Power of Attorney to sue for and collect from the Defendant the amount due to Habib Samaan on the promissory note. This action was brought by the Plaintiff as indorsee and not under the power purporting to have been conferred by the Power of Attorney.

The trial of the action commenced before Valero, J. and Mejid Bey Abdel Hadi, J. A charge of forgery of the date of the indorsement was alleged against the Plaintiff, and the case was struck out pending the investigation of the criminal charge, with liberty ro re-enter it when that charge had been disposed of.

The criminal charge was investigated by Saba Eff. Said. When the case was re-entered it came before a Court consisting of Mejid Bey Abdel Hadi and Saba Eff. Said JJ., who gave judgment for the Plaintiff for the amount claimed.

The Defendant has appealed against this judgment, and one of the grounds of appeal is that, as Saba Eff. Said had sat as

Examining Magistrate in the charge of forgery brought against the Plaintiff, he was not competent to sit as one of the Judges in this case. In our opinion this contention fails; we see no reason for holding that the fact of a Judge having sat as Examining Magistrate precludes him from subsequently trying a civil case arising out of or connected with the same transaction.

At the trial it was argued that the acceptance by the Plaintiff in 1923 of a Power of Attorney from Habib Samaan should be regarded as a proof that the indorsement of the promissory note to her in 1921 was invalid or was not intended to confer upon her the rights of an indorsee. On the question of the circumstances in which the Power of Attorney was given, the Court appears to have read the statement given by the Plaintiff before the Examining Magistrate and not to have examined her upon oath.

In our opinion this procedure was irregular, but having regard to the letter written by the Defendant to the Plaintiff on 18th July, 1926, in which he admits her right to the sum mentioned in the promissory note and promises payment, and to the view that we take as to the legal effect of the indorsement, we are of opinion that this irregularity of procedure did not affect the result of the case and that therefore it would be absurd to quash the decision and remit the case for retrial on this point.

The indorsement on the promissory note is regular in point of form, and therefore in law it conferred upon the Plaintiff all the rights of a holder of a negotiable instrument as against the maker, whatever may have been the opinion of the parties to it as to its effect, and whatever may have been the understanding between them, and the legal result of the indorsement could not be affected by the subsequent execution of the Power of Attorney.

Finally it is argued that the transaction was really one between husband and wife, and that evidence is admissible under Code of Civil Procedure Article 82 and should have been heard by the District Court to prove the real nature of the transaction.

The answer to this contention is that, though the present action is one between husband and wife, the original transaction, as to which it is sought to give evidence, was between the Defendant and Habib Samaan. The law has seen fit to provide that where the terms of a transaction have been put in writing oral evidence shall not be admissible. It is not necessary for us to

decide how far Code of Civil Procedure Article 82 creates an exception to this Rule in the case of transactions between relatives, but it is clear that to admit oral testimony in this case would mean that oral testimony must be admitted in every case in which the maker of a document alleges that the transactions was not really between himself and the other party, but between himself and some relative of his. Where a person has deliberately availed himself of a certain provision of the law, he must abide by the consequences.

For these reasons we dismiss the appeal and affirm the judgment of the Distict Court with costs and £P. 3 advocate's fee.

Delivered the 15th day of October, 1929.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 50/29.

BEFORE:

Webb, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

Diyab Dahnun — APPELLANT.

vs

Hadiyeh Hassan Dahnun
Fatimeh Mohd. Dahnun
Musa Mohamad Dahnun — RESPONDENTS.

Document produced in Land Court alleged to be a forgery— Decision by Lower Court as to genuiness of document is decision on question of fact.

Appeal from the judgment of the Land Court of Jaffa, dated the 24th day of April, 1929.

JUDGMENT.

The Land Court has considered the document produced by the Appellant and finds that it is not genuine. This is a decision on a question of fact, and having regard to the circumstances we are of opinion that the decision was according to law.

We therefore dismiss the appeal with costs and £P. 3.— expenses. Deposit to be forfeited.

Dilivered the 16th day of October, 1929.

In the High Court of Justice.

H. C. No. 71/29.

BEFORE:

Corrie, J. and Khayat, J.

IN THE CASE OF:

Sheikh Fares As'ad — PETITIONER.

vs

Magistrate of Tulkarem as Chief Execution Officer and Halimeh bint Al-haj Abdalla Nashef — RESPONDENTS.

Execution Order by Magistrate respecting sum of £P.800 — Jurisdiction of Magistrate as Execution Officer — President of District Court as Chief Execution Officer.

ORDER.

The Order of the Magistrate of Tulkarem does not relate to a judgment of his Court, and accordingly he is not the Chief Execution Officer of the Court having jurisdiction.

The claim is one which, on account of its value, can only be established or contested in the District Court and accordingly the President of the District Court is the Chief Execution Officer concerned. The Petition is dismissed.

Delivered the 16th day of December, 1929.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 23/30.

BEFORE:

The Acting Chief Justice, Jarallah J. and Frumkin, J.

IN THE CASE OF:

Suleiman Ibrahim Suleiman El Yasin — APPELLANT.

vs

Mahmud Kasen Abu Nab'ah — RESPONDENT.

Witnesses produced to prove that transaction was mortgage and not sale—Action dismissed due to insufficiency of evidence—Jurisdiction of Court of Appeal — Question of appreciation of evidence is for trial Court.

Appeal from the judgment of the Land Court of Nablus, dated the 15th day of March, 1930.

JUDGMENT.

The Appellant, who was the Plaintiff, produced witnesses to prove his allegation that a certain transaction was a mortgage and not an absolute sale. The Land Court was not satisfied with the evidence tendered by the Appellant and dismissed the action.

The question of appreciation of the evidence was one for the Land Court, and hence there is no ground for an appeal to this Court.

The appeal is dismissed with costs.

Delivered the 25th day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 26/30.

BEFORE:

Baker, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Muhammad 'Afifi — APPELLANT.

vs

Sheikh Muhammad Bashir Taj Ed-Din El-Yashruti — RESPONDENT.

Jurisdiction of Land Court re claim of right of irrigation in land—Customary right to water — Necessity of corroboration of evidence of single witness in civil case—Evidence of Committee of Inspection containing Judge of Court.

JUDGMENT.

We are satisfied that the subject-matter of the action was and is within the jurisdiction of the Land Court.

The lower Court found as a fact that the land in issue was up to the time it was sold in the habit of receiving a certain amount of water.

The Court arrived at these findings on the evidence of a single witness and presumably relied on evidence heard before an inspection committee as corroborative evidence. The Inspection Committee certainly contained one of the Judges of the Court, but evidence heard in such a manner cannot in any way be considered evidence materially corroborating the evidence of a single witness.

The judgment of the lower Court must be set aside and the case returned for the Court below to hear the witnesses who appeared before the Inspection Committee and any further evidence the parties choose to produce, and to give a fresh judgment.

Costs to be costs in the cause.

Delivered the 1st day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 86/30.

BEFORE:

The Senior Puisne Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Ibrahim Mikhail Zifteh — APPELLANT.

vs

Ahmad Salim Dajani and Others — RESPONDENTS.

Joint and several contract by heirs for the sale of a vineyard — Bankruptcy of heir — Sale of share of minor heirs — Liquidated damages for breach of contract—Insolvency of estate—Sale by Syndic of property of ancestor sold by heirs before the insolvency — Disagreement of two Judges constituting District Court—Judgment entered in accordance with the view most favourable to the Defendant—Heirs joined on death of party after commencement of action — Payment to one of several persons jointly and severally entitled is payment to all — Judgment against heirs proportioned to shares inherited.

Appeal from the judgment of the District Court of Jaffa dated the 5th day of May, 1930.

JUDGMENT.

On the 28th January, 1928, the Respondents Amneh bint Hussein Azizeh Dajani and Halimeh, Rakiyeh and Fatimeh, the daughters of Haj Yousef Dajani, on their own behalf, and Haj Salim Dajani and Muhammad Rifaat Dajani as guardian on behalf of Subhi, Muhammad and Mustafa, the minor children of Haj Yousef Dajani (all thereinafter called the First Party) entered into a contract with the Appellant Ibrahim Mikhail Zifteh (thereinafter called the Second Party) to sell to him, jointly and severally, the whole of a vineyard formerly the property of their ancestor, Haj Yousef Dajani, of which the boundaries were stated, for the price of £P. 540.

Under Clause 2 of the contract, the purchase money was to be paid, (a), as to £P. 230, by the cancellation of a debt for that amount due on a bill to the Appellant from the vendor's ancestor, Haj Yousef Dajani. The balance was to be paid, (b), as to £P. 170, in cash at the signature of the contract, (c), as to £P. 50, by a bill payable one month after the date of the contract, and (d), as to the remaining £P. 90, upon registration of the transfer.

The contract recited the fact that Abdullah Yousef, one of the heirs of Haj Yousef Dajani, had been declared bankrupt and provided for payment of his share to the Syndic, and Clause 9 of the contract provided that "if the Syndic does not agree to this sale the First Party is obliged to purchase the share of Abdullah whatever its value may be, and to offer it to the Second Party.

By Clause 6 of the contract the First Party undertook to obtain an authority from the Sharia Court for the sale of the shares of the minors.

Clause 11 provided that—"if the First Party refuses this sale, or commits a breach of one of its terms, he will be bound and obliged to pay £P. 1000, to the Second Party in addition to the price which he received from the Second Party and all the expenses suffered by the Second Party as liquidated damages agreed upon in advance between the two parties".

Subsequent to the signature of this contract the estate of Haj Yousef Dajani was declared insolvent and the vineyard in question, which formed part of this estate, thus became vested in the Syndic of the estate, who sold it to a purchaser other than the Appellant. There is no evidence that any attempt had been made by the First Party to the contract to obtain a transfer from the Syndic to the Appellant, nor is there any evidence of any attempt by the First Party, prior to the declaration of insolvency of Haj Yousef Dajani's Estate, to obtain the consent of the Sharia Court to the sale of the minor's shares, or the consent of Abdullah's Syndic to the sale of his share.

Under these circumstances the Appellant commenced an action in the District Court at Jaffa against the first party claiming repayment of £P. 500, the amount then paid by him in respect of the contract, and £P. 1000, agreed damages with costs and interest.

The two Judges who heard the action were not in complete agreement, and judgment was therefore entered in accordance with the view most favourable to the Defendant. The Court ordered the Defendant Amneh to pay to the Plaintiff her share in the sum of £P. 270, amounting to £P. 33.800, and also her share in the amount of £P. 230, due from her husband, namely, £P. 27.

Jndgment was also given against Halimeh, Rakiyeh and Fatimeh for their share in the latter sum, namely £P. 43.813. The judgment continued: "Whereas it is provided clearly in the contract that the Plaintiff shall pay a sum of £P. 270, to the Defendants at the signature of the contract and whereas the Plaintiff did not pay the sum to them as it appeared to Court, therefore the non-payment of the sum is considered as default as well as the others will be considered as Defaulters. Therefore it is decided to dismiss the claim for liquidated damages against the Defendants, and likewise to dismiss the case against the guardian as it was proved by the evidence and statements of the witnesses heard that they did not receive anything of the sum in claim".

Against this judgment Ibrahim Zifteh has appealed and Amneh has lodged a Cross-Appeal.

As Haj Muhammad Salim Dajani has died since the commencement of the action, his heirs, the first seven Respondents, have been joined as parties to this appeal.

In support of his appeal the Appellant, Ibrahim, has filed four receipts given by Amneh in respect of the instalment of £P. 50, payable under Clause 2 (c) of the contract and a further receipt for £P. 90 payable under Clause 2 (d); and he asks us to say that these receipts, together with a receipt for £P. 30, from Amneh given on the 9th day of April, 1929, prove that he had paid:— (1) the sum of £P. 170 due upon the signature of the contract, (2) the £P. 50 instalment due one month after the signature of the contract, and (3) £P. 50 out of the £P. 90 payable upon registration of the transfer, making a total sum of £P. 270 paid by him in respect of the contract which, together with the sum of £P. 230 due from Haj Yousef Dajani, makes a total sum of £P. 500.

The Respondent Amneh denies that she signed these receipts. She further by way of Cross-Appeal, argues that she is not liable for any share in the £P. 230 owing to the Appellant from Haj Yousef Dajani, as he holds a bill for this debt and can apply to the Syndic for payment.

We are satisfied that the receipts produced by the Appellant are sufficient proof that he paid the sum of £P. 170 due on the signature of the contract, and also paid a further sum of £P. 100 to the Respondent Amneh.

We also hold that in view of the terms of Clause (1) of the contract, the rights and liabilities of the First Party thereto are joint and several, and hence that any payment made to the Respondent Amneh was a payment to the persons constituting the

Party of the First Part jointly and severally, and they are thus jointly and severally liable in respect of any such payment.

On the other hand we are unable to see that the Respondents can be made liable for any part of the £P. 230 due to the Appellant from Haj Yousef Dajani. The Respondents did not receive this sum and the Appellant can take steps to recover it from the Syndic of Haj Yousef's Estate.

With regard to the claim for a penalty, the receipts produced dispose of the District Court's finding that the Appellant committed a breach of the contract by failing to pay £P. 170 at the time of signature.

On the other hand it is clear that a breach has heen committed by the persons constituting the First Party to the contract.

The guardian Haj Salim Dajani and Muhammad Rifaat Dajani undertook obligations under the contract for which they personally, or their estates, are liable.

As regards the sum of £P. 230, therefore, the Cross-Appeal by Amneh is allowed, and the Appellant's claim for this sum is dismissed as against all the Respondents.

With regard to the sum of £P. 270 and the claim for a penalty of £P. 1000, the appeal is allowed, the judgment of the District Court is set aside, and judgment for the above sums is entered in favour of the Appellant Ibrahim Mikhail Zifteh against the Respondents jointly and severally, subject to the restriction as regards the heirs of Haj Salim Dajani that no heir shall be made responsible for more than a rateable part of the judgment debt proportionate to his share of his ancestor's estate.

The Respondents will pay the costs here and below.

Delivered the 3rd day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 10/31.

BEFORE:

The Acting Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Munireh bint Ahmad Rafiq Pasha and Sha'an'ah — APPELLANT.

vs

Mrs. Mary Sabbagh on behalf of the heirs of her late ancestor Tuma Sabbagh — RESPONDENT.

Contract for the transfer of immovable property situated in Palestine— Contract to be carried out in Palestine — Jurisdiction of Courts — Failure to produce documents of title as breach of contract.

Appeal from the judgment of the District Court of Haifa, dated the 17th day of October, 1930.

JUDGMENT.

The primary object of the contract involved in this appeal is the transfer of immovable property situated in Palestine. Hence we hold that the action is one in respect of which the contract is to be carried out in Palestine, and accordingly the Haifa District Court had jurisdiction to hear the claim.

We are satisfied that on the evidence before it, the Lower Court was justified in holding that the Appellants had failed to fulfil their obligation under Clause 3 of the contract inasmuch as they had omitted to provide the necessary documents in support of their title to the land.

The judgment of the lower Court must, therefore, be confirmed and the appeal dismissed with costs and advocate's fees assessed at £P. 2.— Delivered the 21st day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 21/31.

BEFORE:

The Chief Justice, Baker, J. and Khaldi, J.

IN THE CASE OF:

Frederick Fast
Herman Frederick Fast — APPELLANTS.

vs

Ouni Bey Abdel Hadi — RESPONDENT.

Constitution of Courts—Different Judges of the District Court sitting at different hearings—Judgment set aside for irregularity of procedure.

JUDGMENT.

The Court holds that as Barady, J. was not a member of the Court which heard the proceedings on the first day of the trial, the judgment of the lower Court must be set aside and the case remitted to the District Court for rehearing and for judgment to be given accordingly.

Costs to follow the event.

Delivered the 4th day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 29/31.

BEFORE:

Baker, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Raouf Ka'war — APPELLANT.

VS

Mustafa Hussein El-Taha
Saleh Hussein El-Taha
Ahmed Hussein El-Taha — RESPONDENTS.

Leave to appeal granted by President of the District Court— Point of law not stated—Sec. 4, Magistrates' Courts Jurisdiction Ordinance, 1924.

JUDGMENT.

No point of law has been stated by the President of the District Court upon which he has granted leave to appeal in accordance with Section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1924.

Accordingly the case must be dismissed with costs and travelling expenses assessed at 600 mils each.

Delivered the 22nd day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 91/31.

BEFORE:

The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Mme. Ephrosine Gaitanopoulos — APPELLANT.

VS

Elie Kramer — RESPONDENT.

Constitution of Courts — Different Judges of the District Court sitting at different hearings—Preliminary objection as to composition of Trial Court taken on appeal—Adjournment by Court of Appeal for production of proof of irregularity—English doctrine of goodwill held not applicable in Palestine—Introduction of new principles of law—Interpretation of Statutes.

Appeal from a judgment of the District Court of Jerusalem dated the 22nd day of June, 1931, awarding to the Respondent who had been in partnership with the Appellant, the sum of £P. 400 as his share of the goodwill in the partnership.

INTERLOCUTORY JUDGMENT.

The Court by a majority holds that this case can be distinguished from Civil Appeal No. 21/31, inasmuch as the District Court presided over by Judges De Freitas was concerned with the mere issue of law whether "goodwill" is recognisable in Palestine law, while the subsequent proceedings presided over by Judge Plunkett were concerned with another issue viz:— was there goodwill in this case, and if so what was its value? The objection as to the change of Presidents is therefore overruled. It is also alleged that in the proceedings presided over by Judge Plunkett the Court on one occasion was composed also of Majid Bey and on another occasion of Judge Valero. We cannot accept Mr. Horowitz's argument that the fact that this was not pleaded prevents our consideration of the objection. The matter having been brought to our notice, we are bound to take cognizance of an alleged variation in the constitution of the Court, which if proved to have occurred, would go to the root of the proceedings. We therefore adjourn for proof of this to be obtained as all we have before us is the Court proceedings of the 17th June, 1931, when the hearing of the case was concluded and judgment was reserved, which states that Majid Bey was a member of the Court but does not bear his signature.

A certificate to be produced by Appellant from the Court below and to be served on Respondent.

JUDGMENT.

The questions which we have to decide in this case are, first, whether the District Court was right in holding that a claim in respect of the goodwill of a business can be maintained under the law of Palestine and, if the answer to this first question is in the affirmative, whether the value of such goodwill was correctly assessed by the District Court.

There is no provision in the Ottoman law which can be urged in favour of an affirmative answer to the first question. It is not clear from the judgment whether the District Court accepted Mr. Horowitz's argument that "goodwill" is equivalent to what is known as "key money" in Palestine but in any case we are unable to accept this alleged analogy and we have had cited to

us no authority which pointed to any customary recognition of goodwill in this country.

The whole case for the Appellant is based upon the mention of goodwill in Section 54 (1) (g) of the now repealed Companies Ordinance, 1921, which is reproduced *totidem verbis* as Section 86 (1) (ii) of the Companies Ordinance, 1929, in Section 121 (2) and Section 127 (1) (a) of the same Ordinance and in Section 3 (7) of the Partnership Ordinance, 1930.

In Mordechai Eliash v. Director of Lands, Jerusalem, High Court No. 77/31, it was urged by the Petitioner that certain provisions of the Companies Ordinance, 1929, and of the Partnership Ordinance, 1930, had introduced into Palestine the doctrine of private trusts, as to which it was admitted that the law of Palestine was silent.

That which I said in my judgment in that case applies with equal force in the case before us, and I cannot do better than to quote the relevant passage in my judgment which ran as follows:—

> "The Companies Ordinance of 1929 and the Partnership Ordinance of 1930 are very lengthy enactments based upon English Statutes which have been, if one may use the expression, swallowed virtually holus-bolus by the legislator of Palestine with comparatively small alterations. Now there is a presumption that the legislator does not intend to make any substantial alteration in the Law beyond what it explicitly declares either in express terms or by clear implication; or, in other words, beyond the immediate scope and object of the statute. (Maxwell on the Interpretation of Statutes, Sixth Edition, page 149).
>
> "The same authority states that it is more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to its enactment which could not have been intended.
>
> "I do not think one can seriously hold, knowing the nature of the Legislation with which we are dealing, that the Legislature intended by a mere side-wind to introduce a new principle of law such as the doctrine of private trusts, into Palestine.
>
> As is said in Craies on Statute Law, Third Edition, page 112, "To alter any clearly established principle of law a distinct and positive legislative enactment is necessary," and the same authority cites the case of Rolfe v. Flower (1866) Law Reports Privy Council page 27, where the Judicial Committee said with regard to an argument that the Legislature of

Victoria intended by a certain section of an enactment to alter a well-known principle of bankruptcy law:

"If this were the establishment of a new code of insolvent law, and it was the object of the colonial legislature to prevent the operation of a rule which they considered unjust, it is hardly to be imagined that they would have committed their intention to the equivocal meaning of a few words in a single section of the Act."

For the same reasons I hold that the English doctrine of goodwill has not been introduced into Palestine by the Ordinances in question.

The judgment of the District Court is, therefore, set aside and judgment is given for the Appellant with £P. 6 advocate's fee and costs.

Delivered the 12th day of March, 1935.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 61/32.

BEFORE:

The Senior Puisne Judge, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Syndic of Selim Nasrallah Khoury's Bankruptcy — APPELLANT.

vs

Yola Shehab — RESPONDENT.

Constitution of Courts—Different Judges of the District Court sitting at different hearings — Judgment set aside for irregularity of procedure—Question of irregular constitution of Trial Court raised by Court of Appeal of its own motion.

Appeal from the judgment of the District Court of Haifa, dated the 29th day of March, 1932.

JUDGMENT.

It has been decided in Civil Appeal No. 21/31 (Frederick Fast vs Auni Abdel Hadi), that the question whether the Court of trial was duly constituted or not is one of which this Court will take notice even though it may not have been raised by the Appellant.

It follows that, so far as this question is concerned, it is immaterial whether the additional grounds of appeal filed by the Appellant are within time or not.

The constitution of the Court by which the action which gives rise to this appeal was heard, was varied from hearing to hearing on no less than four occasions.

This was clearly irregular, and the judgment delivered in consequence of such irregular proceedings must of necessity be set aside and the case remitted.

Costs will be costs in the cause.

Delivered the 5th day of May, 1933.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 81/32.

BEFORE:

The Chief Justice, Baker, J. and Khaldi, J.

IN THE CASE OF:

Kassam Rabi — APPELLANT.

vs

Said Rabi — RESPONDENT.

Constitution of Courts—Different Judges of the Land Court sitting at different hearings — Whole evidence heard by Judges giving judgment—Arrival of party to action after hearing of case in Court.

JUDGMENT.

In this appeal it is said that a Court differently constituted heard the case on different occasions. It is true that the parties on the first occasion on which the case came before the Land Court, presided over by the late Litt, J. addressed the Court but no evidence was then led and the whole of the evidence was heard by the same two Judges as gave judgment on September 15th, 1932.

As to the second point in the appeal, the Arabic note states that the case was adjourned on September 14th to 8 a.m. on September 15th. It is not correct therefore as the Appellant states that there was an adjournment to noon and in spite of that judgment was delivered at 11.30 in his absence.

The appeal is dismissed with costs and £P. 1 travelling expenses.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 5/33.

BEFORE:

Baker, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Goldberg and Others — APPELLANTS.

vs

Rabinowitz and Others — RESPONDENTS.

Establishment and jurisdiction of Civil Courts— Constitutionality of Land Settlement Courts — Validity of Land Settlement Ordinance, 1928 impugned — Question of ultra vires of Ordinance — Judicial powers of Land Settlement Officers— Arts. 38, 42, Palestine Order-in-Council, 1922 — Ouster of jurisdiction to hear actions concerning rights to land alleged — Secs. 6, 32, 35, 56, 59, Land Settlement Ordinance, 1928 — Procedure on appeal from decision of Land Settlement Officer — Effect of entry made by Land Registrar in Register.

JUDGMENT.

In this appeal from the judgment of the Land Court, Jaffa, confirming the judgment of the Settlement Officer, Ramleh Settlement Area, in cases Nos. 18, 19, 20, 29, Rehoboth (combined) 1930, Mr. Horowitz and Mr. Goldberg raised a preliminary point that the exercise by a Settlement Officer of judicial power under Section 10 of the Land Settlement Ordinance, 1928, is repugnant and inconsistent with the Palestine Order-in-Council, 1922-23, and that accordingly the Settlement Officer is not vested with any judicial power at all and that his judgment, the subject matter of the appeal, not being a judicial act, is inoperative and of no effect.

They have argued that Article 38 which is the 1st Article of Part 5 of the Palestine Order-in-Council, headed Judiciary, provides for the Civil Courts of the country, and Article 42 for the establishment of Land Courts.

The said Articles provide:—

Article 38 that:

"The Civil Courts hereinafter described shall, subject to the provisions of this part of the Order, exercise jurisdiction in all matters and over all persons in Palestine".

and Article 42 that:

"The High Commissioner may by order establish Land Courts as may be required from time to time for the hearing of

such questions concerning the title to immovable property as required".

Appellants allege that the provisions of the Land Settlement Ordinances which empower Settlement Officers to prepare Schedules of Rights to land, direct the registration of such Rights in accordance with the Settlement Officer's decisions, and provide that claims inconsistent with such registration shall be invalid, are provisions which oust the jurisdiction of the Courts established under Article 42 of the Order-in-Council, and change such Courts into Courts of second instance inasmuch as a litigant cannot go to the Land Courts as of right, but only on sufferance with the leave of the Settlement Officers, and are ultra vires the Order-in-Council, and must be treated as invalid.

It is necessary, therefore, for us to examine the Land Settlement Ordinances and to ascertain whether their provisions do, in fact, oust the jurisdiction of the Civil Courts constituted under the Palestine Order-in-Council.

The relevant Sections of the Ordinances are as follows:—

Section 6 of the Land Settlement Ordinance, 1928, (referred to herein as the Principal Ordinance), as amended by Section 3(1) of the Land Settlement (Amendment) Ordinance, 1930, provides as follows:—

> "Save as provided herein, no action concerning rights to land in any village in which notification of settlement has been published shall be entered in any Land Court or Civil Court until the Schedule of Rights has been published in accordance with Section 32 hereof. Any action entered before the notification is published shall, if possible, be heard and decided before the settlement is begun in the village, or, by leave of the Court, any such action may be withdrawn. Provided that nothing herein shall prevent the Land Court or Civil Court from completing the hearing of an action pending at the date the notification of settlement was published".

Section 32(1) of the Principal Ordinance provides that:

> "The Schedule of Rights shall be signed by the Settlement Officer and shall be posted at the office or camp of the Settlement Officer for a period of 15 days. One copy shall be posted for the like period at the office of the Sub-District in which the village is situate, and a notice of such posting shall be published in the Gazette".

Section 35 of the Principal Ordinance, as amended by Section 5 of the Land Settlement (Amendment) Ordinance, 1932, provides that:

> "A new register in a form to be prescribed by Regulation under this Ordinance shall be opened for each village and notwithstanding any appeal that may be pending, the land shall be registered by the Registrar in such register in accordance with the Schedule of Rights and the plan transmitted as provided in Sub-Section (1) of Section 30 of this Ordinance, and in accordance with the decisions of the Settlement Officer in the case of rights shown as disputed in the Schedule of Rights".

Section 42 of the Principal Ordinance provides that:

> "Save as provided herein, the registration of rights to land in the new register shall invalidate any right conflicting with such registration".

Sec. 56 (1) of the Principal Ordinance as amended by Sec. 16 of the Land Settlement (Amendment) Ordinance, 1930, provides:

> "(1) No Appeal shall lie from the decision of a Settlement Officer as to any right to land save with the leave of such officer or of the President of a Land Court. An application for leave to appeal shall be made by a petition in writing within thirty days of the notification of the decision of the Settlement Officer in a disputed claim, and shall be submitted to the Settlement Officer. Application for leave to appeal may be made also by a claimant who is aggrieved by the decision of the Settlement Officer in an undisputed claim, within fifteen days from the date of the posting of the Schedule of Rights or the Partition Schedule containing the decision which is the subject of appeal. If the Settlement Officer refuses the application, the applicant may within fifteen days of such refusal refer it to the President of the Land Court stating the grounds for the appeal".

Section 59 of the Principal Ordinance, as amended by Section 18 of the Land Settlement (Amendment) Ordinance, 1930, provides as follows:

> "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".

Considering first the provisions of Section 56 (1) it is clear that a person aggrieved by the decision of a Settlement Officer can bring his claim before a Land Court by way of appeal unless leave to do so is refused by the President of the Land Court, and even when such leave is refused, it cannot be argued that petitioner's claim has not been considered by the Land Court. Under these circumstances it would seem difficult to hold that the jurisdiction of the Court is ousted.

And when we turn to the other Section cited, it is clear that although from notification of settlement until publication of the Schedule of Rights, no action concerning title to land in the settlement area can be entered, there are the remedies contained in the before cited Section 59 of the Ordinances, whereby it is possible for a party aggrieved even after the completion of the Settlement to apply to the Land Court on the grounds therein stated.

Section 42, which invalidates rights conflicting with registration in the new register is qualified by the proviso "save as herein provided".

We find considerable difficulty in assigning a meaning to this phrase; but having regard to the other Section quoted, it must, in my opinion, be held to mean:

> "Subject to any order made by a Court in an appeal from a decision of the Settlement Officer or in an action entered either before notification of the settlement or after completion of the settlement for the rectification of the Register in accordance with Section 59 of the Ordinance".

It obviously cannot be the intention that the Land Registrar should have the power by making an entry in the new Register to decide claims which are at the moment of registration the subject of an action in the competent Court.

Such being, in my opinion, the meaning of Sec. 42, it follows that the decisions of the Settlement Officer are open to challenge either:

(a) by way of appeal to the Land Court by leave granted under Section 56 (1) of the Principal Ordinance, or

(b) by way of action in the Land Court, entered after the completion of the Settlement, in accordance with Section 59.

We are, therefore, of opinion that the Land Settlement Ordinances do not oust the jurisdiction of the Courts and that the Ordinance is not ultra vires the Order-in-Council.

CRIMINAL LAW.

In Special Court, Jerusalem.

CR. A. No. 6/21.

IN THE CASE OF:

The Advocate-General
vs
Mohammed Ali Najati
and four Others ACCUSED.

Criminal law — Incitement of mob to commit murder — Accessory to attempted murder — Articles 45, 46, Ottoman Penal Code — Offence committed by one of several participants.

JUDGMENT.

Mr. Snowman accompanied by his two friends Max Lovik and Moussa Lostig left the house in which he had been dwelling near the Austrian Hospice and proceeded in the direction of the Damascus Gate. At the junction of the roads, about 50 yards inside the Gate, they met a crowd of Arabs, whose numbers have been variously estimated at from 100 to 200, drawn up across the road 5 or 6 deep. Some of them were carrying heavy sticks and as subsequent events proved some also had knives or daggers. The three men were attempting to pass through the crowd, when some one shouted out "Jews, Jews" and immediately an attack was made on them, and Snowman and Lovik were stabbed. Snowman fell to the ground, but was picked up and dragged to the Police Post and then to the Governorate, helped by Judith Wittenberg who left her house, when she saw the wounded men staggering up the road, and went to their assistance. Miss Wittenberg deserves to be complimented on the courage which she displayed.

There is no definite evidence to show who actually struck the blows and therefore none of the accused can be convicted for attempted murder.

Now, Najati has been identified by 5 witnesses, who say he was present in this crowd, and one defence witness also saw him at the Bab-el-Amoud during the morning. In addition, Snowman, Lovik and Lostig all identified him as the man who shouted out. Snowman says that he does not know Arabic and therefore says that the words used were..... but Lovik and Lostig both say that

they were "Yehud, Yehud". All three agree that the attack followed immediately on these words being uttered.

In my opinion these words were an incitement to the mob to attack these men, and they were so interpreted by the mob, and this is sufficient to constitute Najati as an accessory to the attempted murder of these two men. If there had been no such incitement, then quite possibly these two men would not have been touched. As regards the other two accused there is evidence to show that they were present in the crowd which attacked Snowman and Lovik, there is no evidence to show that they took any active part in it, and there is no evidence to show that they were carrying sticks or knives. I therefore give them the benefit of the doubt and discharge them.

The medical evidence shows that a determined attack was made on Snowman and Lovik and that they were lucky to escape with their lives. The latter may feel the effects of the attack permanently.

The Court finds Mohammed Ali Najati guilty in that he is an accessory to the attempted murder of Isaac Snowman and Max Lovik by inciting the crowd to attack the said Snowman and Lovik and thereby knowingly assisting the principal perpetrator or perpetrators contrary to Articles 46 and 45 of the Ottoman Penal Code.

The sentence of the Court is that Mohammed Ali Najati be imprisoned with hard labour for the space of twelve calendar months and pay the costs of the prosecution. Judgment in presence and final.

Given at Jerusalem the 5th day of December, 1921.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 122/21.

BEFORE:

The Chief Justice, Tute, J. and Corrie, J.

IN THE CASE OF:

Yacoub Yahya
Haim Nakawa
Yashu Gannon — APPELLANTS.

vs

The Advocate-General — RESPONDENT.

Action tried by Special Court—Criminal law—Riot—Bombs thrown by members of riotous assembly — Articles 45, 102, 174, 178, 180 Ottoman Penal Code and Addendum to Article 180—Punishment

for offence committed by some of several participants — Criminal procedure—Conviction under Section not included in indictment—Amendment of indictment—Self defence held not to be an unlawful act—Abuse of office by policeman.

JUDGMENT OF HAYCRAFT, C. J.

On the 26th day of November, 1921, the 3 persons who are now Appellants were found guilty by a Special Court consisting of two Judges under Article 180 of Ottoman Penal Code and sentenced to terms of imprisonment.

The following facts were proved by the witnesses for the prosecution and were never questioned. On the 2nd November, 1921, between 10 and 11 o'clock in the morning a crowd of Arabs about a 100 strong were attempting to force their way into the Jewish Quarter of the City. On that day there was an Arab demonstration against the Jews and Jews were attacked, a few were killed and many wounded. The crowd in question was opposed by four policemen, and behind them at the entrance to the Jewish Quarter were from 30 to 40 Jews assembled to defend it. Some were firing revolvers and others throwing stones. There was no doubt that the Arab crowd was bent on attacking Jews and that murder would have been committed had they succeeded in getting the police. There was revolver firing from both sides and apparently without effect as there is no evidence of anyone having been wounded by it.

On three occasions the crowd sought to get through but each time the leader was bombed by the Jews, in one case with fatal results and in the other with serious injury and each time the attempt to break through failed. There is evidence of a third bomb having been thrown but the only persons reached by bomb explosions were the above mentioned. There was evidence that the three accused were present in the crowd and had thrown bombs. The Court was unanimous in finding that they were present but was divided as to whether they were proved to be the actual throwers of the bomb.

The facts which must be accepted on these two heads are: That the accused were members of a crowd from which bombs were thrown, but that they were not proved to have thrown them. The Article under which the accused were convicted is an Addendum to Article 180, Ottoman Penal Code, added in 1329, which in the English translation is as follows:

"If in a killing taking place during a quarrel or in an injury to a member or in a death from the effects of wounding several persons have participated and it has not been determined who the perpetrator is, the punishment prescribed by law for the act in respect of each one of such persons is awarded by being reduced from one third to one half and in acts rendering necessary the punishment of death or kyerek in perpetuity the punishment of kyerek for not less than ten years is prescribed".

None of the accused were indicted under the Addendum but briefly as follows: Yacoub Yahya for killing Ahmed Abdul Kadr with a bomb, under Article 174, Ottoman Penal Code, Haim Nakawa for attempting to kill Ibrahim Mohamed, under Ottoman Penal Code 180 and wounding the same by a bomb, under Ottoman Penal Code 178, Yashu Gannon for attempting to kill some person or persons by a bomb, under Ottoman Penal Code 180.

There were other charges in the indictment not necessary to be considered because there is no finding of guilty in respect of them, except one under Article 102 which we shall consider afterwards. The indictment was not amended before judgment and the question has been raised whether the Court could convict under the Addendum to Article 180 without amending.

We are of opinion that the Addendum was enacted for the purpose of enabling the Court to deal with a state of facts which renders it possible, when there has been a killing or wounding in which several persons have taken part, to determine who has actually committed the offence. Now the first two accused were charged, one with killing and the other with wounding and we are of opinion that the Court might on sufficient evidence find the one guilty of participating in the killing although not actually proved to have killed, and the other guilty of participating in the wounding although not proved to have wounded, without amending the indictment. The second accused could be convicted of participating in the killing without amendment because he was not charged either with killing or wounding or with participation in one or the other. We therefore find that the conviction was bad in part in the second case and wholly bad in the third case on this point of law. As these findings of law do not dispose of the whole case we must deal with the facts so far as to enquire whether there was evidence in the case that would justify a finding that the first accused had participated in the killing of Awad Abdul

Kadr and that the second accused had participated in the wounding of Ibrahim Mohammed.

The Addendum to Article 180 is intended to apply to a case in which the accused are shown to have participated in an unlawful act of violence. It was not unlawful for the Jews to defend their Quarter. They were faced by a crowd of about 100 Arabs bent on breaking through and committing violence. Two of the four policemen who solely did their duty keeping back the mob stated at the trial that had it broken through, murder would have been committed. The Jews were not bound to stand by waiting to see what would happen while four policemen strove to keep a dangerous crowd at bay. Moreover it was their duty as far as they could to save themselves and the Jewish families of the Quarter from violence and murder. They were not as a body engaged in an unlawful brawl as men who go voluntarily into a quarrel. If some members of the Jewish crowd used means of defence which the Court found to be excessive and unreasonable that would not bring persons who are not proved to have acted unlawfully within the scope of the Addendum to Article 180.

The grounds on which the Court found these men to be implicated in bomb throwing are, apparently, that they were present in the crowd from which bombs were thrown, that they knew one another and appeared to act in concert, that they were leading the crowd (as to which we are uncertain whether there is evidence), that one of them had lost a nephew killed by an Arab. If they were leading the crowd and acting in concert and if one of them had a relative killed by an Arab, none of these facts are in our opinion sufficient to show that they were engaged in an unlawful brawl so that they should all bear share in the responsibility for any act of violence committed. Any man might have lawfully engaged in such a defence as the Jews were making to protect the lives of the people in their Quarter and his presence in the crowd or even active leadership of the defence would not involve him in participation in a throwing of a bomb unless he could be shown to have had something to do with it.

We have been asked by the Advocate-General to amend the conviction by placing it under Article 45 which deals with accomplices and accessories. Were we to do this we should have the same difficulties to meet as arise now in applying the Addendum to Article 180. The conviction of the three Jews under the Addendum to Article 180 fails and must be set aside.

There remains a conviction of Yacoub to which we have

not yet drawn attention because it had nothing to do with the main part of the judgment. This conviction was one under Article 102 for abuse of office in that he, being a policeman, failed to report for duty. According to the practice he was not sentenced separately for that offence but it was taken into consideration in awarding the punishment under the whole indictment. We are of opinion that this case comes under the first part of Article 102 as re-enacted in 1329 for neglect of duty and not under the Addendum of 1332 to the same Article for abuse of office. We amend the conviction by substituting the words "neglect of duty" for abuse of office. It is a serious case of insubordination for a constable to absent himself from duty without leave but the section does not provide any penalty beyond the fine. We sentence him to pay a fine of £E. 20 without prejudice to any disciplinary action which the police authorities may see fit to take.

JUDGMENT OF MR. JUSTICE TUTE.

I concur with the judgment of the Chief Justice. A conviction under a section not included in the indictment is, as shown in that judgment, invalid. It is useless to attempt to rectify this by directing a re-trial under an amended indictment. Such a trial would have no chance of success.

The governing fact of the case is that the crowd of Jews of which the accused formed part were acting in the exercise of the right of defending themselves and their Quarter from a formidable danger.

If a small number of them not exceeding three persons threw a like number of bombs it is impossible to base on that fact a presumption that the Accused were privy to their use, though such a presumption might have been based on a more general use of these means of defence.

JUDGMENT OF MR. JUSTICE CORRIE.

I concur. In doing so I wish to make it clear that in my opinion there is no evidence of any arrangement for concerted action between the accused and the other Defenders of the Bab-es-Silialeh involving the use of means of defence in excess of what might be reasonable under the circumstances and further that the fact that the Accused continued to take part in the defence after it became clear that other Defenders were using means which the Court below has held to be unreasonable, does not in my opinion render them liable as participators or accessories in the unlawful acts committed.

Delivered the 26th day of January, 1922.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 20/22.

BEFORE:

The Chief Justice, the Vice President and Frumkin, J.

IN THE CASE OF:

Isaac Ben-Israel — APPELLANT.

vs

The Advocate General — RESPONDENT.

Importation of prohibited weapon without licence — "Prohibited Weapon" within meaning of Art. 166, Ottoman Penal Code—Mens rea — Guilty knowledge as element in criminal offence — Acts constituting importation—Possession of unlicenced firearm.

JUDGMENT.

The Appellant was found guilty by a District Court on 28th March last under Article 166 of the Ottoman Code of importing a prohibited weapon and sentenced to 7 months' imprisonment. The facts were briefly as follows:—

In January a parcel (No. 158) was received by the Post Office from Vienna addressed to the Appellant. Not being accompanied by a "declaration" it was opened in the Custom House and found to contain books, one of which had been hollowed out so as to form a box and contained what has been found by judgment to have been a revolver and which some witnesses described as such. We doubt whether it was a revolver, but not rather an automatic pistol, but there was evidence on which the Court could find that it was a revolver and they did so find. The Appellant called for the parcel at the Post Office and it was delivered to him without any intimation of the contents, and he took it home. On the following day the house of the Appellant was searched without any trace of the parcel being found, and subsequently he was arrested on the charge on which he was afterwards tried and convicted, of importing a prohibited weapon.

At the trial defences were put up which were substantially the following:— that importation with guilty knowledge was not proved, that the revolver, if it existed, was a small weapon, not included in the category "prohibited weapon" in Article 166 of the Ottoman Penal Code.

Let us examine them in turn.

When a man to whom a parcel has been addressed from abroad, receives it from the Post Office he is apparently the importer

of the contents. Up to that point there has been a series of acts which constitute importation, the last being the receipt in this country by a person who assumes control as consignee. We do not decide at what point importation begins and ends, but in this case we hold that the act of receiving the parcel was one of the series which constituted importation. According to counsel for the defence, the operation was completed when the Post Office received the parcel and nothing which happened afterwards had anything to do with importation. Consequently, if he had not, when he received the parcel, a knowledge of its contents, he cannot be held to have imported with a guilty knowledge if he afterwards found out that the parcel contained a revolver and retained it and disposed of it instead of returning it to the Post Office or the Customs House. We do not hold that you can close the series at the point chosen by the defence and say "here the series ends". Importation is not closed at either of these points. If the Appellant brought home from the Post Office what he believed to be a parcel of books and found out when he opened it that it contained a revolver over which he assumed control instead of returning it to the Post Office or the Customs House, we hold that he constituted himself a participant in the process of importation.

There is no direct evidence that the Appellant knew that he was importing a revolver or that he so knew when he opened the parcel, or that he even opened the parcel. But we think that the practical way of approaching the question is thus: when a man receives a parcel containing a prohibited article from the Post Office and does not afterwards return it to the authorities one should presume that he is importing the article knowing what it is. It will then remain for the accused to show that so long as the parcel remained in his possession he did not know that it contained a prohibited article. He did try to establish the above defence. He produced a letter from a person he did not know asking him to deliver a parcel bearing another number (No. 54) to a Mr. Blum whom he did not know, a letter dated from Vienna in October, 1921. He did also produce a receipt for a parcel for a Mr. Blum signed by a man he did not know and dated in October, the statement put forward was that in consequence of the direction in the letter, he had taken home the parcel and delivered it unopened to the man who said he came from Mr. Blum. That story the Court disbelieved and the fact remained unexplained that Appellant had received a firearm from the Post Office, obviously concealed with the intention of evading the law, and that he did not return

it or produce it up to the time of trial, or satisfy the Court as to what had become of it.

We should be prepared to hold the Appellant guilty of the offence charged provided the revolver was a prohibited weapon. But Section 166 of the Ottoman Penal Code says "for the purpose of the Penal Code" prohibited weapons means generally State or military weapons and revolvers of which the barrels are more than 15 centimetres. The only evidence we have of the size of the revolver is that the book containing it was about as large as a Volume of Young's Collection of Ottoman Laws. A revolver with a barrel 6 inches long is a large weapon, quite impossible to be put within the compass of a box hollowed out of a Volume of "Young". The revolver is so much too big that no Volume at all approaching the size of the book in question could contain it.

We have been invited to hold that although the revolver may not be a prohibited revolver it is nevertheless a military weapon, and prohibited under that general category. We cannot accept this suggestion. The law has specifically stated what size of revolver is intended for the category of prohibited weapons and this is not within it.

But the Section above referred to is not the only Article of Law dealing with the importation of arms. There is a Public Notice of May, 1920, published in the Gazette of 15th August, 1920, which has at present the force of law; it is headed "Carrying and Possessing Firearms" and is mainly concerned with licensing. Clause 9 requires an importer to obtain a licence before importing, but provides no penalty for an evasion of the rule. We find, howover, in Article 17 a penalty provided for the possession of a firearm without a licence. This Article would apparently apply to the case in question had the Appellant been charged in the indictment with being found in possession of a firearm without a licence. We might, without the indictment having been amended, convict the Appellant for possessing a firearm without a licence, if the charge already made under Ottoman Penal Code 166 were sufficient to cover a conviction under Article 17 of the Public Notice. But this is not the case. The charge made was "importing a contraband firearm through the mail" and a conviction under that charge would not necessarily involve a finding of possession by the Appellant. That being so it would not be permissible for the Court of Appeal according to the practice to apply Article 17 in dealing with the charge in this case. The conviction under Ottoman Penal Code 166 will be set aside and the Appellant acquitted.

This decision does not affect the question of liability under Article 17 of the Public Notice of May, 1920.

Delivered the 24th day of May, 1922.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 23/23.

Offence investigated by police at expense of village — Bribery of policemen — Obtaining of money by fraudulent trick — Fraud as essential element in false pretence—Art. 232, Ottoman Penal Code.

JUDGMENT.

It is true that Khalil believing that he would be taken in arrest by the police, collected money for the purposes of buying-off Mohamed who was in the village with policemen who were living at the expense of the village enquiring about a theft of grain from Mohamed's well, and if he paid this money to Mohamed, who, having got it departed with the police without arresting anybody, does this amount to an obtaining of money by Mohamed by a fraudulent trick? It is not pretended that the story of the wheat stolen from the underground store was trumped-up. We do not know whether there was ground of suspicion against Khalil, but evidently Khalil was suspected. If the money was given to Mohamed to buy him off and put an end to the police proceedings, does that bring the case within Article 232 of the Ottoman Penal Code? It may have been that the money was accepted by Mohamed by way of compensation which seems most likely. But in any case this is not a case in which the evidence fulfils the conditions required by Article 232 of the Ottoman Penal Code of which a necessary element is fraud and fraud must be proved.

The appeal is allowed and the judgment of the District Court set aside.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 15/24.

BEFORE:

The Chief Justice, the Senior British Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Saleh Kassem Abu Hamdeh
Kassem Mohamed Fleikhain — APPELLANTS.

vs

The Attorney General — RESPONDENT.

Conviction for killing police constables to facilitate common purpose of robbery — Amendment of charge by Court of Appeal—Arts. 45, 62, 174, Ottoman Penal Code — Sentence of death affirmed by majority—Sentence of life imprisonment reduced.

JUDGMENT.

The Court is divided as to whether this case comes under the operation of Article 62 of the Ottoman Penal Code. The majority of the Court, Ali Eff. dissenting, is of opinion that this case is covered by Articles 174 and 45 of the Ottoman Penal Code. The majority of the Court is of opinion that there was evidence before the District Court to justify a conviction for killing Constables Leydall, Davies and Parirs, to facilitate a common purpose of robbery of the occupants of two motor cars.

The judgment of the District Court will be amended so as to apply only Sections 174 and 45 of the Ottoman Penal Code to this offence.

The sentence of death passed by the District Court on Saleh Kassem Abu Hamdeh is affirmed by a majority of the Court of Appeal. The sentence of perpetual imprisonment passed on Kassem Mohamed is reduced to fifteen years.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 98/24.

BEFORE:
The Chief Justice, Copland, J., Khaldi, J. and Khayat J.

IN THE CASE OF:
Ahmed Muhammed El Kassem Abu Lehyeh
Said El Sheikh Musa Hussein Abu Ghankar
Muhammed Ahmed El Musa
Yousef Mahmoud Abu Dawace — APPELLANTS.

vs

The Attorney General — RESPONDENT.

Murder committed in facilitation of robbery—Offence committed by one of several persons in pursuance of joint criminal enterprise—Intent to commit offence — Judgment for more serious offence not substituted by Court of Appeal—Article 218, Ottoman Penal Code.

JUDGMENT OF THE CHIEF JUSTICE AND MR. JUSTICE COPLAND.

Four persons agreed to commit robbery upon a man and his wife. Two of the robbers appeared before the tent where the man and his wife were living and threatened them with rifles. The man fired a pistol in self defence and slightly wounded one of the robbers. One or both of the robbers fired, killing the man and wounding the woman. The other two were in the vicinity one being armed with a rifle, and the other not armed. The robbery was carried out.

If the Court had ground for believing that all four men were engaged in a common enterprise, intending to kill if resistance was offered, all would have been found guilty of murder committed for the purpose of facilitating the robbery. The Court would be justified in finding such intent from the fact that one or more of the party carried arms and that arms were used and murder committed. In this case Said was found to have been one of the two persons who appeared before the tent and threatened the occupants at the time when the murder was committed by one of them. It is not clear whether Ahmed or Muhamad was the other. The Court found Said and Ahmed to be co-perpetrators and sentenced them to death. It found Muhamad and Yousef to have been guilty of robbery with violence and sentenced them to 15 years' imprisonment. As all four might lawfully have been found guilty of the full

offence the judgment in my opinion should stand, although it is not certain whether Ahmed was one of the two men who were before the tent when the victim was killed. Whether he was or not, the District Court in the majority judgment has found that he was one of the four persons who had agreed and taken part in the offence of stealing the property of the victim "using force and violence, wounding and killing in consequence of the intent to steal" and in that the President of the Court agreed. The majority of the District Court later in its judgment apparently withdrew this charge as against Mahmud and Yousef finding them guilty of a lesser offence. In my opinion all the persons should have been found guilty of murder on the undisputed evidence, but we cannot interfere with the judgment on Mahmud and Yousef by substituting a judgment for the graver offence.

In my opinion the judgment should be confirmed in all four cases, but as the Court is equally divided, the judgment against Ahmed will be reduced to one for robbery under Article 218 of the Ottoman Penal Code and the sentence reduced to 15 years' imprisonment.

Delivered the 27th day of September, 1924.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 66/25.

BEFORE:

The Chief Justice, the Senior British Judge and Aziz, J.

IN THE CASE OF:

The Attorney General — APPELLANT.

vs

Saadia Paz

Jacob Segal — RESPONDENTS.

Judgment quashed for irregularity of procedure—Homicide committed by one of several persons in quarrel — Amendment of information by Court—Discharge of firearms with intent to intimidate—Criminal procedure — Sections 29, 45, 69 (a), Trial Upon Information Ordinance, 1924 — Judgment on information improperly amended held invalid—Articles 174, 179 (3), 180, Ottoman Penal Code.

Appeal from the District Court of Nablus sitting at Nazareth against judgment given on 18th June last, sentencing Paz to 6 months' imprisonment under Ottoman Penal Code, Article 179, and Segal to 12 years' penal servitud e under Ottoman Penal Code, Article 174.

JUDGMENT.

In this case three men were charged before the District Court sitting at Nazareth on 15th June, 1925, with having killed intentionally one Mohamed El Yusef by firing at him contrary to Article 174, Ottoman Penal Code, but with that Article was coupled Article 180, Ottoman Penal Code, which implied that the prosecution would be unable to show who the actual killer was but would prove that three men had taken part in the quarrel which resulted in the death of Mohamed. The result of a conviction under these two Articles used in conjunction would be to impose a liability to a sentence of as much as 81 years penal servitude.

At the end of the third day of the trial after all the evidence was concluded and arguments heard on both sides, the Court amended the information by adding a count charging one of the accused, Yacob Segal, with wilful homicide under Article 174 Ottoman Penal Code standing alone without the addition of Article 180 Ottoman Penal Code, also a count charging another accused Saadia Paz with discharging firearms with intent to intimidate under Article 179 (3) of the Ottoman Penal Code.

On the following day, after hearing further argument on both sides, the Court considered its judgment and found Segal and Paz guilty under the amended charges, and acquitted the third accused.

So far as Paz is concerned there is no reason to interfere with the judgment of the District Court and judgment was delivered by this Court to that effect on the 3rd September.

With regard to Segal the case is very difficult. The amendment of the information rendered him liable to a sentence of 15 years' penal servitude, double the penalty which could have been imposed on a conviction under the information on which the case was launched before the Court and evidence heard. Such amendment is forbidden by the provisions of Section 29 of the Trial Upon Information Ordinance, 1924, and the procedure which should have been followed in such a case is set out in Section 45 of the same Ordinance.

Where, therefore, the District Court proceeded to give judgment on the information amended contrary to the Ordinance, it was acting without jurisdiction and that judgment must be set aside and the case remitted to the District Court for the procedure provided by Section 45 of the Trial Upon Information Ordinance, 1924, to be followed.

It has been argued by Counsel that this ought to be done unless there was evidence before the Court of the charge sought to be substituted by amendment. We are of opinion that this argument is a sound one. It would be unjust to send a prisoner back to be committed on an added charge and tried on an amended information if there was not sufficient evidence upon the record to justify that proceeding. Each argument has been expended on this point, but we do not propose in our judgment to give an opinion as to this or that part of the evidence lest by so doing we may in some degree prejudice the second trial. Without saying whether, if the case had been tried by us in the first instance, we should have come to the same conclusion, we are of opinion that there was evidence sufficient to justify the District Court in following the procedure set forth in Section 45 and for that purpose we remit the case so far as regards Segal.

The Arabic judgment signed by all three judges contains however such inaccuracies in its reference to the evidence that we are of opinion that the Court should re-read the evidence before deciding whether to judge the case against Segal on the unamended information, or to follow the procedure provided in Section 45.

The judgment is that the conviction is quashed for irregularity of procedure and the case remitted to the Court below for a new trial. For the procedure to be followed we direct the attention of the District Court to Section 69 (a) of the Trial Upon Information Ordinance, 1924.

Delivered in presence the 23rd day of October, 1925.

In the Supreme Court sitting as a Court of Appeal.

CR. A. of 1926.

IN THE CASE OF:

O. K. Milne
Thomas H. Tripp — APPELLANTS.

vs

The Attorney General — RESPONDENT.

Postdating of cheque as criminal offence under Art. 3 Ottoman Law of Cheques, 1330 — Obtaining money by false pretences — Cheques not honoured on presentation—Payment stopped of cheque drawn in good faith — Fraudulent intent as necessary element in offence of obtaining money by trick — Art. 233, Ottoman Penal Code — Misrepresentation of facts.

JUDGMENT.

The Appellant Milne has been convicted on three charges of postdating a cheque contrary to Article 3 of Ottoman Law of Cheques of 1330, and on three charges jointly with the Appellant Tripp, of obtaining money by trick, contrary to Articles 233 and 45 of the Ottoman Penal Code.

The cheques, which gave rise to these charges, are as follows:

1. A cheque for PT. 330 dated the 29th September, 1925, drawn by Milne on his account with the Anglo-Egyptian Bank on or before the 4th September, 1925, and negotiated by Tripp on that date with N. Boyajian, Manager of the Jerusalem Branch of Kodak Limited, for cash.
2. A cheque for PT. 350 dated the 26th September, 1925, drawn by Milne on the same account on or before the 6th September, 1925, and handed by him on that date to Franz Nothbaum, waiter of St. John's Hotel, Jerusalem, in payment of the account, the balance of PT. 276 being received by Tripp in cash.
3. A cheque for PT. 300 dated the 9th September, 1925, drawn by Milne on the same account on or before the 6th September, 1925, and passed by Tripp on that date to J. McKee Robertson, Manager of the Jerusalem Branch of Messrs. Lawrence and Mayo, for cash.

None of these cheques were met on presentation.

It is not part of the case for the prosecution that Milne or Tripp intended that the cheques should never be met; what is illegal against Milne is that when he drew and uttered the cheques he knew that they would not be met on the dates for which they were made payable. In proof of this, evidence was given as to Milne's financial position.

In March, 1925 Milne had obtained a loan of £E. 50 from the Anglo-Egyptian Bank, upon terms that it should be paid by monthly instalments of £E. 8.333 the loan thus being wholly repayable by the 1st October.

In fact the Bank had not debited him with any of the monthly instalments, so that in September no part of the loan had been repaid.

Apart from this liability, Milne had at the end of September a credit balance of £E. 36, and on the 30th September he received the monthly salary of £E. 35, making a total of £E. 71.

Against this there were outstanding cheques presented to the Bank before the 1st September and returned marked "Refer to Drawer" to an amount of £E. 32.

On the 29th September, Milne wrote to the Bank with a list of cheques to be honoured, amounting to £E. 29.200, in addition to the September instalment of his overdraft.

The Bank replied on the 30th pointing out that the whole of the £E. 50.— loan was repayable on the 1st October, leaving a balance of £E. 21.— only to meet cheques, and asking Milne to submit a revised list.

This he did on the same day.

The earlier list included the cheques negotiated with the St. John's Hotel and Robertson, but did not include the cheque given to Bayajian. All three cheques were omitted from the second list.

Unquestionably Milne knew that a cheque that was not included in the list would be dishonoured, and that omission from the list was equivalent to an order to stop payment of the cheque.

The learned Judge who constituted the District Court for the trial of the Appellants held that "if a man tenders a cheque and obtains money thereon, and then stops payment before that cheque is presented to the Bank, then in my opinion he is guilty of obtaining money by means of a trick, just as much as he would be guilty if he tendered a cheque knowing that it would not be met on presentation".

This is a view which I cannot accept. In my view a man cannot be found guilty of obtaining money by a trick, unless it is proved that he had a fraudulent intent when he obtained the money and that he obtained it in consequence of his fraud.

If he acted in good faith when he obtained the money, any later act of his cannot constitute an offence against Article 233 of the Penal Code. Such later act, however, may be used as evidence to prove that his intent when he obtained the money was fraudulent.

The learned Judge, however, has based his judgment upon another ground, namely that Milne when he drew the cheques knew that they could not be met on the dates for which they were drawn. He says:

> "Since the 1st May, 1925, twenty three cheques drawn by Milne have been dishonoured by the Bank – eleven of these prior to 4th September.
>
> It is therefore clear that Milne knew that he could not overdraw, and that cheques over and above his credit balance

would not be met. He had therefore no authority to draw cheques over this amount and the cheques were not good and valid orders".

There can be no doubt that Milne did know that he could not draw for more than his credit balance. What, however, is not so clear is that when he drew the cheques in question he knew that he was exceeding his balance.

Against the £E. 71 that would stand to the credit of his current account at the end of the month, the only liabilities which have been proved were previously returned cheques which might be re-presented to the value of £E. 32, and the debt to the Bank of £E. 50.

Now there is no evidence that Milne knew that the whole £E. 50 would have to be repaid to the Bank on the 1st October. It is true that the terms of the loan were that it would be repaid by that date; but the terms of the loan also provided for payment by monthly instalments, and this obligation had not been enforced by the Bank. Up to the beginning of September 1st, the Bank had not insisted upon the fulfilment of the terms of the loan, and there is no evidence that Milne knew for certain that it would do so on the 1st October, until he received the Bank's letter of the 30th September.

Apart from that liability to the Bank, the balance of Milne's credit would be sufficient to meet the cheques which he drew on the 4th, and 6th September and his other outstanding liabilities of which there is evidence; and it cannot be inferred that when he drew those cheques he did not believe that they would be met. Indeed as regards two of them, it was clearly still his intention that they should be paid, when he compiled his first list for the Bank on the 29th September.

That he afterwards stopped payment of all three cheques does not, by itself, prove that when he drew the three cheques in question he did not do so in good faith.

It follows that on the charges of obtaining money by a trick Milne must be acquitted.

It is not contestable that all the three cheques were postdated, and that to postdate a cheque is an offence against Article 3 of the Law of Cheques.

The convictions upon this charge must be affirmed.

As regards the Appellant Tripp the position is somewhat more involved.

In so far as his conviction rests upon complicity with Milne in obtaining money upon cheques, which he knew would not be met at maturity, he stands in the same position as Milne and must be acquitted.

With regard, however, to the cheques negotiated with Bayajian and Robertson, there is this further circumstance. Both these cheques were negotiated on a Sunday evening, and in each case Tripp gave as a reason for asking that they should be cashed, the fact that the Bank was closed. That amounted to a representation that if the Bank were open, he would have been able to cash the cheque there, and hence that it would be possible to obtain cash for the cheque on the following day. As in each case the cheque was postdated, the representation was false. In the case of Bayajian, however, we have his evidence that he saw that the cheque was postdated and cashed it nevertheless. In his case therefore, although there was a false representation, nothing was obtained on the strength of it, and hence no offence within Article 233 was committed.

The case of Robertson was different. He did not notice the postdate and did not become aware of it until the cheque was refused payment on presentation at the Bank next day.

There is however no evidence that he would have refused to cash the cheque, had he noticed the postdate. If such were the case, then the money was obtained from him on the faith of a false representation. If the contrary were the case, then he stands in the same position as Bayajian. It was thus essential for the prosecution to prove that Robertson would not have negotiated the cheque, if he had not been deceived by the false representation made to him, and as such evidence was not given, Tripp is entitled to be acquitted on this charge.

There remains the charge upon which Tripp alone was convicted, namely that arising out of the cheque of PT. 400 drawn by him on the 14th May upon his account with the Anglo-Palestine Company and negotiated with Selim Michel, and dishonoured.

In that case it was essential for the prosecution to prove that Tripp knew when he gave this cheque that it would not be met. On the 14th May when the cheque was negotiated Tripp's account had a credit balance of PT. 155 which was reduced next day to PT. 50 by payment of a cheque of PT. 105, so that if the Bank paid Selim Michel, it is clear that the account would be overdrawn.

It does not follow that Tripp knew that the Bank would refuse payment. Tripp had at one time, according to the evidence of the Bank Manager, a balance of £E. 40 to £E. 50 to his credit. On the other hand, there is evidence that on the 1st May Tripp had drawn a cheque for £E. 4 in favour of one Mandossian, which had been dishonoured. If Tripp was aware of the dishonour of the earlier cheque when he gave the cheque to Selim Michel, he was guilty of obtaining money by a trick. Mandossian gave evidence that he told Tripp of the dishonour of his cheque, but he was not asked when he did so. Without proof that this communication was made before Tripp gave his cheque to Michel, a conviction cannot be sustained.

Hence Tripp must be acquitted on all the charges against him.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 2/26.

BEFORE:

The Chief Justice, Seton, J., Jarallah, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Khalil Ahmed Jubran — APPELLANT.

vs

The Attorney General — RESPONDENT.

Use of firearms as evidence of intention to commit criminal offence—Homicide committed by one of several persons in pursuance of joint criminal enterprise—All participants equally guilty of offence—Murder committed to facilitate robbery—Articles 45, 174, 180, Ottoman Penal Code.

JUDGMENT.

A Court may find that persons had the intention to kill from the fact that firearms were used by them and that some person was actually killed by a bullet fired by one of them.

If persons having a common intention to steal the animals of other persons fire at them for the purpose of effecting the robbery and one of the owners of the animals is killed, it may be presumed that all the robbers had a common intention to kill and that their acts of firing were done in pursuance of that common intention, and all are guilty of murder under Articles 45 and 174

of the Ottoman Penal Code. The common intention brings all the persons concerned within the scope of the law of murder. The common intention is to fire at the owners generally and kill them if they resist the robbery.

There may be cases in which persons are engaged in a quarrel with no common intention to kill, but a person is killed intentionally by one of the brawlers and it is not known by whom. Article 180 of the Ottoman Penal Code will apply. But this case comes under Articles 45 and 174 of the Ottoman Penal Code because the killing is the result of one of a number of acts committed with the common intention to kill.

The judgment of the Court of Criminal Assize will be confirmed and the appeal will be dismissed.

Delivered the 6th day of May, 1926.

In the Court of Criminal Assize sitting at Beersheba.

A. No. 10/26.

BEFORE:

Baker, J., Webb, J., Abdul Hadi, J. and Valero, J.

IN THE CASE OF:

The Attorney General

vs

Amreihel Bin Haj Abu Mahfouz,
of Mahfouza tribe Beersheba ACCUSED.

Sufficiency of identification of accused person—Description of accused given by eye-witness shortly after crime—Accused entitled to benefit of doubt—Article 174, paras 2 and 3, Ottoman Penal Code.

JUDGMENT.

The Accused is charged with the murder of Magid Eff. Jabrail and indicted under Article 174, paras 2 and 3.

The chief witness for the prosecution is one Nimr Mohamed Azzam who was with the deceased when he was murdered. The witness returned to Beersheba immediately after the crime and the next day made a report of the occurrence, which was taken down in writing. In the report he gave a description of the person who shot deceased. A few days afterwards (in three days) this witness made a further report which was taken down in writing in which he gave a similar description of the murderer.

Now the Accused before the Court possesses two very characteristic features, which we are of opinion anyone seeing him could not fail to observe and to be duly impressed by them. The one is a cataract of the right eye producing a white film over the pupil of the eye and the other a scar stretching three or four inches from the right corner of the mouth across the lower portion of the right cheek.

In neither description by the witness Nimr, made shortly after the murder, does he mention either of these features and not until two and a half years afterwards, when Accused had been extradited from Transjordan, did the witness mention anything about the scar and the cataract, although he stated in evidence before us that the right side of Accused's face was turned towards him.

This flight of memory by Nimr creates in our minds a great doubt as to whether the witness did in fact recognise the man who fired at deceased as being the Accused now before us, and if we have doubts as to the witness being able to identify Accused as the actual murderer, the case for the prosecution must fail, for we do not believe the two witnesses who state that they met the Accused with his two brothers shortly after the murder and although only having a casual acquaintance with them they volunteered the information that they had killed deceased. There is a considerable doubt in our minds as to the guilt of the Accused and the Accused is entitled to the benefit of that doubt and must accordingly be acquitted.

Judgment in presence the 6th day of July, 1926.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 12/26.

(Reprinted from Official Gazette of 1926).

IN THE CASE OF:

Saleh Hassan Abu Rashed
Muhammad Ali Abu Rashed
Abed Rashid Abu Rashed
Massad Abed Abu Rashed — APPELLANTS.

VS

The Attorney General — RESPONDENT.

Offence committed by one of several persons in joint criminal enterprise—Guilt of co-perpetrators of murder—Articles 45, 170 and 180 Ottoman Penal Code.

JUDGMENT.

Three persons were found to have fired simultaneously at a fourth with premeditation and with the intention to kill. The person fired at was killed by a bullet from the weapon of one of the three assailants but there was no evidence as to which of the three assailants had fired the fatal shot. The three persons who fired were all found guilty of premeditated murder as co-perpetrators under Articles 170 and 45 of the Ottoman Penal Code and this judgment was upheld in the Court of Appeal on the ground that the three were all engaged in a common enterprise the object of which was to kill the victim in the case and which resulted in his death.

It was urged for the defence that is such a case the conviction should have been made under Article 180 of the Ottoman Penal Code, but it has been frequently decided that a case where accused persons are shown to have acted with a common intention to kill does not come within that Article, although it may not be known by whose immediate act the victim was killed.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 16/26.

BEFORE:

The Acting Chief Justice, Baker, J., Jarallah, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Mahmud Ibn Ahmad Mahmud Abu Jasser — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Unpremeditated murder of sister—Criminal procedure—Bad character and conduct of victim as ground for reduction of sentence—Extenuating circumstances.

JUDGMENT.

In view of the evidence as to the conduct and character of the woman who was the victim of the crime, we hold that the case is not one for which the maximum penalty should be imposed. We accordingly reduce the sentence to one of ten years' penal servitude.

Delivered the 10th February, 1927.

In the District Court of Haifa sitting as a Court of Appeal.

CR. A. D. C. Ha. No. 16/26.

IN THE CASE OF:

Talal Mohd. Khalil & Others — APPELLANTS.

vs

Palestine Land Development Co. Ltd.
The Attorney General — RESPONDENTS.

Possession of land recovered by force — Rights of ownership and possession distinguished—Resistance by owner of entry by trespasser—Exercise of reasonable force — Trespassers ordered to commence action in Land Court to prove ownership.

JUDGMENT.

In our opinion for the prosecution to succeed, it must establish the fact that the Defendants were not legally entitled to the possession of the land in question. We consider that it is not enough for the prosecution to prove, if it could or did, that the complainants are the owners of the land for there are many servitudes on land which might entitle Defendants to possession and a criminal charge must be strictly proved.

A man is entitled in law to protect by the exercise of reasonable force — as the case was here, his own property from interference by a stranger and if he does so, he is not liable under Article 130 of the Ottoman Penal Code.

As this case stands we cannot say that the Defendants were not within their rights if protecting land lawfully in their possession.

This judgment must not be read as entitling persons to use any sort of force in protection of their own property and accordingly we again stress the point that such force must entirely be reasonable.

The judgment of the Civil Magistrate must be quashed and the papers remitted to him. This case must be reheard by him when final judgment as to ownership and/or possession is given by the appropriate Court.

It is ordered that the Accused persons bring an action in the Land Court within 6 months from the date they receive information of this judgment.

Delivered the 17th day of April, 1926.

In the District Court of Haifa.

CR. C. Ha. No. 4/27.

BEFORE:

The Senior British Judge, Strumza, J. and Hasna, J.

IN THE CASE OF:

The Attorney General

vs

Annis Hamma Khas ACCUSED.

Attempted murder by person under the influence of liquor — Drunkenness not an excuse but considered as extenuating circumstance—Civil claim allowed by criminal Court.

JUDGMENT.

Upon the evidence before it the Court finds the following facts: There had been a row between the accused and the complainant owing to the complainant having cursed the accused. The fact that he had been cursed seems to have rankled in the accused's mind. This was known to the complainant and his friends, and finally having primed themselves with drink they proceeded to the accused's brother's house with the object of making peace. The accused was not present when they reached the house but turned up some half hour later, somewhat the worse for arak All of the men sat down and went on drinking, and the complainant and accused drank out of one another's glasses, viz. the complainant mixed the beer he was drinking with the arak that the accused was drinking and the accused mixed the complainant's beer with the arak.

The annoyance still felt by the accused was apparently fanned by this mixture of drinks and suddenly he picked up a knife which had been used for pealing apples and stabbed the complainant therewith in the abdomen. The complainant somehow managed to stagger home. Dr. Castero was called in and operated the same night. He found that there were eight penetrating wounds of the small bowel and four cuts in the mesentery, one of which later severed an artery. The complainant was in a very dangerous state but ultimately recovered.

The fact that the accused was drunk at the time cannot excuse him, and we are satisfied that at the time he picked the knife off the table and stabbed the complainant in the abdomen, his intention was to kill the complainant. The position of the

wounded man and the injuries inflicted shows this clearly. Accordingly we find the accused guilty in law under Articles 174 and 46 of the Ottoman Penal Code.

The only thing that can be said for the accused is that he was drunk at the time and so far as we know has always had a good character. We think that if he had been in the possession of his sober senses he would not have committed this wicked act. At the same time it must be remembered that it was the accused's own fault if he was in this drunken state and he cannot be excused paying the penalty for his act.

We think, taking everything into consideration, that we are justified in passing the very lenient sentence of 7 years, penal servitude, and pass this sentence which is to run from this date. No costs. Judgment in presence and appealable.

As regards the civil claim for £E 50.— we are satisfied that this is a reasonable and just claim, and we give judgment therefore with costs and advocate's fees of £E. 6.—

Delivered the 23rd day of February, 1927.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 30/27.

BEFORE:

The Chief Justice, Corrie, J. and Jarallah, J.

IN THE CASE OF:

Abdel Rahman Ibn Daoud El-Rahal — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Homicide—Admissibility in evidence of statement made at time of, or shortly before or after, offence — Secs. 5, 6, Law of Evidence Amendment Ordinance, 1924 — Material evidence in corroboration of other evidence—Arts. 174 (3) and 179, Ottoman Penal Code.

JUDGMENT.

The first point in this case which in our opinion we have to consider is the question whether a statement made at the time when, or shortly before, or after, an offence is alleged to have been committed, if admissible under Section 6 of the Law of Evidence Amendment Ordinance, 1924 (No. 13 of 1924), can be taken to be material evidence corroborating other evidence as required by Section 5 of the same Ordinance.

The Court is of opinion that the answer to that question is in the affirmative.

The Court below was of opinion that the early statement of complainant was material evidence sufficient to corroborate the evidence in the witness box of complainant; and this Court will not go behind that finding.

The lower Court found that the shots were "intended to hit and possibly to kill".

In view of that finding, the Court is of opinion that the conviction under Article 174 (3) of the Penal Code cannot stand, and substitutes a conviction under Article 179 and a sentence of one year's imprisonment for the sentence of five years.

Delivered the 18th day of June, 1927.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 9/28.

BEFORE:

The Chief Justice, Baker, J., Jarallah, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Abdel Rahim Jamil El-Haj Saleh — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Conviction for premeditated murder set aside — Different verdicts given by Judges of Court of Criminal Assize — Majority of Court required by Section 42 Trial Upon Information Ordinance, 1924— Corroboration by other material evidence — Statement made by deceased in hospital to Magistrate in absence of accused—Repetitions of evidence not corroboration — Evidence of dishonour to accused as material corroboration—Section 5, Law of Evidence Amendment Ordinance, 1924.

JUDGMENT.

The Court is of opinion that the Court of Criminal Assize erred in recording the fact that the Court by a majority found that the murder was committed by premeditation and then sentencing accused to death. Two Judges found the accused guilty of premeditated murder, one of unpremeditated murder and one acquitted.

There was therefore not the majority required by Section 42 of the Trial Upon Information Ordinance to justify conviction of premeditated murder, although as the greater is included in the less there was a majority for a conviction of unpremeditated murder.

The conviction, however, was based on the assumption that the evidence of the deceased was corroborated. Her statement in the village was testified to by two witnesses and supported by her statement to the Magistrate in hospital in the absence of the accused, but we hold that such repetitions of the evidence of a single witness are not the corroboration by some other material evidence which Section 5 of the Evidence Ordinance requires, and we further do not think that the refusal by the deceased or her family on her behalf, of the hand of the younger brother of accused as a second husband is a sufficient dishonour or affront to accused or the whole of his family to be a motive which would suffice to provide the necessary material corroboration.

For these reasons the conviction must be quashed and the accused discharged.

Delivered the 16th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 14/28.

BEFORE:

Corrie, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Mustafa Ahmad Mustafa — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal law—Sodomy—Grounds for reduction of sentence in criminal case.

JUDGMENT.

The conviction is affirmed. The sentence is reduced to one of two years' penal servitude in view of the medical evidence that the Complainant is an habitual sodomist.

Delivered the 28th day of February, 1928.

In the Supreme Court sitting as a Court of Appeal.

A.A. No. 21/28.

BEFORE:

The Chief Justice, Webb, J., Jarallah, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Jouma Abdel Rahman Issa — APPELLANT.

vs

The Attorney General — RESPONDENT.

Criminal law — Attempt to commit rape — Conviction for killing for the purpose of rape held untenable — Article 174 (3), Ottoman Penal Code.

JUDGMENT.

The Court is unanimously of opinion that the conviction of the accused for an act of killing committed for preparing or facilitating the carrying out of the offence of rape under Article 174 (3) of the Ottoman Penal Code cannot stand since the act of killing *per se* would prevent the perpetration of the crime of rape

For this conviction there is substituted one under Article 174, para. 1. of killing wilfully without premeditation and the accused is sentenced to kyurek for fifteen years.

Delivered the 7th day of January, 1929.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 52/28.

BEFORE:

Corrie, J. Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Hassan El-Issa Abdul-Hadi — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Death resulting from tetanus contracted as result of wound caused by assault — Intent to kill held essential — Arts. 174, 175, 179, Ottoman Penal Code — Accused convicted by Court of Appeal under new Section.

JUDGMENT.

The accused has been convicted "of having assaulted Hussain Abdallah Abdel Aziz and wounded him whereby he contracted

tetanus and died, the said facts constituting an offence under Article 175 of Ottoman Penal Code".

The main ground of appeal is that the District Court has not found that the accused assaulted Hussain Abdallah with intent to kill him, and that intent to kill is necessary to constitute an offence under Article 175 of the Penal Code.

Our attention has been drawn to the case of Mohammad Hamdan Maragha vs The Attorney-General, Criminal Appeal No. 15/25, the facts of which are very similar to those of the present case. In that case the accused was convicted by the District Court under Article 174 of the Penal Code. On appeal this Court held that the Article applicable was Article 179.

That case would seem to be an authority which we cannot disregard.

It must be noted, moreover, that while in terms Article 175 does not require that the assault which caused the death should have been made with intent to kill, the very high minimum penalties prescribed by the Article suggest that intent to kill is necessary to constitute an offence thereunder.

The conviction under Article 175 must be set aside and the accused must be convicted under Article 179. Taking into account his conviction upon another charge of assault in which sentences of three months' imprisonment were passed upon the coperpetrators, we sentence the accused to serve a term of one year's imprisonment in respect of the two offences of which he has been convicted.

Delivered the 4th day of August, 1928.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 170/28.

BEFORE:

Corrie, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Hussein Mohammad 'Obeyd
Ali Hussein Nijim — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Robbery by night — Meaning of "night time" under Ottoman law —Arts. 218, 222, Ottoman Penal Code— Accused convicted by Court of Appeal under new Section.

JUDGMENT.

In accordance with the Vizierial Order of 6th Rabi-ul-Akhir, 1290 (4 Destour 355), the Court holds that, in interpreting the Penal Code, night time must be taken to commence one hour after sunset.

According to the evidence of both the Complainants, the robbery was committed at 7.30 p.m. on 15th June, on which day the sun sets at 7.2 p.m. Hence the offence was not committed at night and Article 219 of the Penal Code is not applicable. The appropriate Article is the second clause of Article 222, and accordingly the Court convicts both accussed under that Article. In view of the serious nature of the offence, the accused will each serve a term of three years' imprisonment, the maximum sentence allowed by the Article.

Delivered the 2nd day of May, 1929.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 5/29.

BEFORE :

The Senior British Judge, Jarallah, J. and Khayat, J.

IN THE CASE OF :

Butros Issa El Masis
Mohamed Ahmad — APPELLANTS.

vs

The Attorney General — RESPONDENT.

Criminal law—Abuse of office — Bribe demanded by public officer Arts. 68, 102, Ottoman Penal Code — Sec. 9, Criminal Law Amendment Ordinance, (No. 2), 1927 — Accused ordered to pay costs of prosecution.

Appeal from the judgment of the District Court of Jerusalem, dated 6th January, 1929 whereby the Appellants were convicted under Article 68 of the Penal Code and Appellant Butros sentenced to 2 years and Appellant Mohamad Ahmad to one year and a half imprisonment.

JUDGMENT.

The Court holds :

(1) That the fact that the accused demanded money from the Complainant Hussein does not constitute an offence under Article 68 of the Penal Code and Section 9 of the

Criminal Law Amendment Ordinance (No. 2), 1927, but does constitute an offence under the Addendum dated 1332 to Article 102 of the Penal Code.

(2) That there is no evidence to establish the charge that the accused received £P. 51.500 from the Mukhtar corruptly.

(3) That the third charge against the accused Butros is established.

The Court sentences the accused Butros to serve a term of 9 months' imprisonment, and the accused Mohamed Ahmad to serve a term of 6 months' imprisonment.

The accused are to pay the costs of the prosecution.

Delivered the 18th day of February, 1929.

In the Court of Criminal Assize sitting at Jerusalem.

A. No. 22/29.

BEFORE:

The Senior Puisne Judge and De Freitas, J.

IN THE CASE OF:

The Attorney General

vs

Taleb Abdel Rahim Maraka ACCUSED.

Criminal law—Instigation and incitement to commit acts of murder—Articles 56, 66, 170, 174, Ottoman Penal Code—Section 3, Criminal Law Amendment Ordinance (No. 2), 1927—Section 48, Trial Upon Information Ordinance, 1924.

The Accused was charged as follows:

1. Making certain persons at Hebron arm themselves against the Jews at Hebron and instigating and inciting them to commit acts of murder or killing or pillage against the Jews at Hebron, contrary to Article 56 of the Ottoman Penal Code.

2. Murder, - contrary to Article 174, paragraph 3 of the Ottoman Penal Code.

JUDGMENT.

The Court holds:

1. That on the afternoon of Friday 23rd August, 1929, the accused Sheikh Taleb Abdel Rahim Maraka did incite inhabitants of Hebron to proceed to Jerusalem to attack the Jews.

2. That on the morning of Saturday, 24th August, 1929, the accused was addressing a crowd at Hebron; but the Court does not find on the evidence that the accused was inciting the crowd to attack Jews in Hebron.

The facts found do not constitute an offence under Article 56 of the Penal Code or Article 170 of the Penal Code and Section 3 of the Criminal Law Amendment Ordinance (No.2) 1927.

The facts found do constitute an offence under the Addendum of 1328 to Article 66 of the Penal Code; and the Court, in accordance with Section 48 of the Trial Upon Information Ordinance, 1924, finds the accused guilty under that Article.

The sentence of the Court is that the accused do serve a term of two years' imprisonment and pay a fine of £50, and the costs of the prosecution.

The claim of the Civil Claimant fails.

Judgment subject to appeal within 10 days.

Delivered the 24th day of October, 1929.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 153/29.

BEFORE:

Webb, J., Tute, J. and Kermack, J.

IN THE CASE OF:

Said Mohd, Abu Tabun
and 36 Others — APPELLANTS.

vs

The Attorney General — RESPONDENT.

Criminal law—Riotous assembly—Art. 58, Add. 1, Ottoman Penal Code—Wounding instruments carried for purpose of committing assault—Attempt to carry intent into effect — "Attempt" defined — Mere preparations to commit an offence not an indictable offence—Carrying dangerous weapons for the purpose of creating a disturbance— Sec. 32 (6), Police Ordinance, 1926.

Appeal from the judgment of the District Court of Haifa, dated 28th September, 1929, whereby each of the Appellants was sentenced to five years' penal servitude under Article 58 of the Ottoman Penal Code.

JUDGMENT.

On the morning of the 8th of August, 1929 a crowd of about one hundred persons carrying clubs and hoes was seen advancing from the direction of Tireh towards Bath Galim and Haifa. On that day there were disturbances and rioting in Haifa, and it is probable that the intention of the crowd was either to attack the people of Bath Galim (a Jewish Settlement) or to join in the disturbances in Haifa.

They were, however, dispersed by an aeroplane at a point about three kilometres from Beit Galim, and the Appellants were arrested hiding in caves and upon the hillside, by a detachment of troops which came upon the scene.

The Appellants were tried and convicted under Article 58 Addendum 1, of the Ottoman Penal Code. Against that conviction they have appealed.

In the opinion of this Court the conviction cannot stand. The material words of the Article are: "The person who ..... carries firearms aud other wounding or deadly instruments of whatever kind..... for the purpose..... of an evil intent against one or several persons is punishable with death if..... the killing comes into effect: if it remains an attempt he is punishable with penal servitude for not less than ten years".

The law thus requires three elements in order to constitute the offence: the carrying of arms, an evil intent, and an attempt to carry that intent into effect.

In this case, assuming that the two first elements were present, we are of opinion that the acts of the Appellants had not reached a stage sufficiently proximate to the carrying out of their intent to constitute an attempt. Article 10 (1) of the Criminal Law Amendment Ordinance, No. 2. of 1927, defines an attempt thus: A person is deemed to attempt to commit an offence when he begins to put his intention to commit the offence into execution by means adapted to its fulfilment and manifests his intention by some overt act". An attempt consists "in some act which helps in a sufficiently proximate degree towards carrying out the offence contemplated. It is clear that mere preparations for the intended crime, antecedent to the actual commencement of the crime itself, do not amount to an indictable attempt" (Kenny, Criminal Law).

In the present case it appears to us to be impossible to say that the Appellants had done anything which could be called an *attempt* to carry out the object of a seditious body or to attack or

kill any person. Perhaps, fortunately for themselves, they were interrupted before their acts had gone beyond the stage of preparation. No doubt they were advancing towards Bath Galim in a manner and in circumstances highly suggestive of a disorderly purpose, but it appears that they were still at a distance of three kilometres from the place at which they could first commence to put such purpose into execution.

We therefore reverse the conviction and sentence on the second count of the information. The Appellants, however, were clearly guilty on the third count of an offence under Section 32(b) of the Police Ordinance, 1926, and for this offence we convict them and sentence each of them to three months' imprisonment as from the 28th September, 1929.

Delivered the 20th day of November, 1929.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 7/30.

BEFORE:

The Chief Justice, Baker, J. and Khayat, J.

IN THE CASE OF:

Shlomo Hares Goldberg — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal law— Arson— Art. 163, Ottoman Penal Code— Intention to set fire to shop presumed as consequence of setting fire to articles in various parts thereof.

JUDGMENT.

The Court is satisfied that on the evidence before it, the District Court could find that the accused set fire to articles in the shop leased by him, and holds that such setting fire, knowing that by so doing he would probably cause the shop also to take fire and being reckless whether he did so or not, is sufficient to enable the Court to draw the inference that he intended to bring about the probable consequence of this act, namely, to burn the shop, and so bring the offence within Article 163 of the Ottoman Penal Code.

The conviction and sentence are therefore affirmed.

Delivered the 6th day of March, 1930.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 1/30.

BEFORE:
The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Mordechai Mizrahi — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal law—Arson—Arts. 163, 164, Ottoman Penal Code—Accused convicted by Court of Appeal under substituted section — Intention to set fire to building presumed as consequence of setting fire to articles in different parts therein.

JUDGMENT.

The Court sets aside the judgment of the Court below, as in this case there was no evidence of setting fire to the building itself, and in any event the judgment refers to the last para. of Article 163 which covers only the burning by an accused of a building which is his own property.

The Court substitutes a conviction under the last paragraph of Article 164 since the intention to set fire to the building is to be presumed as a natural and necessary consequence of the act of the accused setting fire to articles in different parts thereof.

The accused is sentenced to five years' imprisonment with hard labour, but in view of the fact that the first hearing of this appeal on 12th February was adjourned, and it has only come to a final hearing to-day, the Court orders the sentence to date from the date of conviction in the District Court.

Delivered the 8th day of May, 1930.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 21/30.

BEFORE:
Corrie, J., Jarallah, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Ibrahim Hamdan Matar — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal law — Burden of proving self-defence is on accused — Killing done in reciprocation—Circumstances justifying reduction of sentence—Articles 42, 174 (1), 189, Ottoman Penal Code.

JUDGMENT.

The burden of proving that the act of killing was done in self-defence or in reciprocation so as to bring the case within the Addendum to Article 42 or Article 189 of the Penal Code is upon the defence.

The accused has failed to discharge this burden, and we therefore hold that the Court was right in applying Article 174(1) without modification.

It is clear, however, that the fatal blow was not inflicted until after a prolonged struggle, in the course of which the accused received a number of wounds, some of which might well have been fatal.

Taking these circumstances into account, we reduce the sentence to one of seven and a half years' penal servitude, to run from date of conviction.

Delivered the 3rd day of March, 1931.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 47/31.

BEFORE:

Corrie, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Nazimi Rashid Habish — RESPONDENT.

Criminal law—Marriage following upon rape—Prosecution suspended by marriage of the parties—Consent by father to marriage of ravished girl under 20 years of age — Amendment to Art. 206, Ottoman Penal Code—Section 3 (1), Criminal Law Amendment Ordinance, No. 2 of 1927.

JUDGMENT.

The Amendment dated the 1st of August, 1329, to Article 206 of the Penal Code provides that in the case of a person charged under that Article with abduction and rape—

"if the act of marriage is celebrated with the girl so carried away, and she is 20 years old, the prosecution will be

suspended by her desistance, or by that of her guardian if she is not 20 years old;

if divorce takes place within the period of prescription the prosecution will be resumed and if judgment has already been given it will be enforced."

The Court of Cassation, by a judgment given on 1st November, 1329, held that this provision also applied in the case of a person charged with rape under the Amendment dated 6th Jamad El Akhir, 1329, to Article 197.

This Amendment has now been replaced by Section 3 (c) of the Criminal Law Amendment Ordinance, 1927, under which the Respondent was charged: but no alteration has been made in the above-quoted provisions of Article 206.

We hold that the principle laid down by the judgment of the Court of Cassation is still applicable.

It would clearly be unreasonable to hold that while marriage suspends the prosecution in a case where both abduction and rape are charged, it does not suspend the prosecution where only one of those offences is charged.

Provided therefore that the marriage has been celebrated with the consent required by the amended Article 206, the prosecution of the Respondent is to be stayed.

The District Court has held that as the girl's father has consented to the marriage, it is unnecessary to determine the age of the girl.

This is not strictly in accordance with the provisions of the Article, as if the girl were over 20, it would be her own consent and not that of her father that would be necessary.

As, however, there was medical evidence before the Court to the effect that the girl was about 15 or 16 years of age, the Court was entitled to find that the girl was under 20 years of age and to stay proceedings accordingly. The appeal is therefore dismissed.

Delivered the 21st day of November, 1931.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 54/31.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Daud el 'Abd Daud — APPELLANT.

vs

The Attorney General — RESPONDENT.

Form of judgment irregular—Accused convicted for attempt to kill for the purpose of committing rape—Conviction set aside—Judgment of Court of Appeal as authority in Lower Court—Article 174 (2), Ottoman Penal Code—Sec. 9, Criminal Law Amendment Ordinance, No. 2 of 1927.

Appeal from the judgment of the District Court of Haifa, dated the 8th day of June, 1931, whereby the Appellant was found guilty under Article 174 (2) of the Penal Code and Section 9 of the Criminal Law Amendment Ordinance No. 2 of 1927, and sentenced to five years' hard labour.

JUDGMENT.

In accordance with the judgment of this Court in Assize Appeal No. 21/28, Jouma Abdel Rahman Issa vs. The Attorney General *), the Court holds that the conviction of the accused of an attempt to kill for the purpose of committing rape cannot stand.

We feel some doubt as to the form that the judgment of the District Court would have taken if the judgment referred to had been before it.

We therefore set aside the judgment of the District Court and remit the case for a fresh judgment to be given.

Delivered the 16th day of July, 1931.

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*) Reported ante page 549.

In the District Court of Jerusalem.

CR. C. Jm. No. 89/31.

BEFORE:

De Freitas, J., Abdel Hadi, J. and Valero, J.

IN THE CASE OF:

The Attorney General

vs

Simon Yacob Diskin ACCUSED.

THE ACCUSED WAS CHARGED AS FOLLOWS:

1. Theft of Government property contrary to Article 82 of the Penal Code.
2. Abuse of office contrary to Article 102 (par. 1) of the Penal Code.

Theft of Government property—Personal benefit derived by person in charge of Government labourers—Abuse of office—Articles 82, 102, Ottoman Penal Code—De minimis non curat lex.

JUDGMENT.

In the information the Accused is charged under Article 82 of the Ottoman Penal Code on two counts in that he (1) took six tins of benzine and four kilos of oil, the property of the Government, (2) took 25 boards, a quantity of steel rods and a number of sacks, the contents of which are unknown, all the property of the Government.

After the case for the prosecution was closed, we acquitted the Accused on the first count as we were satisfied that the prosecution had not made out a prima facie case to answer.

We called upon the Accused on the second count but subsequently acquitted him as we are of opinion that the evidence of Valour Naidu has not been corroborated. The Accused is further charged under Article 102 of the Penal Code in that he made use, during working hours for his personal benefit, of labourers employed on Government House and paid by the Government. The case for the prosecution under Article 102 Ottoman Penal Code is that (1) Accused employed a labourer during working hours to fetch his meals; (2) Accused employed certain labourers during the hours they were supposed to be working for, and were paid by, the Government, to transport stones from a quarry at Beit Safafa, to the site at Talpioth where he was building a house; (3) Accused used a labourer employed and paid by the Government, during

working hours, to pump water at his house at Ratisbone. We have taken no notice of (1) as the charge is trifling.

The defence to count (2) is that the foreman Abou Issa employed the labourers without the Accused's permission or knowledge and further that during the two days during which the labourers transported small stones, the labourers were not paid by the Government.

With regard to count (3) the Accused stated on oath that when he became aware that the labourer Shehadeh Ibrahim was in the habit of pumping water at his (Accused's) house at Ratisbone, he ordered Shehadeh to cease doing so and as Shehadeh did not obey the order, Accused dismissed him and refused to re-employ him in spite of the pressure brought upon him to do so; further that Shehadeh did not leave his work in Government House before the time for labourers to knock off work. The evidence led by the prosecution in respect of count (2) purported to establish two incidents: (a) the transportation of small stones on two whole days, (b) the transportation of shippings on two consecutive mornings.

We have already acquitted the Accused on (a). There remains (b) and count (3) and in considering the evidence connected with (b) and count (3), we have taken into consideration the evidence of Mr. Miller in favour of the Accused and the fact that in our judgment, the majority of the witnesses for the prosecution, while wishing to tell the truth, wished also to let the Accused down as lightly as possible.

The evidence of the foreman Abou Issa in connection with 2 (b) is most important. Abou Issa impressed us as being a keen, respectable young man, who, however, very definitely wished to help the Accused. In spite of the fact that we do not believe the defence, we are of opinion that on the evidence of Abou Issa and the other prosecution witnesses, we must acquit the Accused on count 2 (b) and he is accordingly acquitted.

Turning to count (3) we believe the evidence of Shehadeh Ibrahim which is corroborated by the admissions of the Accused during the cross-examination of Shehadeh and by the evidence of Accused and Freda Diskin. We do not believe the defence.

Now, had Shehadeh left his work on Government House before the time for knocking off work on two or three occasions only, we would have been inclined to apply the principle "de minimum non curat lex" and we would have acquitted the Accused but as we find as a fact that Shehadeh systematically left his work on Government House, to the knowledge of Accused and

with Accused's consent, before the time for knocking off, to go to pump water at Accused's house, we convict the Accused under the Addendum to Article 102 of the Ottoman Penal Code.

The court orders the Accused to pay a fine of £P. 5.- and costs.

Dated the 15th day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 7/32.

BEFORE:

The Chief Justice, De Freitas, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Hashem Nofal — APPELLANT.

vs

The Attorney-General — RESPONDENTS.

Criminal law—Art. 170, Ottoman Penal Code—Conviction of young offender for capital offence —Sentence to be passed on person who has not completed his 18th year — Death sentence replaced by imprisonment for a term in discretion of Court — Sec. 3, Young Offenders Ordinance, 1922.

JUDGMENT.

The accused was convicted of a capital crime but being held not to have completed his 18th year he was sentenced to twenty years' imprisonment. We hold that under the first part of Section 3 of the Young Offenders Ordinance, 1922, a term of imprisonment to which there is no statutory limitation must be imposed in place of a sentence of death or penal servitude for life if the offender has not completed his 18th year. A statutory limitation of the length of the sentence of imprisonment is only imposed under the second half of Section 3 in cases where a young offender is convicted of an offence punishable by a maximum penalty of penal servitude for a term. Under this part of the Section such an offender must in such cases receive a sentence of imprisonment which shall in no case exceed half the maximum term of penal servitude laid down by law for an adult offender found guilty of such offence.

There is nothing in the second part of the Section which fetters the discretion of the Court under the first part of the Section as to the length of the term of imprisonment which it should substitute in cases where the normal sentence for an adult offender is death or penal servitude for life.

The appeal is therefore dismissed.

Delivered the 9th day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 90/32.

BEFORE:

The Chief Justice, Corrie, J. and Frumkin, J.

IN THE CASE OF:

Jacob Homa — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal procedure—Notice of appeal not filed in Court of Appeal—Irregularity of procedure—Procedure on grant of leave to appeal—Secs. 60, 70 (3), Trial Upon Information Ordinance, 1924 — Interpretation of Ordinance admitting of two constructions — Misappropriation of funds by Public Officer— Arts. 82, 236, Ottoman Penal Code—Meaning of "official" — New evidence received by Court of Appeal—Ill-healthof convicted person as ground for probation—Sec. 2, Probation of Offenders Ordinance, 1922.

Appeal from the judgment of the District Court of Jerusalem dated 21st day of July, 1932, whereby Appellant was convicted under Article 82 of the Ottoman Penal Code and sentenced to nine months' imprisonment.

JUDGMENT OF MCDONNELL C. J.

The Attorney-General, at the outset of this case, raised a preliminary point to the effect that there was, in fact, no appeal before this Court as the notice of appeal had been filed, not as required by law in the District Court, but in the Supreme Court.

In fact, in the present case, an application for leave to appeal was made to the District Court on July 22nd, 1932, and the application was granted on the same date. The Appellant subsequently filed in the Supreme Court a notice of appeal.

The Attorney-General admitted that a practice existed by which applications to the District Court for leave to appeal, when such leave is necessary, have, when granted, been treated as being the necessary notices of appeal which have to be lodged in the District Court, but he argued that such practice was in conflict with the express provisions of the statute.

The Sections with which we areconcerned are para. (3) of Sec. 70 and Section 60 of the Trial Upon Information Ordinance, 1924.

Paragraph (3) of Section 70 provides that after leave to appeal has been granted "the same provisions shall apply as in cases where no leave is required except that no further ground of appeal may be submitted". At first sight, it appeared to me that this

provision must import the whole of the steps referred to in Section 62, beginning with the lodgment in the office of the District Court, within 10 days of the conviction, of the notice of appeal. Reference, however, to Section 70, para. (1), of the Ordinance shows that an application for leave may be made within ten days of the conviction, and there is nothing that requires that leave should be granted within that period. But, if leave to appeal is not granted within 10 days from conviction, the accused will lose his right of giving notice of appeal under Section 60.

Again, let us suppose that a convicted person applied, as he is legally entitled to under Section 70, para. (1), for leave to appeal at the last moment of the 10 days from the conviction. Leave could not be given until after the lapse of the 10 days, and if the Attorney-General is right such leave would be unavailing as the necessary notice could not then be filed in the District Court within 10 days of the conviction. As was said by Lord Campbell in R. v. Skeen (1859), Bell C.C. 97, which is cited in Maxwell on Statutes, sixth edition, p. 357, whenever the language of the legislature admits of two constructions and if construed in one way would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended unless the intention had been manifested in express words.

This being so, we have to see if the words in para. (3) of Section 70, "the same provisions shall apply as in cases where no leave is required". can be given a sensible meaning without relating them back to the whole of Section 60.

I am satisfied that para. (3) of Section 70 may be given a sensible meaning by being held to relate only to the duties as to transmission of the record and so forth, incumbent upon the District Court as soon as it is seised of the fact that an appeal is pending, either as in ordinary cases, by reason of notice of appeal having been filed in that Court, or by reason of the District Court having given leave to appeal in cases in which such leave is necessary.

For these reasons the Attorney-General's preliminary point is overruled.

To turn now to the substantive appeal. I am satisfied that in the absence in Article 82 of the Ottoman Penal Code of words similar to those occurring in Article 236, viz.: "or refuses to deliver them to the person to whom they ought to be delivered", it cannot be held that, to substantiate the charge, a demand for the restitution of the property concerned must be made, followed by a refusal by the person charged to comply with such demand;

and I cannot assent to Dr. Eliash's proposition that a request for return is implied in the words "Misappropriates or takes possession of" which occurs in Article 82. As to this, I need only say that Article 236, as amended, which deals with, *inter alios*, one who "takes possession of" property, finds it necessary nevertheless in express terms to refer to the case when such person "refuses to deliver them to the person who is entitled", and that while Article 82 does provide for the reduction of penalty in case of repayment before conviction, it does not provide for immunity in case of repayment before commencement of proceedings.

With regard to the question whether the Appellant was an official within the meaning of Article 82, as amended, of the Ottoman Penal Code, it is true that the salary of the Public Custodian and his staff was not paid out of Government Funds but out of the enemy property collected by them and that expenses of transport incurred by them were borne by such property, so that they were not entitled to the free transport facilities granted to the staff of a Government Department.

On the other hand, the Appellant was appointed to be Assistant Public Custodian by the High Commissioner; his remuneration was fixed, increased and subsequently reduced by the High Commissioner; he was subject to dismissal by the High Commissioner, and it was to the High Commissioner and not to the German, Austrian and Bulgarian nationals, whose property they were administering, that the Public Custodian and his staff were responsible for the due performance of their duties.

The office of Assistant Public Custodian does not come within the terms of the Vizierial Decree dated 11th May, 1875, referred to in the footnote to Article 82, which relates only to workers and servants employed and paid daily or monthly wages.

The notice in the Gazette of 15th December, 1920—under the head "Appointments"—states that "The High Commissioner has been pleased to make the following appointments to the staff of the Government of Palestine", and then, after setting out the names of a number of Departments with their staff, comes the entry "Department of Public Custodian— Mr. J. Homa".

The Appellant points out that there appears immediately below this the title "Department of Land Commission" with the names of two gentlemen who merely sat for a while upon a Commission on Land Tenure in this Country: but, as against this in the issue of the official Palestine Civil Service List, both for 1931 and again in that for 1932, there appears under the name Edward Keith Roach the entry—

"1920. 1 July. Appointed Public Custodian, Jerusalem".

and under the name Jacob Homa the entry—

"1920. 1 July. Appointed Assistant Public Custodian, Grade IV, Jerusalem.

1922. 1 Sept. Promoted to Assistant Auditor, Grade III".

It is, I think, significant that the latter officer's grade in 1920 should be set out and that he should be stated to be promoted in 1922, but I think the first date which is set out is still more important, for the 1st of July, 1920, is a very significant date in the official records of officers with long service under the Government of Palestine, by virtue of the fact that Section 6 of the Pensions Ordinance, 1925, prescribes that "no pension, gratuity or other allowance shall be granted to any officer in respect of any service in Palestine prior to the 1st July, 1920" which was the date on which the Military was replaced by a Civil Administration. I am satisfied, therefore, that the Appellant was appointed to be an official and that, in fact, the letter D 11 of 17th September, 1928, from the Acting Chief Secretary, informing the Appellant of the decision that as from 1st January, 1929, he should relinquish responsibility for the custody and administration of ex-enemy property in Palestine, was not acted upon, for in fact he continued to be responsible for such custody and administration until the spring of this year and no notice of the termination of his appointment was gazetted. This being so, I cannot agree that the Appellant had ceased to be Assistant Public Custodian at the date of the offences charged.

We now come to the question whether, as required by Section 82 of the Ottoman Penal Code, the Appellant received and held the funds of the Ottoman Agricultural Bank by virtue of his office as Assistant Public Custodian. The Appellant points out that Mr. Keith Roach, under the authority of a Proclamation of 21st December, 1919, gazetted on the 1st February, 1920, was appointed Public Custodian by the Chief Administrator on the 21st January, 1920. This appointment was gazetted on page 2 of the issue of 1st June, 1920. An order vesting certain property in the Public Custodian was made by a Proclamation of the Chief Administrator on 19th May, 1920, and gazetted on 6th June, 1920.

A further proclamation, of 15th April, 1921, gazetted on 15th May, 1931, page 3, recited the fact of the establishment of the office of Public Custodian and of the issue of the vesting

order and then proceeded to appoint Edward Keith Roach, Liquidator of the Deutsche Palestina Bank.

On page 18 of the same Gazette of 15th May, 1921, there was gazetted another proclamation dated "March, 1921" without any day of the month having been inserted therein, and signed by the High Commissioner, appointing Edward Keith Roach Liquidator of the Ottoman Agricultural Bank. This Proclamation states in Article 5 that forms for declarations by debtors can be obtained from the office of the Public Custodian, Jerusalem, but apart from this there is no reference in it to the Public Custodian.

The Appellant points out that, apart from the notice to which I have referred in the Gazette of 15th December, 1920, appointing Mr. J. Homa to the Department of Public Custodian, there is no appointment of the Appellant which is relevant to this case.

The Appellant takes the point that the office of [Liquidator of the Ottoman Agricultural Bank was totally distinct from that of Public Custodian, that he was never appointed to exercise any functions in respect of the liquidation of the Ottoman Agricultural Bank, and that he was entrusted with the control of the funds of the liquidation solely as subordinate to Mr. Keith Roach, the Public Custodian, who happened also to hold the office of Liquidator of the Ottoman Agricultural Bank.

A reference to the next entry in the Staff List relating to Mr. Keith Roach, to that which has already been quoted, shows that it was on the 11th October, 1920, that Mr. Keith Roach was appointed Assistant Civil Secretary.

It was only three days later and obviously as a consequence of this appointment, that there was written by the Financial Secretary to the Manager of the Anglo-Egyptian Bank Ex. G. R. B. 5, a letter dated 14th October, 1920, stating:—

> "The Public Custodian desires to open an account with your Bank entitled
>
> *Ottoman Agricultural Bank Liquidation Account*
>
> and I hereby authorise you to grant him an overdraft up to £E. 500 and the Government guarantees the payment thereof. Cheques will be signed by Mr. Homa, Assistant Public Custodian".

The first point arising on this letter is that it affords evidence that so far, at least, as the account with the Ottoman Agricultural Bank was concerned, the Government entrusted the Appellant with

control of the funds of the Ottoman Agricultural Bank, and thus it disposes of the Appellant's contention that, as regards the liquidation of the Ottoman Agricultural Bank, he was merely the employee of the official Liquidator, Mr. Keith Roach.

The second point is that in drawing cheques upon the account thus opened by the Government on behalf of the Liquidator, the Appellant was to sign as Assistant Public Custodian.

It follows that upon ceasing to hold the office of Assistant Public Custodian the Appellant would become incompetent to draw upon the account, and would thus cease to control the assets of the Ottoman Agricultural Bank, in so far as they were comprised in that account. This letter, therefore, affords proof that the assets of the Ottoman Agricultural Bank comprised in this account, were under the control of the Appellant by virtue of his office of Assistant Public Custodian and, in the absence of evidence to the contrary, the District Court was entitled to hold that the assets of the Ottoman Agricultural Bank, in the Liquidator's account with the Anglo-Palestine Co., were under the Appellant's control in the same capacity.

Whatever, therefore, may be said of the irregularities committed or omissions made by the Government in those early days of the Civil Administration, it appears clear to me that the District Court was entitled to conclude that the moneys with which we are concerned were received by the Appellant by virtue of his office as Assistant Public Custodian.

This view is supported by a letter, which apparently was not an exhibit before the District Court but which was before this Court, signed by Mr. Homa as Assistant Public Custodian, dated 12th August, 1921, and addressed to the Manager, Anglo-Palestine Co. Ltd., Jerusalem, in which the writer confirmed verbal arrangements regarding the opening of a current account entitled "Ottoman Agricultural Bank in Liquidation No. 1 Account" and attached a specimen of his signature over the rubber stamp "Public Custodian of Enemy Property in Palestine".

Finally, I am satisfied that it was a question of fact on which the District Court had evidence to come to the conclusion to which it did in finding that the sums of £. 1400 and £. 467 were not taken under a genuine claim of right.

A representation has been made to us, in the event of our affirming the conviction, to apply Section 2 of the Probation of Offenders Ordinance, 1928, and merely to bind over the accused in view of his state of health. As to this I can only say that it

appears to me that the District Court, before whom evidence of the health of the accused was called, must have taken this into ample account in passing the sentence which they did, upon a conviction of fraud of this magnitude by an official holding a position of exceptional trust and responsibility.

The appeal is dismissed with costs, the conviction and sentence are affirmed.

Corrie, J., I concur.

JUDGMENT OF MR. JUSTICE FRUMKIN.

I concur to the reasons given by the learned Chief Justice for overruling the preliminary objection of the Attorney-General on the point that notice of appeal was not filed with the District Court, I want only to add one more reason, namely, that departure from the rule requiring an Appellant to lodge his notice of appeal in the office of the District Court is not an irregularity of procedure of such a grave nature as to render the notice of appeal null and void if it has, within the period prescribed by law, reached its ultimate destination, to wit, the Supreme Court, by being lodged directly in the office of the latter Court.

The District Court is not a party interested in the appeal, and the only useful purpose for lodging the notice of appeal in its office is to enable that office to prepare the proceedings in the case appealed from and eventually forward it to the Court of Appeal. If notice of appeal is lodged in the office of the Supreme Court, the purpose is secured by the office of the District Court getting the necessary information from the office of the Supreme Court.

An appeal should not, to my mind, be dismissed on the mere ground that it reached its destination otherwise than through a provided channel, particulary as by avoiding that channel, no harm is caused to any party concerned.

The case differs from Land Appeal No. 71/31, where the position was just the opposite, in that an appeal was lodged in a lower Court when the law required it to be lodged in the Court of Appeal, and it had not reached the Court of Appeal until after the period prescribed by law.

Delivered the 23rd day of September, 1932.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 107/32.

BEFORE:

The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Said Abdo Nicola — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Threat to murder Sergeant of Police—Art. 191 (1), Ottoman Penal Code — Sec. 12, Criminal Law Amendment Ordinance (No. 2) of 1927.

Appeal from the judgment of the District Court of Haifa, dated the 1st of October, 1932, whereby the Appellant was convicted under Article 191 (1) of the Penal Code and Section 12 of the Criminal Law Amendment Ordinance (No. 2) of 1927, and sentenced to three years' imprisonment.

JUDGMENT.

The Court quashes the conviction under Article 191 of the Ottoman Penal Code on the ground that a letter addressed to the Commandant of Police threatening to murder one of his Sergeants cannot be held to be a threat under that Section to inflict harm upon the Commandant.

As to the conviction under Section 12 of the Criminal Law Amendment Ordinance, 1927 (No. 50 of 1927), we hold that the Court below had before it sufficient evidence to justify it in convicting the accused.

We therefore confirm the conviction under this Section and we substitute a sentence of nine months' imprisonment for that of three years' penal servitude passed by the District Court.

Delivered the 16th day of December, 1932.

In the District Court of Jerusalem.

CR. C. Jm. No. 189/32.

BEFORE:

De Freitas, J., Plunkett, J. and Abdel Hadi, J.

IN THE CASE OF:

The Attorney General

vs

Nelson Frederick Cork

Lucien George Bavoillot ACCUSED.

Death caused by Police Officer in execution of duty — Power of Police Officer to arrest without warrant — Attempt to evade arrest made by persons reasonably believed to have committed criminal offence — Sections 3 (e), 10, Arrest of Offenders and Searches Ordinance, 1924 — "Reasonable means" necessary to effect arrest — Discretion of Police Officer to use his rifle — Articles 174, 182, 183, Ottoman Penal Code — Section 9, Criminal Law Amendment Ordinance, 1927.

JUDGMENT.

In the Information filed on behalf of the Attorney General the Accused were charged with murder contrary to Article 174 (1) of the Ottoman Penal Code and attempted murder contrary to Section 9 of the Criminal Law Amendment Ordinance, 1927, and Article 174 (1) of the Ottoman Penal Code.

At the close of the case for the Prosecution we acquitted the Accused of the charges but called upon them to answer charges under Article 182 and Article 183 of the Ottoman Penal Code.

After hearing the Defence, we reserved judgment.

Apparently the Prosecution based its case on two grounds: (1) that the Accused had no power to arrest the deceased and his companions, and (2) that the Accused were not justified in taking the action they took in their endeavour to arrest the deceased and his companions.

We have had no difficulty in arriving at a unanimous decision on the facts.

We find as a fact that:

1. Prior to September 5th the two Accused, who are British Police Constables, were stationed at Artuf Police Post and had been warned by Police Inspector Ahmad Jayoussi, who was in charge of the Ainab Police Station, to take more active measures to stop the traffic in contraband salt which was prevalent in their area.

2. On or about September 2nd, the two Accused seized 30 odd sacks of contraband salt in their area.

3. On September 5th Ahmed Abdel Rahman Jubara saw several men with a number of donkeys and sacks (which he had reasonable grounds to belive were filled with contraband salt) on a hill between Latrone and Aslim villages.

4. Jubara informed the Accused at Artuf Police Post.

5. The Accused, taking Jubara with them, immediately left the Police Post with rifles loaded, and proceeded dressed in uniform and mounted in search of the persons with the donkeys and sacks.

6. On their way, the Accused dismounted on account of the rough state of the ground they had to traverse.

7. About 5 p. m. the Accused came up with the men they were seeking; Jubara pointed out the sacks to the Accused who then approached the men.

8. The men, six in number, among whom were the deceased, Abdullah Odeh el Ghazal, and the Complainant, Humdan Muhammad el Oweidah, seeing the Accused, ran off.

9. The Accused, speaking in Arabic, called upon the deceased and his companions to stop, and Accused number two, who speaks Arabic fairly well, called out to the men not to be frightened.

10. The deceased and his companions did not stop and the Accused formed the opinion that they were in the circumstances authorised to arrest them.

11. The Accused chased the deceased and his companions and finding that they were being outdistanced fired at the deceased whose back was turned to them. The deceased was hit in the back by a bullet and killed and Hamdan Muhammad el Oweidah, whose back was probably turned to the accused, was also hit in the back and wounded.

12. The ground over which the deceased and his companions were running was very rocky and sloping downwards.

13. The deceased would have succeeded in fleeing from arrest had the Accused not fired at him and hit him.

14. Accused number two fired two rounds and accused number one fired one round: and seeing that they hit a man, stopped firing.

15. Both Accused considered that in the circumstances they were justified in firing at the deceased, such a course being, in their judgment, necessary to effect the arrest of deceased and his companions.

16. The Accused seized in the vicinity of the spot where they first saw the deceased and his companions fifteen donkeys and fifteen sacks containing contraband salt which weighed 1118 kilos.

17. The donkeys belonged to the deceased and his companions who were found by the Accused in possession of the 1118 kilos of contraband salt.

18. The Prosecution has not suggested that the Accused were not justified in carrying loaded rifles or that the place where the Accused saw the deceased and his companions and the sacks of contraband salt was near a road or track over which bona fide travellers might reasonably be expected to pass.

Having made our findings of fact, we must now consider their effect in law.

In our opinion the Provisional Law of the Gendarmerie of 28th January, 1327, referred to by the Government Advocate, does not apply to the Palestine Police Force.

We hold that the two Accused believed on reasonable grounds that the men they saw on the hill had committed an offence: that the men by running away from policemen in uniform and refusing to stop when called upon to do so must be held in law to have refused to give their name and addresses; the men had no known abode and were wearing the type of dress usually worn by nomadic Arabs.

We hold that the two Accused were empowered by Section 3 (a) of the Arrest of Offenders and Searches Ordinance, 1924, to apprehend the Accused and his companions without a Warrant; and it follows, therefore that in our judgment the deceased and his companions were liable to arrest.

We think it is important to stress the fact that the word "offence" used in the said Section 3 (e) is not qualified.

Reference must now be made to Section 10 of the Arrest of Offenders and Searches Ordinance, 1924, which reads;—

> "If a person liable to arrest resists or attempts to evade arrest, the person authorised to arrest may use all reasonable means *necessary* to effect the arrest".

We have held that the deceased and his companions were liable to arrest. Clearly they attempted to evade arrest. We have held that the two Accused were authorised to arrest.

Our interpretation of the words "may use" in the Section places an obligation on the two accused. We are left with the words "all reasonable means to effect the arrest". The words are not only ambiguous, but, in our opinion, much too general. No distinction is made in the Section between serious crimes and misdemeanours and lesser offences.

A policeman in Palestine is armed with a rifle and ammunition: yet, the only instruction with regard to the use of the rifle is contained in a few unfortunately worded lines in the Police Manual. (It is true that a Police Circular and Section 28 of the Criminal Law (Seditious Offences) Ordinance 1929 deal with the action that may be taken against rioters). The Accused considered that the offence committed by the deceased and his companions was a serious offence, specially prevalent in their area, and that they were justified in the action they took. In the circumstances, we feel very strongly, in the absence of unambiguous and definite regulations to guide a policeman (unaccompanied by a Senior Police Officer) as to the circumstances in which he may use his rifle, we are not prepared to hold that in this very unfortunate case the Accused exercised the discretion given to them by law unreasonably, and we acquit the Accused.

We wish to emphasise, however, that a policeman has not got a free licence to shoot offenders who flee from arrest, but on the contrary, a policeman must always remember that the taking of human life cannot be easily justified.

Further, in our view, it is incumbent on the proper authorities to issue forthwith definite and unambiguous regulations with regard to the power of the Police to shoot.

We note that in the Draft Criminal Code there is a provision to the effect that no one shall have a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

Delivered the 3rd day of December, 1932.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 6/33.

BEFORE:
The Acting Chief Justice, De Freitas, J., Khaldi, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Khader Musa Taman — APPELLANT.

vs

The Attorney General — RESPONDENT.

Conviction for murder set aside—Insufficiency of evidence to support finding of premeditation—Articles 170, 174, Ottoman Penal Code.

Appeal from the judgment of the Court of Criminal Assize which sentenced the Accused to death for the murder of his sister who, he alleged, had had illicit relations with a man.

JUDGMENT.

We hold that there was not evidence before the Court of Trial to support their finding that the stick then carried by the Appellant and used to commit the murder "was not ordinarily carried by the Accused."

The only evidence on this point was that of the prosecution witness Mohamed Haj Ahmad "They always carry sticks similar to the one produced."

In the absence of evidence to support this finding and in the absence of a finding that the Appellant was lying in wait for the woman on the day of the murder and of any finding with regard to the axe, other than that it was carried by the Appellant, we hold that the finding of premeditation cannot be supported.

The Appellant is therefore acquitted of the charge of premeditated killing contrary to Article 170 of the Penal Code and is found guilty of killing Fatmah bint Musa Taman wilfully without premeditation contrary to the first paragraph of Article 174 of the Penal Code. The Appellant will serve a term of fifteen years' penal servitude from the date of conviction, the 23rd day of May, 1933.

Delivered the 21st day of June, 1933.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 7/33.

BEFORE:

The Acting Chief Justice, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Fakhri Yunes el Husseini — APPELLANT.

vs

The Attorney General — RESPONDENT.

Bond given by convicted person to be of good behaviour— Section 5, Probation of Offenders Ordinance, 1928 — Failure to observe condition of bond.

JUDGMENT.

On the second of February, 1933, Appellant was discharged under the Probation of Offenders Ordinance, 1928, by the Jerusalem District Court conditionally upon entry into a bond of £P. 25 to be of good behaviour for a period of three years and to come up for sentence any time when called on to do so during the said period.

Appellant agreed to pay back the sum of £P. 3 to complainant but this was not part of the bond.

On February 20th, 1933, the £P. 3 not having been paid to Complainant, the Appellant was brought before the District Court which, upon evidence being produced that the money had not been paid, cancelled the judgment under the Probation of Offenders Ordinance and imposed a sentence of six months' imprisonment.

Appellant has now paid the £P. 3 to Complainant and states that the reason for not paying before was due to circumstances over which he had no control.

Now Section 5 of the Probation of Offenders Ordinance prescribes:—

> "If the Court before which the offender is bound by a bond under this Ordinance to appear for sentence is satisfied or any other Court of the like jurisdiction is satisfied, by information on oath that the offender has failed to observe any of the conditions of the bond it may issue a warrant for his arrest and may forthwith, without further proof of his guilt, sentence him for the original offence".

The payment of the £P. 3 to Complainant was not a part of the bond and the non-payment of the money within a time agreed

upon by the Appellant I am of opinion cannot be considered misbehaviour within the meaning of the Ordinance. Had the money at no time been paid I am of opinion it might then have been properly considered so but we have not to deal with this question.

The appeal must be allowed and the sentence of six months be quashed and the Appellant to remain under the original bond to be of good behaviour for a period of 3 years and to come for sentence any time when called upon to do so during this period.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 13/33.

BEFORE:

The Senior Puisne Judge, Baker, J. and Khayat, J.

IN THE CASE OF:

Zeev Ben Arieh — APPELLANT.

vs

The Attorney General — RESPONDENT.

Criminal Law—Article 236 Ottoman Penal Code—Amendment of information—Misappropriation of funds by Bank Manager—Necessity of lodging complaint—Payment of moneys into suspense account—Evidence received of dealings earlier in date than those charged.

JUDGMENT.

The Appellant, Zeev Ben Arieh, has been convicted under Article 236 of the Penal Code.

The charge as framed in the information is as follows:

> "The said accused on various dates during the months of August, September, October and November 1930 in Petah-Tiqva in his capacity as manager of the Halvaa Vehisachon Co-operative Society, having received on trust the under-mentioned drafts in order to sell and deliver the proceeds to the said Society, did sell the drafts, cash the money and fail to deliver same to the said Society."

The term "cash the money" which has no meaning in English, is understood to be used in the sense "receive the money" and the information might with advantage be amended so as to make this clear.

On behalf of the Appellant the point has been taken that the proceedings are void as no complaint has been lodged as required by Article 236.

Now on the 18th November, 1930, a complaint (Exhibit FF 1) was lodged against the Appellant in which it was alleged that, "recently he appropriated various amounts of money in different ways from the safe of the Bank amounting in all to £P. 7500 approximately".

The point taken by the defence is that this is a complaint of theft, while the offence charged under Article 236 is embezzlement.

We hold that this objection cannot be sustained. The complaint charges misappropriation and that is sufficient to support a charge under Article 236.

We have therefore to consider the Appellant's defence on the merits.

Receipt of the proceeds of the 13 drafts specified in the information, the majority of which were bills of exchange accepted on behalf of the Society, is admitted by the Appellant, and it has not been suggested that the duty of the Appellant was to deal with these proceeds in any way other than by paying them to the Society.

Hence, the only question for the Court was, did the Appellant pay these proceeds over to the Society or not; for as the District Court pointed out, if the Appellant could prove that he had paid the moneys to the Society, he would not be guilty on this information, even though subsequent misappropriation of the moneys were proved against him.

The burden of proving that the Appellant failed to pay these moneys was upon the prosecution, and in discharge of it, they have proved that there is no entry relating to any of the drafts in the Bill Register of the Society, and no voucher or entry in the cash registers of receipts of any sum stated to arise out of any of these drafts.

In reply the Appellant alleged that these sums were paid into a suspense account in the name of the Society's Cashier Joseph Khirik.

Now the evidence of the prosecution witnesses is that considerable sums stated by the District Court to amount to £P. 23,000 during the four months to which the information relates, were paid into and drawn out of this account, and that about 90% of the amounts paid in were paid by the Appellant and 90% of the amounts drawn out of this account were paid to him. (See the evidence of Haim Anavi at p. 17).

With regard to this account, the District Court has made the following finding:

"We have come to the conclusion that the account was not a Society account, but was a private bank within the Society and that, therefore, payments to this account did not constitute payments to the Society."

Part of the evidence which the District Court had before it was evidence that on two occasions sums of £P. 1000 and £P. 400 respectively were transferred from this account to the Appellant's private account.

Objection has been taken by the defence that as regards the sum of £P. 1000 this evidence was inadmissable as the transfer was effected before the earliest date to which the information relates.

Clearly, however, the District Court was bound to satisfy itself as to the true nature of the account, and for this purpose was entitled to receive evidence of dealings earlier in date than the first of the charges preferred against the Appellant.

On the question, however, of the nature of the account in Khirik's name we are unable to take the same view as the District Court. The test to be applied, as we think, is this: If during the period under consideration an order had been made for the winding up of the Society, who would have been entitled to the balance then standing to this account?

If the District Court's view were correct, the answer must be that the Appellant was entitled to this balance. But it seems to us clear that, subject to any claim by Khirik for money of his own paid into the account, the balance would form part of the assets of the Society.

That such in the correct view is, in our opinion, established beyond doubt by the fact that in February, 1931, the account in question was split into two, a suspense account and Khirik's account. Into the suspense account went clients' transactions to be transferred to other banks. (See evidence of Haim Anavi at p. 19). It is clear that sums transferred to the new suspense account were part of the assets of the Society, and it follows that sums paid into the old accounts in the name of Khirik, other than moneys which belonged to Khirik, formed part of such assets.

Hence if the Appellant can prove that the proceeds of the 13 drafts were in fact paid into the account of Khirik's name, he is entitled to be acquitted, and the case must go back to the District Court for evidence to be heard on this point.

While we realize the hardship inflicted upon the Appellant by the fact that this charge has been hanging over his head for more

than three years, we must point out that this has arisen mainly, if not entirely, from the Appellant's own conduct. According to the statement of the liquidator, Rojansky, the Appellant told him that he could account for the moneys entered into this account. Nevertheless, the Appellant has made no attempt to furnish this information despite the fact that by so doing he might have destroyed all ground for proceedings against him.

The judgment of the District Court is set aside and the case remitted for the Court to determine whether or not the proceeds of the 13 drafts specified in the information were paid into the account in the name of Joseph Khirik and to give judgment.

Delivered the 16th day of January, 1934.

In the District Court of Jaffa.

M. D. C. Ja. No. 39/33.

BEFORE:

The President and Shehadeh, J.

IN THE CASE OF:

The Attorney General

vs

Zeev Ben-Arieh — ACCUSED.

Criminal Law—Re-hearing by trial Court of action for embezzlement—Different opinion of Court of Appeal on same evidence as was before trial Court—Acquittal of accused.

JUDGMENT.

This case which was originally tried by this Court in April last year has been sent back to us by a judgment of the Supreme Court dated 16th January, 1934, for re-trial.

This Court, on the evidence which we had before us, after very careful consideration, came to the conclusion that the money, which the accused is charged with having embezzled, had not reached the Society, inasmuch as the particular account at the Society into which this money had been paid was in our opinion a purely private arrangement with the Cashier for his own purposes and not for the purposes of the Society, and in fact our whole judgment was based upon the finding that the money was paid into this private account. There was no reason to doubt that this money was paid into this account and was withdrawn by the Defendant.

We came to that conclusion after a very careful consideration of the evidence and made that finding as a finding of fact, and as I have said, that finding of fact was the basis upon which our whole judgment rested.

The case was taken to appeal, and the Supreme Court in the course of its judgment used the following phrase:—"On the question, however, of the nature of the account in Khirik's name, we are unable to take the same view as the District Court", and they came to the conclusion, presumably on the same evidence that we had before us, that if the amounts of money were paid into this account they reached the Society's coffers, thereby holding a contrary view on the same evidence to the view that we had taken.

This being so, the only possible conclusion that we can reach from the judgment of the Supreme Court is that on the information as drawn the accused is entitled to be acquitted.

It is, of course, for the Prosecution to consider whether they would desire to proceed on any other charge.

The accused is acquitted and discharged, on this information.

Dated the 13th day of April, 1934.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 36/33.

BEFORE:

The Acting Chief Justice, The Acting Senior Puisne Judge, and Khayat, J.

IN THE CASE OF:

George Georgiades and Others — APPELLANTS.

vs

The Attorney General — RESPONDENT.

Criminal law—Conspiracy to commit offence—Abduction by force—Rape—Sodomy—Validity of forced marriage—Question of personal status incidentally raised in criminal case — Article 47, Palestine Order-in-Council, 1922 — Competency of wife as witness against husband—Sections 4, 6, Law of Evidence (Amendment) Ordinance, 1924—Jurisdiction of District Court in incidental matters of marriage—Byzantine law of marriage— Art. 206, Ottoman Penal Code — Secs. 3, 6, Criminal Law Amendment Ordinance, 1927—Sec. 4, Criminal Law Amendment Ordinance (No. 2) of 1927 — Admissibility in evidence of statement made before commission of offence.

JUDGMENT.

The Appellant George Georgiades, Nicola Stimati Vassiliades and Jabra Yacub Barham have been convicted of the following offences:

(1) Conspiracy to commit an offence punishable by penal servitude for a term of three years or more;
(2) Abduction by force;
(3) Sodomy; and
(4) Rape.

The Appellants Elias Saliba Bibi and Vassili Karapapas have been convicted as accessories after the fact.

The judgment of the District Court does not specify the offences to which those Appellants were accessories but having regard to the terms of the Information and to the acquittal of these accused on the charge of conspiracy, it must be inferred that the District Court found that they were accessories to abduction, sodomy and rape. And their appeal has been framed upon that basis.

The District Court has made certain findings described as Reasons for Judgment. Of these findings there is only one to which reference need now be made; namely the finding that there was no legal marriage celebrated between the Accused, George Georgiades, and the Complainant.

Article 47 of the Palestine Order-in-Council, 1922, provides that:

> "Where in any civil or criminal case brought before the Civil Court a question of personal status incidentally arises, the determination of which is necessary for the purposes of the cause, the Civil Court may determine the question".

We hold that the question whether the marriage was valid or not, in no way affects the issue whether or not the Accused are guilty of the offences with which they have been charged. For even if the marriage ceremony is valid, the Complainant is a competent witness by virtue of Section 4 of the Law of Evidence (Amendment) Ordinance, 1924. It follows that the question whether the marriage was valid or not is not one "the determination of which is necessary for the purposes of the cause" and thus it did not fall within the jurisdiction of the District Court.

It is further to be observed that had the determination of this question been necessary, it was a question involving the personal law of the parties to the marriage ceremony; that is to say, as

regards the Accused Georgiades, the law of Greece; and as regards the Complainant, the law of the Orthodox Church; and the District Court had not before it any evidence as to the rules of law involved which could support their finding. Indeed, the only evidence before it was that of the Archimandrite Theodorites that, according to Byzantine Law, the marriage is valid until it is declared void by the Ecclesiastical Court.

Of the various arguments that have been put forward on behalf of the Appellant Georgiades, the only one which need be discussed arises from the fact that he has been convicted both under Article 206 of the Penal Code under Section 3 of the Criminal Law Amendment Ordinance, 1927.

It is contended that Article 206 covered the case of abduction followed by sodomy or rape, and that it is to be applied to the exclusion of Section 3 of the Criminal Law Amendment Ordinance, as being more favourable to the Accused.

It must, however, be observed that if the Appellant were convicted of the offence of sodomy or of rape and of no other offence, he would be punishable under Section 3 of the Criminal Law Amendment Ordinance; and it clearly cannot be the case that because he has been convicted of another offence, namely abduction, he is liable only to a lesser penalty.

On behalf of the Appellant Vassiliades and Barham it has been argued that the judgment of the District Court is invalidated by the fact that it was based upon inadmissible testimony, namely that of Mr. Spicer, Miss Nixon and Mr. Inglexis.

This argument is based upon Section 6 of the Law of Evidence (Amendment) Ordinance, 1924, and it is contended that this testimony was inadmissible because it related to statements which were made too long before the commission of the offence to come within the Section.

This argument, in my opinion, rests upon a misunderstanding of the Section. The position was this. The main defence to the charges against the first three Appellants was that the acts committed by them were committed with the consent of the Complainant. It was thus for the prosecution to prove what was the state of mind of the Complainant with regard to the Accused Georgiades; and they were entitled to call witnesses to prove that she had gone in fear of molestation by him and had sought protection against him.

The District Court has convicted the Appellants Vassiliades and Barham of sodomy contrary to Section 6 of the Criminal Law Amendment Ordinance, 1927, and Section 4 of the Criminal Law Amendment Ordinance (No. 2), 1927.

The latter Section provides that:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose any offence or offences is or are committed of such a nature that the commission is a probable consequence of the prosecution of such purpose, each of such persons being present at the commission of any of such offences is deemed to have committed the offence or offences committed".

Without going into the question whether those two Accused could be held to have been present, within the meaning of this Section, when the act of sodomy was committed, we hold that it was not a probable consequence of the common intention of the three first Accused that an act of sodomy should be committed.

Accordingly we acquit these two Appellants of this charge.

Upon similar grounds we hold that there was not evidence upon which the Appellants Bibi and Karapapas could be convicted as accessories after the fact to sodomy, and we acquit them of that charge.

With regard to the other offences of which these four Appellants have been convicted, we hold that there was evidence to support the respective convictions, and they are therefore affirmed.

From a perusal of the record, it is not clear to us why the District Court should have imposed upon the Appellant Karapapas a sentence heavier than that passed upon the Appellant Bibi, and the prosecution have not been able to advance any reason for this difference.

We therefore set aside the sentence passed upon the Appellant Karapapas and sentence him to serve a term of one year's imprisonment. The sentences passed upon the other four Appellants are confirmed. The Appellants Bibi and Karapapas will pay the costs of their appeals.

CRIMINAL PROCEDURE.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 71/23.

IN THE CASE OF:

The Advocate General	APPELLANT.
vs	
Assad Naoura	
Salah Afaneh	
Abdul Rahim Afaneh	RESPONDENTS.

Criminal procedure — Death sentence passed on absent Accused — Indictment amended by prosecution—Power to alter indictment held to belong to Court — Amendment to Criminal Procedure Code — New Article of law substituted by Court of Appeal—Arts. 45, 170, 174, 180, Ottoman Penal Code.

JUDGMENT OF MR. JUSTICE JARALLAH AND MR. JUSTICE KHAYAT.

THE COURT HOLDS:—

(1) That the death penalty passed against Assad Naoura for the murder of Mustafah Salami, it being the gravest offence, under Articles 170 and 45 of the Ottoman Penal Code, after having been sentenced by default under Article 180 to 15 years' kyurok together with his absconding companions in pursuance of the first indictment, is contrary to the law because the prosecution is not entitled to change the Article under which it indicted the said Accused merely because the judgment in absence became inexistent under R. 16 of the Amendment.

The Court further holds that the power to change the indictment belongs to the District Court and not to the Public Prosecutor after the committing circle was abolished as is provided in Article 9 of the Amendment to the Criminal Procedure Code by Rules of Court dated July 4th, 1918. The Court also holds that the last amendment of the Criminal Procedure Code dated June 29th 1922, does not give them this power.

Judgment of the District Court is, therefore set aside and the case remitted for action in accordance with the above procedure.

(2) The Court by majority holds that there is no reason for this Court to interfere with the conviction of Salah Afaneh and his companion Abdul Rahim Afaneh for the murder of Saleh and Ommar Rammal, and it is therefore affirmed, but is amended as

regards the application of the Article of the Law and hence Articles 174 and 45 are applied in lieu of Articles 174 and 180.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 55/24.

BEFORE:

The Senior British Judge, Khayat, J. and Aziz, J.

IN THE CASE OF:

Khamis El Zabat — APPELLANT.

vs

The Attorney General — RESPONDENT.

Admissibility of evidence of brother—Art. 273, Criminal Procedure Code—Admissibility of statement of accomplice — Corroboration of evidence—Failure of Trial Court to hear witnesses—Proof of previous conviction—Extract from prison record as evidence.

Appeal from judgment of the District Court of Jaffa, dated the 13th March, 1924, whereby the Appellant was found guilty under Article 220 of the Ottoman Penal Code and sentenced to 4 years' penal servitude.

JUDGMENT.

The evidence upon which the Appellant has been convicted is:

1. The statement of his brother Misbah, which is inadmissible under Article 273, Criminal Procedure Code, and

2. The statement of co-accused, Ali Jarrad, which is only admissible in corroboration of other evidence. The Court finds however that there were other witnesses, namely: Mahmud Dayesheh who was not heard by the Court; Maibah El-Khattab, who was heard, but of whose evidence no mention is made in the judgment of the District Court and the police by whom the torch was taken from Misbah El Khattab.

As it would appear that if the evidence of these witnesses were heard and believed by the Court and the torch duly identified, it would be sufficient, together with the statement of Ali Jarrad, which in such circumstances would be admissible as corroboration, to support a conviction, the Court sets aside the judgment of the District Court and remits the case for such evidence to be heard and a fresh judgment given.

The District Court has applied Article 8 of the Penal Code. If such Article is to be applicable any previous conviction

of the Accused must be duly proved by production by the proper authority of the record of the convicting Court, or a duly certified extract thereof, or, if such extract is not obtainable, of an extract from the prison record, and a note of such production must be entered in the record.

Delivered in presence, the 5th day of July, 1924.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 9/25.

BEFORE:

Corrie, J., Seton, J., Jarallah, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Muhammad Abdul-Ghani Abu Tabikh,
Yusef Abdul-Ghani Abu Tabikh,
Abdul-Ghani Muhammad Abu Tabikh — APPELLANTS AND RESPONDENTS.

vs

The Attorney General — RESPONDENT AND APPELLANT.

Appeal by prosecution from acquittal—Notice of Appeal from Assize Court not signed by Attorney General — Trial Upon Information Ordinance, 1924—Young Offender detained in Reformatory School—Sec. 7, Young Offenders Ordinance, 1922.

JUDGMENT.

The Court holds that the Notice of Appeal lodged on behalf of the Attorney-General, not having been signed by him, is not given in conformity with the Trial Upon Information Ordinance, 1924, and accordingly the appeal is dismissed*.

As regards the appeal by the accused Muhammad, Yusef and Abdul-Ghani the Court sets aside the sentence passed upon the Appellant Yusef and, in accordance with Section 7 of the Young Offenders Ordinance, 1922, sentences him to serve a term of three years' detention in a Reformatory School.

Subject to this amendment the judgment of the Court of Criminal Assize is affirmed.

Delivered the 27th day of May, 1925.

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* See to the same effect Attorney General vs Alexandrovitz et al, M. A. No. 29/25.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 66/25.

BEFORE:

Baker, J., Khaldi, J. and Abdel Hadi, J.

IN THE CASE OF:

Zuhdi Abdul Fattah Sa'di — APPELLANT.

vs

Ragheb Saleh Agha — RESPONDENT.

Criminal procedure—Time for filing appeal from acquittal by District Court — Procedure for appeal in civil case arising out of criminal action—Art. 22 Appendix to Code of Civil Procedure—Trial Upon Information Ordinance, 1924.

JUDGMENT.

The appeal is objected to on the ground that it is out of time: judgment was given on the 8th of October, 1925, the fees of appeal were paid on the 21st of October, 1925, three days out of time prescribed for an appeal in a criminal case. It has been argued that this case being a civil claim, Appellant is entitled to thirty days as allowed by the Code of Civil Procedure.

However, commentators on the Ottoman Law of Procedure lay down that where a civil claim is associated with a criminal prosecution such civil claim cannot be disassociated from the criminal action and necessarily follows the procedure relating to such criminal prosecution.

No provision for an appeal of this nature has been made by the Trial Upon Information Ordinance, 1924, and we therefore are of opinion that the procedure in existence prior to the Ordinance must be followed.

The appeal is therefore dismissed with costs as being out of time.

Delivered the 20th day of January, 1925.

In the Supreme Court sitting as a Court of Appeal.

CR. A. (Official Gazette of 16.7.26).

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Saleh Attiyeh El Hamdallah — APPELLANT.

vs

The Attorney General — RESPONDENT.

Conviction for arson under Article 165, Ottoman Penal Code — Confession made while in custody of police officer — Criminal procedure—Free and voluntary confession—Sec. 8, Law of Evidence Amendment Ordinance, 1924.

JUDGMENT.

In this case the prisoner was charged before the District Court of Nablus and convicted under Article 165, Ottoman Penal Code for wilfully setting fire to gathered corn and sentenced to two years' imprisonment. The conviction depended on a confession by the accused to which more than one witness gave testimony. It appeared, however, that the prisoner had been induced to make the confession while in the custody of the Police Officer, by friends and notables, not for the purpose of the prosecution, but in order to settle the dispute arising out of the incident and to avoid reprisals. It was argued for the defence that the confession was not free and voluntary, and could not be acted upon by the Court.

Held that the Police Officer who recorded the confession was not implicated in the proceedings which involved the confession, and that the District Court was justified in acting upon it, in view of the circumstances, if the Court believed it to be a true confession.

Appeal dismissed.

Delivered the 26th day of April, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 77/26.

BEFORE:

Corrie, J., Khayat, J. and Abdel Hadi, J.

IN THE CASE OF:

Ahmad El-Sayed — APPELLANT.

vs

Yusef Saad El-Din — RESPONDENT.

Civil claim in criminal proceedings suspended until final judgment in criminal action — Prescription in criminal cases — Arts. 3, 482, Code of Criminal Procedure.

JUDGMENT.

Under Article 3 of the Code of Criminal Procedure, proceedings in the civil action of the Respondent are suspended until the final judgment has been given in the criminal proceedings.

Criminal proceedings in this case are barred by lapse of time under Article 482 of the Code of Criminal Procedure. Hence the Respondent cannot proceed with and obtain judgment in his civil action.

The appeal is allowed.

Judgment of the District Court of Nablus is set aside and the Respondent's action is dismissed with costs.

Delivered the 20th day of July, 1926.

In the District Court of Jerusalem sitting as a Court of Appeal.

CR. A. D. C. Jm., of 1927.

BEFORE:

Baker, J. and Valero, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Joseph Steinberg — RESPONDENT.

Offence contrary to Sec. 6, Passport Ordinance, 1925 — Criminal procedure—Time allowed for Attorney-General to appeal—Secs. 73 (a) Trial Upon Information Ordinance, 1924—Provisions of one statute incorporated in another and earlier statute later repealed—Interpretation of Statutes—Court not bound by the interpretation of an

Ottoman Law by an Ottoman Court—Section 4, Magistrates' Courts Jurisdiction Ordinance, 1924—Magistrates' Law held to incorporate Arts. 132-198 of the Criminal Procedure Code—Months calculated according to lunar months.

JUDGMENT

This is an appeal by the Attorney-General against the judgment of the Jerusalem Magistrate acquitting one Joseph Steinberg of the charge of having committed an offence contrary to Section 6 of the Passport Ordinance, 1925.

The Magistrate delivered judgment in this case on the 20th December, 1927 and the Attorney-General lodged an appeal on the 20th January, 1928.

The first question we have to consider is whether the appeal of the Attorney-General is in time. Now it has been argued by the Government Advocate that by virtue of the Code of Penal Procedure, Article 187, the Procureur-General has two months within which to appeal, and that by virtue of the Trial Upon Information Ordinance, Section 73 para. (2) the Procureur-General s to be deemed to be the Attorney-General; with this argument the Court agrees. The Government Advocate then proceeds to state that although inter alia this Article of the Code of Penal Procedure was repealed by Article 73 (a) of the Trial Upon Information Ordinance, he contends that Sections 132 to 198 were incorporated in the Magistrates' Law and that by such incorporation they were saved from the general repeal of them in the Trial Upon Information Ordinance.

Although the Magistrates' Law does not expressly incorporate the before mentioned Section, the Magistrates Courts of this country have always held them so to be incorporated as their predecessors the Ottoman Courts did before them, and although the present Courts are not bound by the interpretation of an Ottoman Law by an Ottoman Court, I am of opinion that it was not an unreasonable interpretation by the said Ottoman Courts. They were faced with the difficulty of there being no code of penal procedure in the Magistrates' Law, and I am of opinion they were correct according to their canons of interpretation to adopt the before imentioned practice.

This practice has continued for a considerable number of years and although I can find no judgment of a Higher Court confirming the said practice yet undoubtedly the Superior Courts have acquiesced in the practice, and I do not find sufficient reasons

to upset it. A further reason in support of this contention is the law laid down in the cases of R. v. Stock (1838), 8 Ad & El. 405 and R. v. Smith (1873), L. R. 8 Q. B. 146 (Maxwell on Interpretation of Statutes, 5th Edition, page 676) which prescribes that "Where the provisions of one statute are by reference incorporated in another and the earlier statute is afterwards repealed, the provisions so incorporated obviously continue in force so far as they form part of the second enactment.

The object of the Trial Upon Information Ordinance was to regulate the procedure in criminal cases within the jurisdiction of the Court of Criminal Assize and the District Court, and it must be presumed, and the Ordinance construed as, limited to its actual object and not as altering the law beyond. See Sir J. Romilly in Minet v. Leman, 20 Beavan page 278 (Maxwell page 182). Adopting the presumption I hold that the Legislature did not intend to depart from the general system of law governing criminal procedure in Magistrates' Courts and to leave the Magistrates' Courts without any statutory code of penal procedure. Had however this been the intention of the Legislature, the Magistrates' Courts would have quite properly resorted to their previous practice in the absence of any statutory code of procedure.

In the Magistrates' Courts Jurisdiction Ordinance, 1924, it is enacted by Section 4, Sub-Section 2 that "the Public Prosecutor shall have the right to appeal from any judgment of a Magistrates' Court in a criminal case" and the time for appeal of the Public Prosecutor is prescribed as being 30 days from the pronouncement of judgment in Article 64 of the Magistrates' Law.

This law, however in my opinion does not impliedly repeal Article 187 of the Code of Penal Procedure hereinbefore referred to and does not debar the Attorney-General's right to appeal.

Article 187 of the Code of Penal Procedure prescribes that the appeal must be notified to the other party by the Appellant within two months. The Appellant admits that Respondent was not notified within two lunar months, but that if the Court holds that calendar months are intended the appeal was properly notified.

Now the Court of Appeal has held that time is to be calculated according to lunar months in the provisions of the Code regarding prescription and in these circumstances it is difficult to see how a different principle can apply to this case. I therefore hold that the time for service on Respondent is two lunar months, that such service was not effected within two lunar months and that accordingly the appeal must fail. The Government Advocate

has requested the Court to give a ruling as to the application of the doctrine of those judges to the case. I am however of opinion that the present time is not the proper occasion for a ruling of this nature to be sought.

Delivered the 27th day of March, 1928.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 14/27.

BEFORE:

Corrie, J., Baker, J., Jarallah, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Ismail Muhammad Mahmud — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal procedure—Action struck out temporarily and returned for further investigation—Fresh information filed by Attorney-General—Accessory to murder — Articles 45, 170 Ottoman Penal Code — Procedure when graver offence disclosed at hearing — Section 45, Trial Upon Information Ordinance, 1924.

JUDGMENT.

On 30th May, 1927, the Attorney-General filed an Information committing the Appellant, Ismail Muhammad Mahmud, for trial before the District Court, Jaffa, on the charge of unpremeditated murder of his sister Khalilieh.

On 29th June, 1927, the District Court delivered a judgment of which the President's note—which is not signed by the other judges—is as follows:

> "This case has been so imperfectly investigated, and the condition of the body and circumstances show that it is a clear case of premeditated murder, that we feel that it should be further investigated. We therefore recommitted the accused to the Examining Magistrate for further evidence to be taken if possible by the Police. Case to be struck out temporarily."

The formal judgment of the Court, which is signed by the President and Mikhail Eff. Mani, but not by the third member of the Court, reads as follows:—

> "Seven months ago a woman was killed in Annabe village in the most atrocious manner. This may be the most

brutal case the Court has yet met. Therefore, it is its duty to adopt every possible measure for the discovery of this offence. The Court is not satisfied that it is impossible to obtain further evidence than that which is already before it; therefore and for the better administration of justice in this case it is decided to remit it to the investigating department to be prosecuted as far as can be to enable the obtaining of further evidence, and to strike it out temporarily provided that it should be renewed when it is again returned."

Further investigations were made and depositions taken by the Magistrate, who on 14th July, 1927, made a further order of committal of the Appellant Ismail and another person Abdallah Mohamed Abdel Razak for trial by the District Court on a charge of unpremeditated murder.

On the 20th September, 1927, before the case came on for trial by the District Court, the Attorney-General filed a fresh Information, charging the Appellant Ismail with murder with premeditation contrary to Article 170 of the Penal Code and the accused Abdallah as an accessory contrary to Articles 170 and 45.

As regards Abdallah against whom no Information had previously been filed, the Information was good, and the subsequent proceedings in the Court of Criminal Assize are valid.

As regards the Appellant Ismail, however, the position was different. An Information had already been filed against him and the case was pending in the District Court.

If the District Court had referred the case to the Examining Magistrate under Section 45 of the Trial Upon Information Ordinance that would have enabled the Attorney-General to file a fresh Information.

But the District Court did not take that course. In spite of the President of the District Court's note to the effect that "circumstances show that it is a clear case of premeditated murder" the District Court did not apply Section 45, but referred the case for further investigation and struck it out temporarily "provided that it should be renewed when it is again returned."

This order did not discharge the Information filed on the 30th May, 1927, and a fresh Information in respect of the same facts, bringing the accused before another Court, must therefore be invalid.

The Information of the 20th September, 1927, was thus invalid so far as the Appellant Ismail was concerned, and the Court of Criminal Assize had no jurisdiction over him.

The judgment of the Court of Criminal Assize with reference to the Appellant Ismail must therefore be set aside.

Delivered the 8th day of December, 1927.

In the Court of Criminal Assize sitting at Jerusalem.

A. No. 26/27.

BEFORE:

The Chief Justice, Baker, J., Abdel Hadi, J. and Valero J.

IN THE CASE OF:

The Attorney-General

vs

Mahmud Yusef Tantach — ACCUSED.

Charge of premeditated murder contrary to Article 170, Ottoman Penal Code—Necessity of personal signature of Attorney-General—Section 26, Trial Upon Information Ordinance, 1924 — Committal by Magistrate on offence other than charged.

JUDGMENT.

The Court holds that as there was a committal but not for the offence charged, the matter is not governed by Section 26 (2) of the Trial Upon Information Ordinance, 1924, and the signing of the Information on behalf of the Attorney-General by the Government Advocate does not invalidate it.

Delivered the 12th day of December, 1927.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 51/27.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Salim Ben Ali El-Absi — APPELLANT.

vs

The Attorney General — RESPONDENT.

Criminal procedure—Information filed on behalf of Attorney-General—Sec. 26 (1), Trial Upon Information Ordinance, 1924 — Procedure on refusal by Magistrate to commit — Appeal by Attorney-General from acquittal—Authority to sign on behalf of the Attorney-General.

JUDGMENT.

The only point which, in our opinion, we have to consider in this case is whether the information is properly filed or not. That document concludes:—

> "This information is hereby filed on behalf of the Attorney-General on 17th day of April, 1927, under No. 121.
>
> (Sgd.).....Public Prosecutor, Haifa".

Section 26(1) of the Trial Upon Information Ordinance states that no person shall be put upon his trial in the superior Courts notwithstanding committal for trial by a Magistrate "except on an information filed by or on behalf of the Attorney-General.

It is to be observed that Subsection (4) of the same Section provides that if a Magistrate refuses to commit, the Attorney-General may alternatively make an order (*a*) for committal, or (*b*) that further evidence be taken by the Magistrate with a view to committal; so, too, under Section 66, where the Attorney-General may appeal from acquittal, Subsection (2) runs: "notice of appeal by the Attorney-General shall be lodged".

In each of these cases, then, the functions of the Attorney-General must be performed by him in his own proper person.

The legislature differentiated in Section 26 (1) by allowing the Information to be filed on behalf of the Attorney-General.

Counsel for Appellant urged us to read Section 26 (1) as though there were contained in it after the words "filed by or on behalf of the Attorney-General" some such words as "by a person thereto authorised in writing by the Attorney-General". A more usual and explicit formula and one which would have avoided the lengthy discussion involved in this point is to be found in many British dependencies to the effect that the Information shall be "signed by the Attorney-General, the Solicitor-General or a Crown Counsel". We are, however, concerned with the terms the legislature has employed and since all that it requires is that the document be filed "on behalf of the Attorney-General", we have come to the conclusion, since we are bound to give a meaning to the words "on behalf of" which are the only words employed, that a Public Prosecutor, who is an officer enjoying statutory recognition under the very Ordinance which is under review, is competent without express or written instructions from the Attorney-General in any given case to file an Information under Section 26 on behalf of the Senior Law Officer of the Crown.

For this reason the appeal is dismissed.

Delivered the 26th day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 61/27.

BEFORE:

The Senior British Judge, Frumkin, J. and Abdel Hadi, J.

IN THE CASE OF:

Raphael Amsterdam — APPELLANT.

vs

The Attorney-General — RESPONDENT

Criminal procedure — New Articles of law substituted by Court of Appeal — Sentence increased by Court of Appeal — Section 69 (b), Trial Upon Information Ordinance, 1924—Articles 45, 221, Ottoman Penal Code—Accused recommended for deportation.

JUDGMENT.

No sufficient ground for setting aside the conviction has been put before us; but in view of the fact that, according to the evidence, another man took part with the accused in the offence, we think that the conviction should have been under Article 221 and the first paragraph of Article 45 of the Penal Code, and we amend the judgment accordingly.

As regards the sentence, the District Court seems to us to have taken an unduly lenient view.

According to the evidence the accused decoyed an old man into a quiet spot, where he was knocked down by another man and was held down by the accused with a handkerchief thrust into his mouth and robbed.

Under Section 69 (b) of the Trial Upon Information Ordinance, 1924, this Court in determining an appeal may "increase or reduce the punishment and in general give such judgment as in its opinion ought to have been given by the Court below on the Information and evidence before it," and the Section does not make the Court's power to increase a sentence dependant upon an appeal having been made by the Attorney-General.

We regard the sentence of eighteen months' imprisonment with hard labour passed upon the accused as inadequate, and are of opinion that the Court might well have imposed a sentence of double that amount.

As, however, this is the first occasion upon which this power has been exercised by this Court, and the accused may not have realised that he ran the risk of incurring an increase of

sentence, we propose to treat him with leniency, and we order that the sentence passed upon him shall run from to-day.

The recommendation as to deportation is confirmed.

The accused will pay the costs of this appeal.

Delivered the 1st September, 1927.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 33/28.

BEFORE:

The Senior British Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

The Attorney General — APPELLANT.

vs

Shalom Nathan Gibler — RESPONDENT.

Criminal procedure—Procedure on refusal by Magistrate to commit for trial — Necessity of personal signature of Attorney-General — Arts. 106, 203, Ottoman Penal Code—Sec. 26, Trial Upon Information Ordinance, 1924.

Appeal from the judgment of the District Court of Haifa, dated 16th March, 1928, whereby the Respondent was convicted and sentenced to nine months' imprisonment under Articles 106 and 203 of the Penal Code.

JUDGMENT.

In accordance with the judgment of the Court of Criminal Assize in the case of the Attorney General vs. Tantach (Criminal Assize No. 26/27*) this Court holds that where an accused person has been committed for trial by the Magistrate upon any charge Section 26 (1) of the Trial Upon Information Ordinance, 1924, governs the framing of the Information.

Section 26 (2) only applies to a case where the Magistrate has refused to commit upon any charge whatever.

To hold the words "refused to commit" in that sub-section "refused to commit upon the charge in question" would be inconsistent with the terms of the last sentence of sub-section (1) "any offence may be charged in an Information which is supported by evidence taken at the preliminary enquiry".

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* Reported ante p. 595.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 44/28.

BEFORE :

Corrie, J., Khaldi, J. and Khayat, J.

IN THE CASE OF :

The Attorney-General — APPELLANT.

vs

Fahmi El-Husseini, Editor of the "Sout el-Haq" newspaper, Jaffa — RESPONDENT.

Criminal action for defamation disallowed because civil claim for damages not filed—Articles 179, 201, 214, Ottoman Penal Code—Lapse of action by desistance of plaintiff—Meaning of "personal action".

JUDGMENT.

This is an appeal against a judgment of the District Court of Jaffa dismissing a charge made against the Respondent under Article 214 of the Ottoman Penal Code on the ground that a prosecution does not lie under that Article unless a claim for damages has been filed by the complainant.

The ground of the appeal is that the District Court has misinterpreted the provisions of that Article.

The relevant portion of the Article is as follows:—

> "The taking of proceedings with regard to the offences set forth in this Article depends on the person attacked instituting a personal action according to the rule; but nevertheless in other cases, other than those for slander, the action of general rights also lapses by the plaintiff's desistance from the action after having instituted the action.
>
> "The complainant can, together with instituting an action and besides demanding the making good of the material loss sustained by him in consequence of the offence committed against him, claim as much pecuniary compensation as he may wish in return for the moral loss as well, which he thinks has been occasioned to him. The amount of the compensation is assessed and awarded by the Court according to the importance and violence of the offence and the social position of the person attacked."

The District Court has taken the view that a "personal action" means a civil claim, and this is certainly the natural meaning of the phrase.

The Attorney-General argues, however, that the phrase means simply a complaint. In support of this view he relies upon the words "the complainant can, together with instituting an action and besides demanding the making good of the material loss sustained by him . . . . claim."

In support of his argument he has quoted decisions of the Court of Cassation on the Article in which the expression "personal complaint" is used.

Article 214 in its present form was enacted on 6th Jemazi ul-Akhir 1329 (4 June, 1911) as part of a law which made very extensive amendments in the Penal Code. These amendments included an addition to Article 179 providing that "If the act stated in this Article has not been the cause of sickness for more than ten days, the taking of proceedings depends on the lodging of a complaint," and an amendment to Article 201 providing that the taking of proceedings thereunder depends "on a complaint being made."

We think it is clear that a distinction was intended between the "personal action" required by Article 214 and the "complaint" required by Article 179 and 201.

It would no doubt be a strong argument in support of the appeal if it were shown that the general practice of the Courts was to treat personal action as equivalent to complaint. It appears, however, that in three of the four District Courts the question has arisen and in each case the Court has decided that personal complaint means a civil claim. I feel no doubt as to the correctness of this view.

The appeal must be dismissed.

Delivered the 25th day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 63/28.

BEFORE:

Corrie, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Abdel Rahim Bakr El-Hassan
Hussain El-Mansour — APPELLANTS.

vs

The Attorney-General
Yacub Elhaj Saleh — RESPONDENTS.

Criminal procedure— Information charging different offence to that on which accused committed for trial—Sections 3, 4, 9, 17, Criminal Law Amendment Ordinance, No. 2 of 1927 — Articles 170, 180, Ottoman Penal Code — Secs. 29, 45, Trial Upon Information Ordinance, 1924—Judgment not clear as to offence of which accused convicted—Information to specify Article of law—Repeal of Article held to repeal also Addendum thereto—Notice of civil claim not served.

Appeal from the judgment of the District Court of Nablus, dated the 23rd day of April, 1928, whereby the First Appellant was convicted and sentenced to five years' penal servitude, and the Second Appellant to two years' penal servitude under Sections 4 and 9 (1) of the Criminal Law Amendment Ordinance, No. 2 of 1927, and under Article 245 of the Penal Code and to pay £E.15 and costs of the civil claim to the Second Respondent.

JUDGMENT.

Although the accused were committed for trial by the Magistrate on a charge of attempted murder with premeditation contrary to Article 170 of the Penal Code and Section 9 (a) of the Criminal Law Amendment Ordinance No. 2, 1927, the Information charged them under the addendum to Article 180 of the Penal Code and Section 3 (1) (a) of the Criminal Law Amendment Ordinance No. 2, 1927.

The District Court without amending the information before judgment, in accordance with Section 29 of the Trial Upon Information Ordinance, 1924, convicted the accused under Section 9 (a) and Section 4 of the Criminal Law Amendment Ordinance No. 2, 1927.

Section 9 (a), however, renders the convicted person liable to a sentence of penal servitude for life, while under the addendum to Article 180 of the Penal Code, the maximum sentence that could be imposed would be fifteen years' penal servitude. The Court should, therefore, have applied the provisions of Section 45 of the Trial Upon Information Ordinance, 1924, and committed the accused into custody to be charged with the offence involving the more severe penalty.

The further point arises, moreover, that the judgment of the Court does not make clear the offence of which the accused has been found guilty.

The conviction being under Subsection (a), the offence attempted must be one which would involve a sentence of death; but there is nothing to show whether such offence was murder with premeditation contrary to Article 170 of the Penal Code, or murder to facilitate escape contrary to Article 174 (3) of the Penal Code.

The Information must specify the Article under which the offence, which the accused are charged with attempting, is punishable.

A further point arises on the Information. By Section 17 of the Criminal Law Amendment Ordinance No. 2, 1927, it is declared that (inter alia) Article 180 of the Penal Code "shall no longer have effect in Palestine". In the absence of any indication of a contrary intention, this must be held to include the addendum to Article 180, which is, therefore, no longer in force.

As regards the civil claim, it appears that no notice of any claim was served on the defence and no fees were paid on the claim. Under these circumstances the civil claimant was not entitled to judgment for damages and the appeal in this respect is allowed and the claim dismissed.

The judgment of the District Court is set aside and the case remitted for completion.

Delivered the 2nd day of July, 1928.

In the Supreme Court sitting as a Court of Appeal,

CR. A. No. 162/28.

BEFORE:

The Senior British Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Sa'adeh Abed Abu Rashid
Najib Irsheid Abu Rashid — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Defence held not entitled to examine Police file—Right to put statement in evidence which supports defence case and which is in Police file—Procedure re obtaining access to statements in Police file.

JUDGMENT.

The defence is clearly not entitled to inspect the Police file relating to the charge against the accused, which contains or may contain matters of a confidential nature which cannot be given in evidence and which it would be contrary to the public in terest to disclose.

If, however, a complainant or a witness for the prosecution has made a statement to the Police which is inconsistent with his deposition or evidence, or which goes to support the case for the defence, it would clearly be a denial of justice that the existence or nature of such statement should be withheld from the defence. They are entitled, if they so desire, to have such statement put in evidence and to use it as a ground for cross-examination of the person by whom it was made.

It follows that an opportunity must be given to the defence to peruse such statements before the trial, if they so desire, for the purpose of deciding whether they wish to have the statements put in evidence.

The practice in the Court of Criminal Assize is to allow the defence to see such statements upon an application in writing specifying the witnesses whose statements the defence desires to see. We hold that this practice should be observed in District Courts also.

In the present case we propose to call for production of the statements of the complainant and to examine them with a view to satisfying ourselves whether they are or are not to the effect alleged by the defence.

The defence will be given the opportunity of inspecting such statements.

Delivered the 12th day of February, 1929.

In the Supreme Court.

A. A. No. 3/29.

BEFORE:

The Chief Justice

IN THE APPLICATION OF:

The Attorney-General — PETITIONER.

vs

Hilweh Khalil Hazboun — RESPONDENT.

Criminal procedure—Further Information filed by Attorney-General disallowed by Court of Criminal Assize—Leave to appeal applied for by the Attorney-General to Chief Justice as President of Court of Appeal—Amendment of Information by the Court—Irregularity of procedure occasioning failure of justice—Application not disposed of on technicality—Art. 170, Ottoman Penal Code—Secs. 6 (1) and (3) (a) Criminal Law Amendment Ordinance, No. 2 of 1927—Secs. 47, 55, 64, 70 (1), Trial Upon Information Ordinance, 1924.

ORDER.

In this case an Information was filed by the Attorney-General in the Court of Criminal Assize, on 30th November, 1928 (not as stated in the Attorney-General's application on the 13th November), charging Jerius Khalil Hazboun and Hilweh Khalil Hazboun jointly, the first with premeditated murder contrary to Article 170 of the Ottoman Penal Code, and the second with being an accessory after the fact of the said murder, contrary to Sections 6 (1) and 6 (3) (a) of the Criminal Law Amendment Ordinance (No. 2), 1927. (No. 50 of 1927).

On 11th January, 1929, a further Information against Hilweh Khalil Hazboun was filed by the Attorney-General in the Court of Criminal Assize, charging her separately with premeditated murder contrary to Article 170 of the Ottoman Penal Code.

The Court of Assize on 24th January, 1929, by a majority, held that the Trial Upon Information Ordinance, 1924, does not give the Attorney-General power to file a second Information arising out of the same set of facts as an Information already filed by him.

From that decision the Attorney-General asked for special leave to appeal.

The Attorney-General points out that the powers of appeal conferred on him by Section 64 of the Trial Upon Information

Ordinance are restricted to the three cases set out in Subsecs. 1 (a), 1 (b) and 1 (c) of that Section, none of which covers the present case, and he therefore applies to me, as President of the Court of Appeal, to give leave to appeal under Section 70 (1) of the Trial Upon Information Ordinance, on the ground that there has been a failure of justice and that the law as been wrongly decided. The Section in question empowers me to give such leave "if it appears that there has been some irregularity of procedure which has occasioned a failure of justice, or that a question of law has been wrongly decided".

The advocate for Hilweh in para. (4) on page 2 of his reply dated 3rd March, 1929, to the Attorney-General's application, says: "In this particular case, the Examining Magistrate ('indicted') meaning, presumably, thereby committed Hilweh for the graver offence, murder under Article 170 of the Ottoman Penal Code."

I am not quite sure what the Magistrate intended by his Committal Order of Hilweh, but in fact she was committed in the following form: —"Under Article 170 of the Ottoman Penal Code and Article 3 (a) and (b) and Article 6 (1) of the Criminal Law Amendment Ordinance (No. 2) of 1927 (Official Gazette No. 199, p. 749), considering her to be an accomplice during and after the crime."

The references to Ordinance No. 50 of 1927 should be apparently to Sections 3 (1) (a) and 3 (1) (b) and to Section 6 (1).

The view of the Attorney-General in the matter was that having, on 30th November, 1928, indicted Hilweh jointly with Jerius he could, by filing a new Information against Hilweh on 11th January, 1929, drop the part of the first Information dealing with Hilweh and proceed against her on the second Information.

Now it is clear that the Court could have amended the Information under Section 29 of the Trial Upon Information Ordinance, but this would not have served the Attorney-General's purpose as such amendment could not have been made so as to render Hilweh liable to a greater punishment than did the charge in the Information originally drawn.

Again, the Court could have applied Section 47 of the Trial Upon Information Ordinance, and the Attorney-General invited the Court to apply that section, but, in fact, this was not done.

The whole matter appears to me to be governed by Section 55 of the Trial Upon Information Ordinance, 1924, which runs as follows:—

"55. At any time during criminal proceedings and before judgment, the Attorney-General may stay such proceedings by order in writing filed in the Court before which they are pending. When an accused person has been committed for trial the case shall be deemed to be pending in the Court for trial before which he has been committed."

Hilweh having been committed for trial by the Attorney-General on 30th November, 1927, her case was to be deemed pending before the Court of Assize upon that Information.

The Attorney-General could have stayed proceedings upon that Information and filed a new Information, or new Informations, charging Hilweh as well as Jerius with murder, either jointly with Jerius in one Information, or separately in distinct Informations.

The Attorney-General did not make use of the one means which lay to his hand for carrying into effect his change of view regarding the nature of the offence with which the accused Hilweh should be charged, and he asks me to cure that omission by giving leave to appeal under Section 70 (1) of the Trial Upon Information Ordinance.

In my opinion, it cannot be said that—

(1) there has been any irregularity of procedure which has occasioned a failure of justice, or

(2) that a question of law has been wrongly decided.

That being so, I have no power to give leave to appeal.

The application, as the Respondent points out, is addressed to the President of the High Court of Appeal. It is true that the Supreme Court, sitting as a High Court of Justice, is a different entity from the Supreme Court, sitting as a Court of Appeal, and to speak of the High Court of Appeal is, strictly speaking, a misnomer, but I have thought it well to treat the misnomer as a piece of surplusage, since the point at issue in this application is not one which could, with justice, be disposed of on a technicality.

The application is dismissed with £P.2 advocates' fees and costs.

Delivered the 14th day of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 9/29.

BEFORE:

The Senior British Judge, Webb, J., Jarallah, J., Khaldi, J. and Khayat, J.

Territorial jurisdiction of Assize Court — Place where murder committed confirmed by accused's own statement — Application for adjournment to prepare case refused—Right to issue summons for immediate notification of witness—Corroboration of evidence of single witness.

JUDGMENT

It has been argued on behalf of the accused at the trial and on appeal that the Courts of Palestine have no jurisdiction to try this case on the ground that the murder was committed in Syria, and the Accused is a Syrian.

Neither in the Court of Criminal Assize, however, nor in this Court has any attempt been made to prove this assertion that the scene of the murder is in Syria either by calling evidence or cross-examining the witnesses for the prosecution. To the contrary, there is the evidence of a Palestine Police Officer and a Syrian Police Constable that the place where the murder was committed is in Palestine, and this is confirmed by the Accused's own statement to the Police made on the 16th July 1928.

We have therefore no doubt that the Court of Criminal Assize had jurisdiction.

Another point raised in this appeal is that the defence ought to have been granted an adjournment to enable them to call witnesses to prove an alibi.

In a statement made to the Police on 16th July, 1928, the Accused gave an account of his movements on the morning of the murder, mentioning two persons, Nejib Faroun and Abdel Latif Bey, in whose company he said he had been.

At the proceedings before the Investigating Magistrate the Accused said: "I do not wish to make a statement. I shall "give my statement in Court and bring there my defence witnesses".

No name, however, of any witness to be summoned for the defence was notified to the Court before the trial, and no further

mention was made of defence witnesses until after the prosecution had been closed and the Accused had actually given evidence in his own behalf.

At that stage, the advocate for the defence moved for an adjournment to obtain witnesses.

It does not appear from the record that he mentioned the name of the witnesses he proposed to call, or gave any indication of what they were to be called to prove, and accordingly the Court refused to grant an adjournment.

On appeal the Accused's advocate states that he desired to call these witnesses to prove the alibi indicated by the Accused in his statement of the 16th July, and gives as a reason for failing to produce these witnesses the fact that he only received five days, notice of the date of the trial.

It is to be noted, however, that, as the Court of Criminal Assize pointed out, the advocate had been retained for the defence six months before the trial, and thus had had ample time to prepare his case and to apply to the Court for the issue of summonses to the witnesses he required.

Even if the advocate for the defence had assumed that he would be able to procure the attendance of the witnesses without the assistance of the Court, he could on ascertaining at the commencement of the trial that they had not appeared, have asked for the issue of summonses and for immediate notification to the persons required.

Instead of taking this course, the advocate for the defence reserved his application until the Accused had concluded his evidence, in the course of which he made no reference whatever to an alibi.

It was clearly within the discretion of the Court to grant or refuse the adjournment, and in view of all the circumstances it cannot be maintained that any miscarriage of justice has occurred.

A further ground of appeal is that there is no evidence of an attempt by the Accused to commit rape.

But the statement by the woman Abdeh is corroborated by the fact that part of her clothing had been removed and by the wounds found by the Medical Officer on her knee.

The appeal must be dismissed and the judgment and sentence passed by the Court of Criminal Assize confirmed.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 33/29.

BEFORE:

The Acting Senior British Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Taha Muhammad El Yassin — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal procedure—Sentence reduced by Court of Appeal—Mitigating circumstances for reduction of sentence.

Appeal from the judgment of the District Court of Haifa, dated the 20th day of April, 1929, whereby the Appellant was convicted under Articles 3 and 5 of the Dangerous Drugs Ordinance, 1925, and sentenced to one year's imprisonment and a fine of £P. 200.

JUDGMENT.

The conviction must be confirmed. The sentence, however, was the maximum that could be imposed and upon taking into consideration the facts, i. e., that it is Accused's first offence, his previous reputation, and that he has lost his employment with the Government in whose employment he has been for the last eighteen years, we are of opinion that it is too severe and order that it be amended to one of a fine of £P. 50 or failing payment to one of nine months' imprisonment to date from date of arrest.

Accused to pay the costs of this appeal.

Delivered the 24th day of June, 1929.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 68/29.

BEFORE:

Baker, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Bakri Osman Zanat — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal procedure—Evidence—Witness called by Court after close of case for defence — Sec. 39, Trial Upon Information Ordinance, 1924—"At any time during the trial" construed—Right of Accused to call rebutting evidence.

JUDGMENT.

The chief ground of appeal in this case is against the procedure adopted by the Jaffa District Court of calling a witness for the prosecution subsequent to the close of the case for the prosecution and the close of the case of the defence. Section 39 of the Trial Upon Information Ordinance, 1924, prescribes that at any time during the trial the Court may of its own motion call upon any person present to give evidence as a witness or may cause any person to be brought before it as a witness, etc.

We are satisfied that the expression "at any time during the trial" must be construed as at any time prior to judgment and that the time of trial extends to the delivery of judgment.

The second ground of appeal is that accused should have been allowed to call rebutting evidence contradicting the evidence of the witness called subsequent to the close of the case for the prosecution and defence by the Court. The witness was included on the list at the back of the information. The accused was aware from the time of his committal of this evidence. He was also aware that the case had been adjourned for the hearing of this witness. He had ample notice to allow him to produce his witnesses in rebuttal.

We are satisfied that there was evidence before the lower Court on which they could lawfully find the facts necessary to support their judgment and accordingly the conviction must be upheld.

In view of the nature of the instrument used the sentence is reduced from ten to seven years' hard labour.

Delivered the 1st day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 142/29.

BEFORE:

Tute, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Yusef Shukri Abu Rahmeh — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Plea of guilty entered by accused to an offence other than the charged—Refusal by Court to allow charge to be altered—Effect of withdrawal of complaint by complainant—Arts. 174, 177, 178, 179, Ottoman Penal Code—Sec. 29, Trial Upon Information Ordinance, 1924.

JUDGMENT.

The relevant facts are as follows:—

The accused stabbed the complainant. The latter recovered from the slight wound inflicted on her in seven days. Accused was charged under Article 174 of the Ottoman Penal Code and Section 9 (b) of the Criminal Law Amendment Ordinance (No. 2), 1927. The charge was read out and the accused was asked to plead to it. He did not do so but pleaded guilty to an offence under Article 179 of the Ottoman Penal Code. The Assistant Government Advocate accepted this plea.

The Court refused to allow the charge to be altered and after giving a postponement of a few days to enable the accused to prepare his defence to the original charge tried and convicted him on that charge. Just after the postponement was granted the complainant withdrew her claim by an application in writing.

It is claimed by the defence:—

1. That the Court had no power to refuse to accept an amendment of the charge to which the Public Prosecutor had consented, and

2. That the effect of his consent, combined with the withdrawal of the complaint, should have been to bring the trial to an end under the last Addendum of Art. 179 of the Ottoman Penal Code.

As to (1), we hold that the Prosecution had no power to amend the charge after the accused had been invited to plead. Section 29 of the Trial Upon Information Ordinance, 1924, gives this power to the Court alone. Had the Public Prosecutor desired

to stay proceedings he should have put in an order in writing to this effect from the Attorney-General under the provisions of Section 57 of the same law. He did not take this course in spite of the fact that the postponement granted by the Court gave him time to do so.

As to (2), we hold that Article 179 relates only to the offences described in Articles 177 and 178 which immediately precede it. It does not extend to an offence under Article 174 or to an attempt to commit the offence described in that article. This is perfectly clear from the wording of Article 179.

We hold that the conviction is a proper one and must be maintained. We hold, however, that in the circumstances disclosed by the trial, the sentence is too severe, and direct that it be reduced from five years to one year from date of conviction. No costs.

Delivered the 29th day of November, 1929.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

P. C. of 1930.

BEFORE:

Viscount Dunedin, Lord Thankerton and Lord Macmillan.

IN THE CASE OF:

Ahmed Jabir Khatib & Others,
Ahmed Mustafa Sherifi & Another,
Rashid Salim Haj Darwish & Others,
Mustafa Ahmed Deiblis,
Abdul Jawad Farrah & Another — APPLICANTS.

vs

The Attorney-General of Palestine — RESPONDENT.

Criminal procedure — Application to the Privy Council for special leave to appeal in criminal case refused — Appeal sought from considered judgment of Court of Appeal of Palestine.

LORD DUNEDIN.

In these cases Mr. Pritt, with the lucidity which their Lordships have often had occasion to admire, has said everything that could possibly be said in support of his clients' cases. It is to be noticed that the appeal is sought, not from the decision of the Trial Judge, but from the considered judgment of the Court of

Appeal before whom was urged each and every one of the considerations based upon the proper interpretation of the Ottoman Penal Code and Criminal Procedure Ordinances and the adequacy of the evidence adduced which have been repeated here to-day. Their Lordships could not give leave in these cases without infringement of the principles as to appeal in criminal cases which have for many years regulated their Lordships' practice. Their Lordships, therefore, will humbly advise His Majesty that leave to appeal should be refused.

Delivered the 28th day of March, 1930.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 5/30.

BEFORE:

The Chief Justice, Baker, J. and De Freitas, J.

IN THE CASE OF:

Tolia Epstein — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Examination of witness by Police Officer — Criminal law — False evidence — Officer of Police not of or above the rank of Inspector not authorized to examine witness—Secs. 2, 4, Criminal Procedure (Evidence) Ordinance, 1927.

Appeal from the judgment of the District Court of Haifa, dated the 22nd day of January, 1930, whereby the Appellant was sentenced to 6 months' imprisonment under Section 4 of the Criminal Procedure (Evidence) Ordinance, 1927.

JUDGMENT.

The conviction is quashed and the Accused discharged on the ground that the Police Officer was not of or above the rank of Inspector under Section 2 of Ordinance No. 33 of 1927 and that there was no evidence that he had obtained special authorisation under the hand of the High Commissioner under the said Section.

Given the 2nd day of May, 1930.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 14/30.

BEFORE:

The Chief Justice, De Freitas, J., and Plunkett, J.

IN THE CASE OF:

Issa Arafeh
Khalaf El-Khatib
Abdel Mun'im Jaber — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Prosecution witness called at trial who did not testify at preliminary enquiry.—Notice of witness to be called not given to other side—Deposition of absent witness read—Provisions of Sec. 36, Trial Upon Information Ordinance, 1924 cannot legally be waived—Appeal dismissed where no miscarriage of justice has occurred although Appellant might succeed on point raised—Necessity of corroboration—Absence of endorsement by Magistrate that deposition has been read over—Credibility of witness for Lower Court—Secs. 34, 36, 62, Trial Upon Information Ordinance, 1924—Sec. 4, Trial Upon Information (Amendment) Ordinance, 1929.

JUDGMENT.

As to the first accused, Issa, we are not impressed by the argument addressed to us relating to the field of vision open to people standing behind the cupboard and see no reason why more evidence should be called in this respect.

It is true that Mr. Lamont, a witness who did not give evidence at the preliminary enquiry, was called for the prosecution without a note of the substance of his evidence or notice that he was to be called having been given to the other side. Twelve witnesses for the prosecution were called after him, and had the defence chosen to insist on compliance with Section 36 of the Trial Upon Information Ordinance such notice would doubtless have been given and he could have been called later.

In fact the provisions of Section 36 of the Trial Upon Information Ordinance, 1924, could not legally be waived. But in any event his evidence is not vital to the prosecution and the Court of Assize, apart from this, had ample evidence in the testimony of Hanania, Minha and Simha to enable it to come to the conclusion at which it did, and no miscarriage of justice has actually occurred, so bringing the matter under the proviso to Section 62 of the Trial Upon Information Ordinance, 1924.

The arguments regarding the second accused, Khalaf, revolve in part round the deposition of Toker. We cannot for a minute admit that his brother's evidence that Toker was out of Palestine requires corroboration.

As to the absence of an endorsement by the Magistrate to the effect that a deposition has been read over, Section 4 of the Trial Upon Information (Amendment) Ordinance, 1929 (No. 37 of 1929), does not require such an express endorsement by the Magistrate. In any event the judgment of the Court was not based on a chain of evidence of which Toker's was a necessary and indispensable link.

What Schnerson, Kastanovitch and Simha deposed to was that upon which the Court made its finding. Objection to Schnerson's evidence was taken on the ground that his name was not on the back of the information, but Section 36 of the Trial Upon Information Ordinance is concerned not with the persons whose names are not on the back of the information but with those who did not give evidence at the preliminary enquiry which this witness in fact did do.

As to the third accused, Abdel Mun'im Jaber, we do not think we need say anything save that the counsel for Appellant directed himself solely to the credibility of the evidence which satisfied the Court below and which we hold was sufficient to justify them in forming the conclusion at which they arrived.

We therefore dismiss the appeals in each of these three cases and confirm the convictions and sentences passed upon each of the three accused.

Delivered the 27th day of May, 1930.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 5/31.

BEFORE:

Corrie, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Saleh Abed Ayadeh
Kasem Khneifes Ayad — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Criminal procedure—Deposition of absent witness admitted in evidence — Hearsay evidence — Sec. 34, Trial Upon Information

Ordinance, 1924—Judicial notice taken by Court of Arabic date equivalent to Gregorian date, and of the phases of the moon—Injury to trees—Sec. 19, Forests Ordinance, 1926—Firing with intent to intimidate—Art. 179 A, Ottoman Penal Code.

JUDGMENT.

The District Court allowed the deposition of Cpl. Edgett to be read on hearing the sworn statement of the Asst. District Superintendent of Police that he had received official information (which was not produced) to the effect that Edgett had left Palestine.

This Court is of opinion that the statement of the Asst. District Superintendent of Police was hearsay and that the requirements of Section 34 of the Trial Upon Information Ordinance, 1924, were not fulfilled, and hence that the deposition of Edgett must be disregarded.

We further hold that the Appellants are right in the view that the Court will take judicial notice of the Arabic date equivalent to the Gregorian date; and of the phases of the moon; and that the advocate for the defence was entitled to call the attention of the Court to such facts in his closing speech for the defence.

As regards the accused Kasem, however, it is clear that the witness Hussein gave his name, as one of the assailants, to P.C. Ahmed Jaber a short time after the second attack upon the garden, and that half an hour later the police constable arrested Kasem in possession of a revolver which smelt of powder. Having regard to the fact that, on the next morning, trees were found to have been damaged at the spot were the intruders were first seen, we hold that the District Court was entitled to infer that the garden was attacked for the purpose of breaking the trees and that the accused Kasem had taken part in the two attacks and to find him guilty of breaking trees, contrary to Section 19 of the Forests Ordinance, 1926, and of firing with intent to intimidate, contrary to the addendum to Article 179A of the Penal Code.

This Court does not find evidence sufficient to convict the accused Kasem of an attempt to commit highway robbery.

The accused Kasem will serve a term of 18 months' imprisonment.

Against the accused Saleh we do not find evidence sufficient to support a conviction upon any of the charges against him. Accordingly the judgment as regards Saleh is set aside and he is acquitted.

The costs of the appeal are to be paid by the Appellant Kasem.

Delivered the 21st day of March, 1931.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 10/31.

BEFORE:

Corrie, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Abdul Qader Jamal
Hussein Jamal — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Criminal procedure—Sentence of "10 years' imprisonment with hard labour" held improper — Maximum term of imprisonment — When sentence is to be penal servitude—Young Offenders Ordinance, 1923 — Art. 34, Ottoman Penal Code.

JUDGMENT.

The conviction of both accused is affirmed. The accused have been sentenced to a term of ten years' imprisonment with hard labour. Except in the case of a young offender within the meaning of the Young Offenders Ordinance, 1923, the maximum term of imprisonment which a Court can impose is three years (Ottoman Penal Code Article 34), and the Court has no power to order imprisonment with labour or with hard labour.

In a case in which a sentence of three years' imprisonment is inadequate, the proper sentence is one of penal servitude. The accused are therefore each sentenced to serve a term of ten years' penal servitude.

Delivered the 2nd day of March, 1931.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 13/31.

BEFORE:

The Acting Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Sab'a Fadl Qaraman — RESPONDENT.

Criminal procedure — Appeal signed by Government Advocate on behalf of Attorney-General held invalid — Sec. 64, Trial Upon Information Ordinance, 1924.

JUDGMENT.

The appeal is not signed by the Attorney-General as required by Section 64 of the Trial Upon Information Ordinance, 1924.

The appeal signed by the Government Advocate cannot be taken into consideration, and is therefore dismissed.

Costs, including £P. 2 advocate's fees, will be paid by the Appellant.

Delivered the 14th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 19/31.

BEFORE:

The Chief Justice, the Senior Puisne Judge, and Khayat, J.

IN THE CASE OF:

Ibrahim Khalil Ispanyoli — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal procedure — Abuse of confidence — Art. 236, Ottoman Penal Code — Conviction for offence not charged in Information — Failure to substitute complainant in Information.

Appeal from the judgment of the District Court of Nablus. dated 28th day of July, 1931, whereby the Appellant was convicted under Article 236 of the Penal Code, and sentenced to two months' imprisonment.

JUDGMENT.

The Accused in this case was convicted of abusing the confidence of Liza, whereas he was charged in the Information with an offence in respect of the son Emil, and the Court, although asked at the close of the prosecution to amend the Information by substituting Liza as complainant instead of Emil, made no such order. For this reason the appeal is allowed. We need not consider the point as to the complaint having been by Liza and not, as stated in the Information by Emil, or the application of Section 80 of the Civil Procedure Code. The conviction is quashed and the Accused is discharged.

Delivered the 2nd day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 71/31.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Ahmad Muhammad Salem — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal procedure — Witnesses called by the Court after the close of the defence—Close of defence is not close of trial.

Appeal from the judgment of the District Court of Nablus, dated the 12th August, 1931, whereby the Appellant was convicted under Article 174 (1) of the Penal Code and sentenced to fifteen years' penal servitude.

JUDGMENT.

Section 39 of the Trial Upon Information Ordinance, 1924, refers to the calling of witnesses "by the Court at any time during the trial". Section 40, by way of contrast, uses the term "on the close of the defence". It is clear, therefore, that the Court can call witnesses after the close of the defence which is not, as counsel suggested, the close of the trial. The trial lasts till verdict and in case of a finding of guilty till sentence.

The Court is satisfied that there was sufficient corroboration and it sees no ground for reducing the sentence. The appeal is dismissed with costs. The conviction and sentence are affirmed.

Delivered the 8th day of October, 1931.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 9/32.

BEFORE:

The Chief Justice, Corrie, J. and Frumkin, J.

IN THE CASE OF:

Mordechai Mottes,	APPELLANT.
vs	
The Attorney-General	RESPONDENT.
and	
Sama'an Hanna Harb	
Yusef Harb	
Wadi's Harb	CIVIL CLAIMANTS APPELLANTS.

Jurisdiction in criminal matters of District Court comprised of two Judges—Information amended by Court—Appeal from plea of Guilty made in Trial Court—Information signed by Junior Government Advocate—Necessity of signature of Attorney-General—Plea of Guilty made by advocate of accused in presence of accused—Jurisdiction to impose fine exceeding LP.200.—Secs. 16, 26, 29, Trial Upon Information Ordinance, 1924—Sec. 5, Trial Upon Information (Amendment) Ordinance, 1929—Arts. 67, 233, Ottoman Penal Code—Secs. 9, 11, 16, Criminal Law Amendment Ordinance, No. 2 of 1927—Right of Attorney-General to make committal order on refusal of Magistrate to commit—Order of committal by Attorney-General cannot take the place of an Information to be filed by or on behalf of the Attorney-General—Incitement to attempt or incite commission of fraud—Sec. 11 (1), Courts Ordinance, 1924—Imprisonment in lieu of fine—Sec. 3 (2), Imprisonment for Debt Ordinance, 1931—Evidence of criminal system to defraud—Withdrawal of plea of "Not Guilty"—Sentence increased by Court of Appeal—Rights of civil claimant on failure of criminal action due to lack of jurisdiction of Court.

Appeal from the judgment of the District Court of Jerusalem dated the 8th day of June, 1932, whereby the Appellant was convicted under Articles 67 and 236 of the Ottoman Penal Code and Sections 11 and 16 (g) of the Criminal Law Amendment Ordinance No. 2 of 1927, and sentenced to pay a fine of LP.550.

JUDGMENT.

The accused in this case, having been charged under different Articles of the Ottoman Penal Code and Sections of the Criminal Law (Amendment) Ordinance (No. 2), 1927, was committed for trial by the Magistrate under Art. 233 of the Ottoman Penal Code.

An information was filed on behalf of the Attorney-General by the Junior Government Advocate on the 22nd May, 1932, containing 8 counts.

The accused was brought to trial before the District Court, constituted by the President and one other Judge, on the 8th June, 1932, and a plea of Not Guilty was entered.

In the course of the trial the Court held that the first two counts in the information were outside its jurisdiction as they involved crimes and not misdemeanours.

The Court, at the same time, amended the eighth count from one for the substantive offence of taking money by fraud, to one of attempting to take money by fraud. It also added a count numbered IX, for conspiracy, contrary to Section 16 (g) of the Criminal Law (Amendment) Ordinance (No. 2), 1927, and the second addendum to Article 155 of the Ottoman Penal Code. At the same time the Court made verbal amendments to counts III and VII.

After this had been done, the Court called upon the accused under counts III, IV, V, VI, VII, VIII as amended, and also the count added by the Court, count IX, and the Judges' note contains the following line:—

"Mr. Siev—Accused pleads guilty to all the charges".

The first point in the appeal is that the information was signed by the Junior Government Advocate, whereas there should have been an order signed by the Attorney-General; the second is that the plea of guilty was made not by the accused but by his advocate; and the third is that, by virtue of Section 11 of the Courts Ordinance, 1924, a District Court constituted of two Judges cannot impose a fine exceeding £P.200.

Taking the first of these points, let us set out the legal position as it was under Section 26 of the Trial Upon Information Ordinance, 1924, when it stood alone and as it is now under that Section of that Ordinance as amended by Section 5 of the Trial Upon Information (Amendment) Ordinance, 1929.

The position as stated in judgments of the Supreme Court in Attorney-General v. Mahmoud Yusef Tantash—Criminal Assize No. 26/27*—and Attorney-General v. Shalom Nathan Gibler—Misdemeanour Appeal No. 33/28 **, was formerly this:

If the Magistrate committed for trial under Section 16 of the Trial Upon Information Ordinance, 1924, upon any charge what-

* See ante, p. 595.

** See ante, p. 598.

ever, an information under Section 26 (1) filed, by or on behalf of the Attorney-General, might, under the last paragraph of that subsection, charge any offence supported by evidence taken at the preliminary enquiry.

If the Magistrate refused to commit, upon any charge whatever, the Attorney-General might make a committal order on any charges arising out of the evidence taken at the proceedings for committal, and he must make such order if he desires that an information be filed.

The obligation upon the Attorney-General to make an order under subesction (ii) is not expressed in the Ordinance, but it is clear from the judgments cited, that this Court held the view that in the case to which subsection (ii) relates it would be incumbent upon the Attorney-General to make an order for committal if he desired to have an information filed.

The effect of Section 5 (1) of the amending Ordinance of 1929 (No. 37 of 1929) is to widen the scope of Section 26 (ii) of the Trial Upon Information Ordinance, 1924, by adding further cases in which the Attorney-General may make an order for committal and in which, in consequence, he must make such order if he desires that an information be filed.

Under the amending subsection the cases in which the Magistrate has committed for trial, whether upon the charge on which the accused was brought before him or upon some other charge, are placed on exactly the same footing as the case in which the Magistrate has refused to commit upon any charge.

That is to say under Section 26 (ii) as amended, whether the Magistrate has committed or refused to commit upon any charge whatever, the Attorney-General must now make an order committing the accused for trial upon any charges which he desires to have included in the information. The only exception being where the Magistrate has committed the accused for trial upon the charges in question.

The object of this amendment is clear. Where it is intended to override the decision of the Magistrate, the authority of the Attorney-General himself is required, and the matter is not to be left to the discretion of a Junior Government Advocate.

We wish to make only one other observation upon this topic, because it appears to us that the arguments of counsel indicate that it is not perfectly clear.

Our observation is this, that the order of committal by the Attorney-General cannot take the place of an information filed by

or on behalf of the Attorney-General, for Section 26 (i) says, that no one shall be tried, notwithstanding that he may have been committed for trial by a Magistrate, except on an information filed by or on behalf of the Attorney-General; so that it follows from this that every order of committal of the Attorney-General must, if a person is to be put on his trial thereupon, be followed by an information filed by or on his behalf.

In the present case the accused was charged before the Magistrate under Article 67 of the Ottoman Penal Code and Section 11 of the Criminal Law (Amendment) Ordinance (No. 2) of 1927; under Article 233 of the Ottoman Penal Code and Section 11 of the Criminal Law (Amendment) Ordinance (No. 2), 1927; under Article 233 of the Ottoman Penal Code alone; and finally under Article 233 of the Ottoman Penal Code and Section 9 of the Criminal Law (Amendment) Ordinance (No. 2), 1927.

The Appellant was committed by the Magistrate under Article 233 of the Ottoman Penal Code only. Under count III, he is charged with attempting to incite another to commit a fraud contrary to Article 233 of the Ottoman Penal Code and Section 11 of the Criminal Law (Amendment) Ordinance (No. 2), 1927.

The charge of inciting, or attempting to incite, the commission of a fraud is in our opinion an offence distinct in character from the actual commission of the fraud, and hence is not covered by the Magistrate's Order of Committal under Article 233 of the Penal Code; and no order of committal has been made by the Attorney-General.

As regards count III, therefore, we hold that the Appellant has not been committed for trial and consequently that count III is not before the Court.

Counts IV, V and VI were framed under Article 233 of the Penal Code and with regard to these counts this objection does not arise.

As regards count VII, "attempt to take from the possession of others their money by exercising fraud by way of swindling, contrary to Article 233 of the Ottoman Penal Code and Article 9 of the Criminal Law (Amendment) Ordinance (No. 2), 1927", we hold that the order of committal under Article 233 is sufficient to support a charge of attempting to commit an offence under that Article.

The same consideration applies to Count VIII, in which it may be noted that no reference to Section 9 of the Criminal Law (Amendment) Ordinance (No. 2), 1927, is inserted.

The first two counts of the information were, as we have seen, held by the District Court in the Court of Trial to be outside the jurisdiction of the Court constituted by two Judges. The same objection appears to us to apply to counts IV, V and VI, which are for offences under Article 233 of the Ottoman Penal Code. The penalty under that Article is imprisonment from three months to three years and a fine of from one to 50 Mejidieh gold pieces.

Under Section 11 (1) of the Courts Ordinance, 1924, two Judges of a District Court may sit in criminal trials if the penalty that may be imposed does not exceed three years' imprisonment or a fine not exceeding £P. 200.

Since Article 233 allows of a penalty of a fine in addition to three years' imprisonment, it is clear that two Judges are incompetent to try charges thereunder.

The only other counts in the information as originally drawn with which we are left are counts VII and VIII as amended, namely, attempts to defraud contrary to Article 233 of the Ottoman Penal Code and Section 9 of the Criminal Law (Amendment) Ordinance (No. 2), 1927.

The punishment for attempts under Section 9 (c) of the last-named Ordinance is half the maximum for the substantive offence.

These counts were, therefore, punishable with a maximum of eighteen months' imprisonment and a fine of 25 gold Mejidieh, and the Appellant could discharge himself from liability to the fine by serving a term of not more than 91 days' imprisonment under Section 3 (2) of the Imprisonment for Debt Ordinance, 1931 (No. 8 of 1931).

These counts were, therefore, within the jurisdiction of a District Court composed of the President and one other Judge.

We need only add here that the President of the District Court, in amending count VIII from a charge of a substantive fraud to an attempt, omitted to insert in the information a reference to Section 9 of the Criminal Law (Amendment) Ordinance (No. 2), 1927, but we hold that this omission entailed no miscarriage of justice as regards the accused.

Let us now turn to the question of the admissibility of the addition of count IX by the Court.

Since the Court had no cognizance of counts IV and VI dealing with Banayot Harb and Wadi Harb, we were disposed at first to conclude that it had before it no evidence upon which it could add count IX to the information.

The evidence with regard to Banayot and Wadi Harb was, however, relevant to counts VII and VIII as showing system, and it had been taken before the Magistrate and there was, in consequence, a justification for the addition by the Court of count IX to the information so long as the charge in count IX did not render, to quote Section 29 of the Trial Upon Information Ordinance: "the person charged liable to a greater punishment than does any charge in the information as originally drawn". This must of course be understood in the present case as relating to those charges in the information as originally drawn which were within the cognizance of the Court of Trial.

Section 16 of the Criminal Law (Amendment) Ordinance (No. 2), 1927, under which count IX was drawn, provides for a maximum penalty of two years' imprisonment. This is a penalty greater than 18 months' plus 91 days' imprisonment which, as we have seen, is all that can be imposed under counts VII and VIII. It follows, therefore, that count IX could not legally be added by the Court in view of the proviso to Section 29 of the Trial Upon Information Ordinance, 1924.

We come now to the argument that because the accused did not himself with his own tongue enter a plea of guilty, that plea was improperly taken. As we have seen, one of the advocates holding a power of attorney from the accused entered the plea.

The accused is very far from being a simple or illiterate person who is unaware of what was being said on his behalf. He made no protest against his counsel's action and immediately thereafter when there was addressed to him the allocutus, which to a man of his education cannot have been all Greek, once more he made no protest against the obvious implication of guilt contained in its form. When he was brought up for sentence on a subsequent day he still made no protest against the plea entered by his counsel.

We hold that there was no irregularity in the Court accepting from the advocate of an accused, such as this, a plea which he heard and to which he did not demur on even one of the several opportunities which presented themselves to him, and we would add that it is significiant that in the notice of appeal, filed within eight days of the judgment of the Court, there is no mention of this point, which first makes its appearance in the grounds of appeal which are dated the 2nd September, 1932.

Further, we can find no authority for saying that a plea of Not Guilty cannot be withdrawn in the course of a case before

judgment and replaced by one of Guilty, and we are satisfied that in practice it has been frequently done in the Court of this country.

The third ground of appeal argued before us is that, under Section 11 of the Courts Ordinance, 1924, the Court could not impose a penalty in excess of a fine of £.200 and that it was, therefore, not entitled to fine the accused £.550. The answer to this is that a fine of £.200 may be imposed for each of the offences of which a person is convicted, and the Court convicted the Appellant upon seven counts. The appeal upon this ground therefore fails.

The convictions under counts III, IV, V, VI and IX are quashed; those under counts VII and VIII are affirmed.

The Attorney-General has, as we think very properly, appealed against the sentence as being insufficient. Even if the Crown Law Officers had not taken that view, we should have held, as was held by one of the Judges in the Court below, that a fine was an entirely inadequate punishment for fraudulent offences of this kind.

The Appellant stands convicted upon two counts of attempting to obtain money by fraud.

In determining the sentence, however, the Court is bound to take into account the evidence, which as it has held was properly before the District Court, as to the Appellant's transactions with Khouri Harb, Sam'an Harb and Wadi Harb, which show that the two offences of which the Appellant stands convicted were not isolated instances, but were part of a system of fraud practised by the Appellant.

The sentence fining the Appellant £.550 is set aside and there is substituted therefor a sentence of imprisonment for one year and a half, the Appellant bearing the costs of the appeal.

There remains the question of the civil claims made by Banayot Harb, Wadi Harb and Sam'an Hanna Harb.

In view of the fact that the District Court was incompetent to try the charges to which these claims relate, the judgment of the Court upon the civil claims must be set aside. The claimants will be entitled to prosecute their claims if at any time the charges to which they relate are brought for trial before a Court competent to hear them.

Delivered the 6th day of September, 1932.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 5/32.

BEFORE:

Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Karam Saleh El Ali — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal procedure—Theft—Criminal jurisdiction of District Court composed of two Judges—Irregularity of procedure—More serious offence revealed during course of trial than that alleged in Information—Art. 222, Ottoman Penal Code—Sec. 3, Criminal Law Amendment Ordinance, No. 2 of 1927—Sec. 45, Trial Upon Information Ordinance, 1924—Sec. 11, Courts Ordinance, 1924.

Appeal from the judgment of the District Court of Haifa, dated 24th February, 1932, whereby the Appellant was convicted under Article 6 of the Criminal Law Amendment Ordinance No. 2 of 1927, and sentenced to two years' imprisonment.

JUDGMENT.

The Appellant Karam Saleh El Ali with another person was charged with theft contrary to Article 222 of the Ottoman Penal Code and Section 3 (1) (a) of the Criminal Law Amendment Ordinance No. 2 of 1927. He was tried by the two learned members of Haifa District Court who on the 24th February, 1932, acquitted him of the charge of theft, but found him guilty of being in possession of stolen property well knowing it to have been stolen, and by virtue of Section 6 of the Criminal Law Amendment Ordinance sentenced him to two years' imprisonment.

Against this conviction and sentence the Appellant has appealed alleging:

a. That there was no evidence on which the Court could lawfully find the facts necessary to support the judgment;

b. that there was an irregularity of procedure.

After hearing Mr. Koussa for Appellant and the Assistant Government Advocate with regards to the alleged irregularity of

procedure, it appears that Section 6 of the Criminal Law Amendment Ordinance prescribes as a punishment for the offence of which Appellant was found guilty, penal servitude not exceeding ten years; an offence which rendered the Appellant liable to a more severe punishment than could be awarded to him on conviction of the offence of theft charged in the Information.

We are of opinion that it was not necessary for the Court to commit the accused into custody to be charged with the said offence and undergo a further preliminary enquiry under Section 45 of the Trial Upon Information Ordinance, in view of the fact that the previous enquiry was sufficient to disclose the facts necessary to support the new charge.

We are however of opinion, that by virtue of Section 11 of the Courts Ordinance 1924, sub section (1) para (a), the trial should have been adjourned and a Court composed of the President and two other Judges been formed to try the case.

We are satisfied that the legislature did not intend that an offence of being in possession of stolen property should be tried by a Superior Court to that which has jurisdiction to try an offence for house-breaking under Article 222 or that a similar constituted Court should not be able to try both offences.

In support of this view one only has to refer to the Order of the 16th September, 1930, under the Magistrates' Courts Jurisdiction Amendment Ordinance, 1926-1930, which adds to the Schedule of offences triable by a Magistrate, offences under Section 6 of the Criminal Law Amendment Ordinance.

However, Section 11 of the Courts Ordinance, 1924, sub-section (1) para (a) has not been amended, neither has Section 6 of the Criminal Law Amendment Ordinance, and as the law stands at present, we are of opinion that the judgment will have to be quashed and the charge under Section 6 of the Criminal Law Amendment Ordinance No. 2 of 1927, will have to be tried by the Haifa District Court composed of the President and two Judges.

The judgment is accordingly quashed and the case remitted for retrial by the District Court consisting of the President and the two members.

Delivered the 27th day of April, 1932.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 10/32.

BEFORE:

The Acting Chief Justice, de Freitas, J.,
Khaldi, J. Khayat, J. and Abdel Hadi, J.

IN THE CASE OF:

Ahmad Diab Abu Khfuf — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal procedure—Record in writing of all evidence taken at the trial made by Judge other than presiding Judge—Sec. 33, Trial Upon Information Ordinance, 1924, not mandatory but discretionary.

The following note was attached by the Chief Justice to the record of this case.

"Owing to indisposition I have asked Plunkett, J. to record on my behalf the evidence taken at the trial as I do not consider that Section 33 of the Trial Upon Information Ordinance is mandatory. I hold that it is merely discretionary and so does not make it imperative that the note to be taken should be that of the presiding Judge, the object of the Section being not that a particular Judge should take the note, but that a note should be taken which in normal circumstances would naturally be by the senior Judge present".

JUDGMENT.

We are satisfied that there was evidence before the lower Court on which they could lawfully find the facts necessary to support their judgment.

The appeal must be dismissed and the conviction and sentence affirmed.

Delivered the 18th day of June, 1932.

In the Supreme Court sitting as a Court of Appeal.

A. A. No. 11/32.

BEFORE:
Baker, J., De Freitas J., Khaldi, J., Frumkin, J. and Abdel Hadi, J.

IN THE CASE OF:

Qasem Haj Ibrahim — APPELLANT.
vs
The Attorney-General — RESPONDENT.

Criminal procedure—Right of final address—Redress refused where irregularity of procedure has not caused miscarriage of justice—Sec. 40, Trial Upon Information Ordinance, 1924.

JUDGMENT.

There is no provision in the Ottoman Law allowing the Attorney- or Solicitor-General to have the right to reply after counsel for the defence has made his final address, the procedure being governed by Section 40 of the Trial Upon Information Ordinance, 1924, and although we are of opinion that allowing the Solicitor-General the final address was irregular, yet we are satisfied that no miscarriage of justice has been caused thereby and, therefore, cannot be a reason for interfering with the lower Court's judgment.

The Court by a majority is not satisfied that premeditation was proved, and therefore quash the findings of premeditation and amend the judgment to one of wilful murder under the first paragraph of Article 174 and order the accused to serve a term of fifteen years' penal servitude.

Mr. Justice Baker: I dissent on the question of premeditation.

Delivered the 21st day of July, 1932.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 16/32.

BEFORE:
The Chief Justice, The Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Assaf Ciffrin
Mikhail Copti
Yehuda Penikver — APPELLANTS.
vs
The Attorney-General — RESPONDENT.

Criminal procedure—Form of judgment—Failure of presiding Judge to record findings of fact on which conviction based — Conviction

quashed for failure to comply with provisions of Section 48, Trial Upon Information Ordinance, 1924.

Appeal from the judgment of the District Court of Haifa, dated the 19 July, 1932, whereby the Appellants were convicted under Article 233 of the Ottoman Penal Code and Sections 3 and 15 of the Criminal Law Amendment Ordinance, No. 2 of 1927, and sentenced, the first Appellant to pay a fine of £P. 100 or one year's imprisonment and costs; the second Appellant to pay a fine of £P. 50 or six months' imprisonment and costs; and the third Appellant to pay a fine of £P. 25, or three months' imprisonment and costs.

JUDGMENT.

The Court after hearing Abcarius Bey for the first Appellant and Mr. Kaiserman for the second and third Appellants, orders that the conviction be quashed and the case remitted to the District Court to give a fresh judgment and to place on record in the President's notes of the proceedings, the findings of fact upon which the conviction is based, in accordance with Section 48 of the Trial Upon Information Ordinance, 1924.

Delivered the 23rd day of September, 1932.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 19/32.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Ni'meh Awwad el Khury,
Ass'ad Hanna,
Muhammad Husein Daud,
Saleh abd Ayadeh — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Jurisdiction of Court of Appeal—Question other than point of law on which appeal allowed by President of District Court not dealt with.

Appeal from the judgment of the District Court of Nablus, dated the 19th September, 1932, sitting in its appellate jurisdiction, whereby the Appellants were convicted under Article 226 of the Penal Code and Section 3 of the Criminal Law Amendment

Ordinance (No. 2) of 1927 and sentenced to one month imprison ment each.

JUDGMENT.

The Court cannot deal with any question other than the point of law on which appeal has been allowed by the President of the District Court.

The appeal is dismissed with costs. The sentences upon the accused will run from the date of conviction.

Delivered the 17th day of December, 1932.

In the Supreme Court of Jerusalem.

CR. L. A. C. A. No. 28/32.

BEFORE:

The Chief Justice, Khaldi, J. and Frumkin, J.

IN THE APPLICATION OF:

Nahum Heth — APPLICANT.

vs

The Attorney-General — RESPONDENT.

Jurisdiction of Supreme Court to grant leave to appeal on refusal of President of District Court — Exclusive jurisdiction of President District Court to grant leave to appeal under Section 4, Magistrate's Courts Jurisdiction Ordinances, 1924 — Conviction under Section 38, Town Planning Ordinances, 1921-1929.

Application for leave to appeal from the judgment of the District Court of Haifa confirming the judgment of the Magistrate of Haifa in Case No. 1988/31 whereby the Applicant was convicted under Section 38 of the Town Planning Ordinances 1921-1929 and sentenced to pay a fine of £P. 5.—.

JUDGMENT.

This is not an Application for leave to appel which could be granted by the Supreme Court.

The President of the District Court who alone uuder Section 4 of the Magistrate's Court Jurisdiction Ordinance, 1924, can grant leave to appeal, has refused to grant such leave.

The Application is refused.

Delivered the 4th day of December, 1932.

In the District Court of Nablus.

CR. C. D. C. Na. of 1932.

BEFORE:

Cressall, J., Ali Hasna, J. and Yusef Khaldi, J.

IN THE CASE OF:

The Attorney-General

vs

Ibrahim Amer El Omair
and Others ACCUSED.

Criminal procedure — Right of Defence to see statements in Police file — Duty of Prosecution towards Court — Accused presumed innocent until proved guilty — Credibility of witness may be attacked by production of previous statement inconsistent with testimony — Article 170, Ottoman Penal Code — Sections 3, 4, 9, Criminal Law Amendment Ordinance, No. 2 of 1927.

JUDGMENT.

The Accused who are charged with attempted murder contrary to Article 170 of the Ottoman Penal Code and Sections 3, 4 and 9 of the Criminal Law Admendment Ordinance, No. 2 of 1927, have pleaded not guilty to the information.

At the outset of the proceedings and before any evidence has been heard Mr. Adel Zu'eiter who appears for the Accused applied to the Court for an order directing the Police Prosecutor to give him access to the statements taken by the Police in connection with the case. He has stated that he is not in a position to "prove the innocence" of his clients unless he sees, before the trial, all the statements the witnesses have given to the Police, so that he can cross-examine them. He bases his application on the judgment of the Supreme Court in CR. A. No. 150/28.

We are of opinion that such an order should not be given unless the Court is satisfied that a particular witness has, in fact, made a statement to the Police which is inconsistent with the testimony given before the Magistrate's Court, or the District Court, thereby affecting his credibility as a witness at the trial.

We regret we cannot interpret the Supreme Court judgment to mean that an accused person or his advocate has no unrestricted right to peruse every statement taken by the Police in the course of their investigation into a crime. Such an interpretation would have no basis in law or in practice.

There is no provision under the Turkish Code of Criminal Procedure which provides for access being given to a Defendant to peruse Police files, but it is a well established rule in English Criminal practice that where it is shown to a Court or Judge that a witness has made a previous statement which is inconsistent with his present testimony, such statement, if in existence, will be ordered to be produced in order to allow the Defence an opportunity to attack the witness' credibility. We know of no rule however, which entitles a Court to assume from the mere ex parte statement of an advocate that a witness for the Prosecution has in fact given an inconsistent statement to the police.

We are of opinion, therefore, that the Supreme Court judgment already referred to, must be interpreted in the light of the recognized English rule, namely, that an Accused person must be given every facility to examine Police Statements provided it is shown to the satisfaction of the Court that such statements are inconsistent with a witness' testimony and that their production is therefore necessary in the interests of justice. Further than that, we are not prepared to go, and we decline to make the order asked for, unless and until it is shown to us that the production of the statements are essential in the interests of the Accused. If, and when, this state of affairs is established, then an order will issue, and if necessary, the case will be adjourned to enable the Defence to examine the statement, or statements, in question.

Before leaving the matter, we desire to remind the learned advocate that it is not part of his duty to "prove the innocence" of his client. In submitting this proposition in support of his application, he has apparently forgotten that a fundamental rule of English Criminal practice is that an accused person is deemed to be innocent until he is proved guilty, and the prosecution authorities are under a clear and definite obligation to inform the Court of facts which tell in favour of an accused as well as those which tell against him.

As Mr. De Freitas has stated that this principle is not always followed, it may not be out of place to remind the Police authorities that their correct attitude as prosecutors is to endeavour as far as possible to feel indifferent as to the results of cases, and to remember that their duty is best performed when they lay before the Court, accurately, and without malice or favour, all the material facts in their possession. Any wilful suppression or over statement on their part of a fact or incident so as to favour the prosecution or prejudice the prisoner will result in the Court

taking serious disciplinary action against the particular person; for they must remember that in administering justice the Courts depend to a large extent on the trust worthiness of their evidence and on their impartial conduct of prosecutions.

The trial must therefore proceed, the Accused or their advocate being entitled to establish, if possible, during the cross-examination of any particular witness that it is necessary, for the just determination of the case, for any particular Police Statement to be produced.

In the Supreme Court sitting as a Court of Appeal.

A.A. No. 8/33.

BEFORE:

The Acting Chief Justice, The Acting President District Court, Frumkin, J., Khayat, J. and Abdel Hadi, J.

IN THE CASE OF:

Faris Muhammed Khadija
Mustafa Ghazal — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Criminal procedure — New evidence revealed after trial and conviciton — Highway robbery — Duties of Police in prosecutions — Probable consequence of prosecution of common purpose — Amendment of Information before judgment by adding charges thereto — Art. 174, Ottoman Penal Code — Sections 3, 4, Criminal Law Amendment Ordinance, No. 2 of 1927 — Section 29, Trial Upon Information Ordinance, 1924.

JUDGMENT.

Part of the evidence upon which the Court of Trial relied in convicting the two Appellants was that of a tracker who followed the tracks of two persons which resembled those made by the Appellants' shoes, from a spot where the two Appellants were seen together sitting and eating halfway to the scene of the crime and thence to the railway line.

It was not brought to the notice of the Court and was not disclosed to the defence that two other trackers had been employed.

It is now stated by the prosecution that these two trackers Ibrahim Abu Rakaik and Mustafa Kattami followed certain tracks from the scene of the crime to the railway; but it is not stated

whether as suggested by the defence they were asked to pick out tracks leading to the scene of the crime and failed to do so.

No statements by either of these trackers has been recorded.

It is clear that the fact that the trackers had been employed should have been communicated by the Police to the Government Advocate so that he would have been in a position to inform the Court and the defence of their existence.

The defence now argues that if they had been in a position to call these trackers their evidence would have nullified that of the tracker Yakub Daoud Ghantas, which was relied upon by the Court of trial as a connecting link between the other witnesses.

We hold that the defence should have an opportunity of calling the trackers.

A further question arises with regard to the Appellant Mustafa Muhamad Ghazal who has been charged and convicted under the third paragraph of Article 174 of the Penal Code and Section 3 of the Criminal Law Amendment Ordinance No.2 of 1927.

The prosecution have been unable to point out to us any subsection of Section 3 which in our opinion, is applicable to the facts of this case.

Had the Appellant been charged, however, under Section 4 of that Ordinance, it may well be that the Court of Criminal Assize would have held that the homicide committed by the Appellant Faris was a probable consequence of the prosecution of the common purpose of the two Appellants, and hence that the Appellant Mustafa was guilty under that Section.

It is within the power of the Court of Criminal Assize by virtue of Section 29 of the Trial Upon Information Ordinance, 1924, to amend the Information before judgment by adding charges thereto; and we hold that this power should have been exercised by the Court of Trial.

Even if in the opinion of that Court the Appellant Mustafa is not guilty under Section 4 of the Criminal Law Amendment Ordinance (No. 2) of 1927, there is evidence upon which, if believed, he may be convicted of robbery and a charge under the appropriate Article of the law should be added.

Accordingly the judgment of the Court of Assize is set aside and the case remitted:—

(1) For the defence to be afforded an opportunity of calling the trackers Ibrahim Abu Rekaik and Mustafa Kattami; and

(2) For a charge to be added charging the Appellants under Penal Code 174 (3) and Section 4 of the Criminal Law Amendment Ordinance No. 2 of 1927, and

(3) For a charge to be added charging the Appellants with robbery, and for the judgment to be given.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 22/33.

BEFORE:

The Acting Chief Justice, Khaldi J., and Khayat J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Abdel Kader Ahmed el Hadidi and three Others — RESPONDENT.

Power of the Trial Court to call evidence of its own motion—Failure of District Court to excercise its discretion under Sec. 39 of the Trial Upon Information Ordinance, is not a ground for setting aside the judgment—Sec. 64, Trial Upon Information Ordinance, 1924.

Appeal by the Attorney-General from the judgment of the District Court of Nablus discharging three of the accused and acquitting the other. The appeal was based on the ground that two of the accused had made certain statements to the police which were incriminating and that before their discharge the Court should have required them to affirm or deny such statements.

JUDGMENT.

The question whether certain evidence was wrongfully excluded or not is not raised by this appeal.

The facts that the District Court did not exercise its discretion conferred upon it by Section 39 of the Trial Upon Information Ordinance, 1924, is not a ground for setting aside the judgment.

The other questions raised by this appeal do not in our opinion, come within the terms of Section 64 of the Trial Upon Information Ordinance.

The appeal is therefore dismissed.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 59/33.

BEFORE:

Baker, J., Khaldi, J., and Frumkin, J.

IN THE CASE OF:

Mustafa ej-Joroun — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Criminal procedure—Failure of Trial Court to set out findings of fact in judgment—Verdict of guilty on two unspecified charges out of three contained in the Information—Sec. 48, Trial Upon Information Ordinance, 1924.

JUDGMENT.

This is an appeal against the conviction of the Appellant by the Nablus District Court and a sentence of 15 years' imprisonment for wilful murder.

Mr. Goitein for the Appellant has submitted that there were three charges against the accused and that the Trial Court in their judgment made no finding of fact, the Court merely stating: "The Court finds accused No. 1 guilty of both charges", that the said judgment in its present form is bad inasmuch as Appellant is unaware of which two of the three charges he was found guilty and of the facts found by the Court to support their conviction.

It is clear to us that the trial court convicted under the 1st and 2nd charges of indictment, for their judgment states "accused is sentenced to fifteen years on the first charge and five years on the second charge, sentence to run concurrently". There are, however, in the Acting President's notes of the proceedings, no findings of fact on which the conviction is based.

And in accordance with the decision in Misdemeanour Appeal No. 16/32, the Court orders that the conviction be quashed and the case be remitted to the District Court to give a fresh judgment and to place on record in the proceedings the facts upon which the conviction is based in accordance with Section 48 of the Trial Upon Information Ordinance, 1924.

Delivered the 25th day of September, 1933.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 67/33.

BEFORE:

Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Mikhail Masir Musa Khury,
Rida Jirhis Ibrahim,
Nasir Armis Naris — APPELLANTS.

vs

The Attorney-General — RESPONDENT

Alleged confession made by accused to Police Sergeant — When confession free and voluntary — Admissibility of confession not preceded by warning — Sec. 8, Law of Evidence Amendment Ordinance, 1924.

Appeal from the judgment of the District Court of Haifa, dated the 3rd day of August, 1933, convicting the Appellants of burglary under Article 220 of the Penal Code and Section 3 of the Criminal Law Amendment Ordinance, No. 2 of 1927, and sentencing each to eight months' imprisonment.

JUDGMENT.

The principal evidence against the accused was an alleged confession made by the accused to a Police Sergeant. This alleged confession was made after the brother of complainant (admitted to be a most influential man in the village) had been allowed to have ten to fifteen minutes interview with the accused.

There is also evidence that the complainant's brothers had promised two of the accused that no proceedings should be taken against them.

The alleged confession was never committed to writing by the Police Sergeant and signed by the accused; neither have we any evidence that the accused were ever warned, a most necessary precaution to render a confession admissible.

On the evidence presented by the prosecution of this alleged confession, we are of opinion that the Court below was wrong in believing that the confession was free and voluntary within the meaning of Section 8 of the Law of Evidence Amendment Ordinance, 1924.

Without the confession, we are of opinion that there is not sufficient evidence to support a conviction; and the appeal must be allowed and the judgment of the lower court quashed and the accused acquitted.

CROWN ACTIONS.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 134/23.

BEFORE:

Corrie, J., Khayat, J. and Khaldi, J.

IN THE CASE OF:

Sa'id Kamel Basha — APPELLANT.

vs

Registrar of Lands, Haifa, ____ — RESPONDENT.

Jurisdiction of Land Court—Crown actions—Necessity of consent of High Commissioner before taking proceedings against the Government—Transaction made outside the Land Registry after the issue of the transfer of Lands Ordinance, 1920.

JUDGMENT.

Whereas the Land Court considered this claim to be outside of its jurisdiction because:

1. There was no permission from the High Commissioner for proceeding in this case, a matter which this Court has decided in its preliminary judgment dated the 28th day of January, 1924, that there was no need of it.

2. Whereas it could not hear cases which are based on transactions made out of the Land Registry after the issue of the Transfer of Lands Ordinance, 1920;

The Court finds that there is nothing in the law which disentitles the Court of the above jurisdiction to hear this case from the beginning and to give a new judgment.

Delivered the 11th day of February, 1924.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 54/30.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Government of Palestine — APPELLANT.

vs

Muhammad Afifi — RESPONDENT.

Crown actions — Execution of judgment obtained against the Government — Party desiring execution to serve copy of judgment upon the Attorney-General for submission to the High Commissioner—Section 6, Crown Actions Ordinance, 1926.

Appeal from the judgment of the Land Court of Haifa, dated 13th November, 1930.

JUDGMENT.

Section 6 of the Crown Actions Ordinance, 1926 requires that a copy of any judgment against the Government of Palestine shall be transmitted to the High Commissioner. The Section does not state by whom such copy is to be transmitted but we have no doubt that the obligation to do so lies upon the party who desires execution of the judgment, and that it should be served upon the Attorney-General for submission to the High Commissioner. It is then for His Excellency in the case of a judgment relating to title to land to "take such measures as shall be necessary to cause the same to be carried into effect; or, in case he shall think fit, he may direct that an appeal shall be entered".

In the present case there is no evidence of any service upon the High Commissioner of a copy of the judgment and in consequence no direction thereon.

There is therefore no appeal before the Court and the application is dismissed.

The Appellant will pay the costs of this appeal, including £P. 3 advocate's fees and expenses.

Delivered the 30th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 15/31.

BEFORE:

The Chief Justice, Corrie, J. and Khayat, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Sab'a Fadl Qaraman — RESPONDENT.

Costs against Attorney-General not allowed in criminal proceedings-Crown Actions Ordinance, 1926, held to relate only to civil proceedings—No personal liability of Public Officer—Costs of accused in case of acquittal—Secs. 53, 54, Trial Upon Information Ordinance, 1924.

JUDGMENT.

This appeal raises the question whether or not costs can be adjudged against the Attorney-General in criminal proceedings.

The Crown Actions Ordinance, 1926, Section 8, provides that in "all actions and proceedings brought by or against the Government of Palestine.....costs may be awarded in such manner as in actions between private parties". But that Ordinance relates only to civil proceedings.

The Rule in force in Ottoman Criminal Courts was laid down by the Court of Cassation in the following terms:—

> "The Acting Public Prosecutor in bringing the action and appealing against the decision of the Court below did not act in a personal capacity but in the public interest, and by virtue of his office and as such could not be charged with payment of the costs of the trial".
>
> (Baz's Commentary on Article (1) of the Criminal Procedure Code of 1905 Edition, para. 16, page 19).

Since the British Occupation the only enactment affecting liability to pay costs in criminal cases is the Trial Upon Information Ordinance, 1924.

Section 53 of the Ordinance deals with costs in case of conviction, and Section 54 with costs in case of acquittal.

The latter Section provides that:

> "When the Court acquits the accused person, it may, if it is of opinion that the prosecution was frivolous and vexatious, order any person who preferred the charge, or any

person whom it may consider responsible for having procured the information to be filed, to pay to the accused his costs of the defence which shall be recoverable in the same manner as a fine".

We hold that this Section does not apply to the Attorney-General who files the information in performance of his public duty. It follows, therefore, that the Court has no jurisdiction to order payment of costs by the Attorney-General in a criminal proceeding, and the application of the Respondent for costs is dismissed.

Delivered the 31st day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 158/32.

BEFORE:

The Senior Puisne Judge, Khaldi J, and Frumkin, J.

IN THE CASE OF:

Leban — APPELLANT.

vs

Damash and Another — RESPONDENTS.

Action for the price of iron pipes requisitioned by the Military Authorities in 1919—Action against owner of land on which pipes used not allowed—Liability of requisitioning authorities.

JUDGMENT.

The only right that the Appellant appears to have had with respect to the pipes, which he alleges were recquisitioned from him by the military authorities in 1919 was a right to claim compensation from the requisitioning authorities. He has no right as against the owner of land in which the military authorities may have made use of the pipes.

The appeal must be dismissed with costs including LP.2.500 advocate's fees and expenses.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 48/33.

BEFORE:

The Chief Justice, Frumkin, J, and Khayat, J.

IN THE CASE OF:

Morowat Said Sarkassi — OPPOSER.

vs

Ahmad Mustafa Sarkassi et al,
Government of Palestine — RESPONDENTS.

Opposition to judgment of the Court of Appeal—Section 3 (2), Crown Actions Ordinance, 1926—Consent of High Commissioner to bring action obtained after commencement of action.

Opposition to a judgment of the Court of Appeal claiming certain rights as against the Government of Palestine. The consent of the High Commissioner to bring the action was obtained several months after the Opposition had been commenced.

JUDGMENT.

The claim being against the Government and the written consent of the High Commissioner not having been obtained under Section 3 (2) of the Crown Actions Ordinance, 1926, the Opposition is dismissed with LP.2 costs to the Government and LP.3 costs to the first three Respondents.

Delivered this 11th day of December, 1934.

CURRENCY.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 72/22.

BEFORE:

The Chief Justice, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Salti Bishara — APPELLANT.

vs

Selim Haddad — RESPONDENT.

Offer to pay indebtedness in 1917 in Turkish notes — Acceptance of Turkish currency on threat of deportation—Validity of agreement entered into under compulsion — Depreciation of currency.

JUDGMENT.

In the year 1917 the Defendant was indebted to the Plaintiff in the sum of L. T. 200 pounds paid in gold with interest on a promissory note yet due. The Defendant offered to pay in Turkish notes of the nominal amount. Those notes were legal tender but the Plaintiff was not bound to accept them because the debt was not due. The notes were much depreciated in value and he refused to accept them. Finally he accepted and gave a receipt in gold. The Plaintiff stated that he was induced to receive the money by a threat that if he refused the notes he would be reported to the Government and would incur the very serious risk of being deported to Anatolia. In 1920 the Plaintiff sued the Defendant for the difference between the amount due in gold and the amount which he had been induced to receive under compulsion and threat. The District Court refused to hear evidence of compulsion and gave judgment for the Defendant. The judgment was appealed and the case sent back to the District Court to find two issues of fact:—

(a) Was the payment made in gold or in Turkish notes.

(b) If made in Turkish notes was the Plaintiff induced to accept them in payment by fear of the treatment he might receive from the Government officials if he refused, a fear induced by the Defendant.

When the case was sent back for trial of these issues it was considered that the answers would be conclusive. But it was of common notoriety that in 1917 under the rule of Jamal Pasha the fear of deportation and the risk even to life involved was so general that threats of the kind put forward by the Plaintiff would be sufficient to render the agreement to receive the amount of the debt before it was due in Turkish notes a void agreement.

The District Court heard evidence on both sides and found in the affirmative on both issues, giving judgment for the Plaintiff for the difference between the amount due in gold and the value of the Turkish notes received under compulsion.

There was nothing more to be done in the case than to have those issues decided. There was evidence on which the District Court could find as it did and the judgment should be confirmed.

Delivered the 8th day of August, 1922.

In the Supreme Court sitting as a Court of Appeal.

No. 64/24.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Mary Eugenie Henriette Estrangin
of Marseilles — APPELLANT.

vs

Michel Bishara Anton Tayan
Emile Bishara Anton Tayan — RESPONDENTS.

Bei-bil-wafa made in 1883 to secure amount payable in French Napoleons—Mortgaged lands remaining in possession of mortgagor for long number of years—Transfer of mortgage by attorney—Sale in satisfaction of mortgage—Limitation of actions—Absence of mortgagee and heirs but presence of authorized agent in Palestine as affecting prescription—Arts. 1663, 1674, Mejelle—Discharge of mortgage—Arts. 26, 37, 117, Tabou Law—Art. 144 Execution Law—Arts. 20, 78, Land Code.

Appeal from the judgment of the Land Court of Nablus dated March 31st, 1924.

JUDGMENT OF MR. JUSTICE CORRIE.

There is no dispute about the facts. They are as follows:—

On 5th January, 1929, Anton Bishara Tayan mortgaged the lands in claim by bei-bil-wafa registered in Tabou to Henry Estrangin of Marseilles to secure the sum of 15,000 Napoleons, repayable by six annual instalments without interest. The loan was further secured by six promissory notes. The lands mortgaged remained in possession of Tayan.

On 6th November, 1888 Estrangin gave a power of attorney to Ishak Arie to take all necessary steps to recover the 300,000 francs from Tayan. On 5th December, 1304 (19th December, 1888,) Estrangin through his agent Edward Portalis transferred his rights under the mortgage to Ishak Arie and also transferred the six bills of exchange (promissory notes). On 9th February, 1304, Arie transferred his rights to recovery of 300,000 francs to J. A. Frutiger and Haim Valero, and gave them a power of attorney to collect the debt. This power of attorney contains a statement by Arie to the effect that some of the bills had been protested.

In 1923 the representatives of the mortgagees applied for sale of the land in satisfaction of their mortgage debt. This was opposed

by the heirs of Tayan. No order was made, the parties being left to establish their rights by action. Proceedings were then commenced by the heirs of Tayan claiming that they were entitled to the lands freed from all claims under the mortgage. It is not disputed that ever since the date of the mortgage, Henri Estrangin and his heirs have been absent from Palestine.

The land Court has held:

(a) That the transfer from Estrangin to Arie of the rights under bei-bil-wafa was invalid having been made without the mortgagor's concurrence, and hence that the rights to sue thereon (if any) remained vested in Estrangin.

(b) That Estrangin's absence from Palestine did not prevent time from running against him owing to the fact that he had an agent in Palestine with full powers to take all steps necessary to protect Estrangin's interest; and hence that Estrangin's right of action was barred; and Tayan's heirs were entitled to their declaration.

Against this judgment Estrangin's heirs have appealed.

To deal first with the question of prescription. Article 1663 of the Mejelle provides that "consideration is not given to time which passes in consequence of one of the excuses allowed by Sheri Law such as a person being in a foreign country". In my opinion the Article must be taken as it stands and we cannot read into it any qualification such as that the excuse shall not be regarded if the person had a duly authorised agent in the country where the action should be heard. Accordingly I hold that Estrangin's right of action under the bei-bil-wafa is not barred by lapse of time.

It has moreover to be noted, that Tayan's heirs admit the mortgage transaction, as indeed they are bound to do, in view of the fact that the mortgage to Estrangin is on the Register. And it would therefore appear that even if Estrangin had throughout been resident in Palestine, the heirs of Tayan could not have got the mortgage removed from the Register without proving that the debt had been discharged.

The fact that the heirs of Tayan can only come to the Court as mortgagors is in effect an admission by them of the title of the registered mortgage, and the principle of Article 1674 of the Mejelle is applicable.

As regards the effect of the transfer to Arie. It is clear that, as the Land Court has held, such a transfer could not operate to confer upon Arie the right to enforce against Tayan the terms of the bei-bil-wafa on his behalf. It might however be valid as between Estrangin and Arie, as an agreement by Estrangin that Arie should

take the benefit of the enforcement by Estrangin of his rights under the bei-bil-wafa, and the existence of such an agreement would not operate to prevent Estrangin from enforcing such rights against Tayan.

In so far however as the debt secured by the bei-bil-wafa has been discharged by the payment of the promissory notes given as collateral security or otherwise, the amount for which the mortgaged land is security is to be reduced accordingly.

The judgment must be set aside, and the case remitted to ascertain whether the debt due on the bei-bil-wafa has been wholly discharged in accordance with the last preceding paragraph of this judgment.

Delivered in presence the 1st day of April, 1926.

JUDGMENT OF MR. JUSTICE JARALLAH.

The Court holds the facts of the case to be as follows:—

Michel and Emile Tayan claim, in their capacity as heirs of the late Antoine Tayan, that Mr. Arie, domiciled at Jerusalem, acting personally and representatively, urged for the sale, by the Execution Office of Nablus of the land upon which a mortgage with right of redemption had been created by their ancestor in favour of Mr. Estrangin (as shown by the Tabou Extract dated 1299) in satisfaction of a debt, amounting to 14,500 Napoleons maturing six years after the date of registration (1305).

Further that the said agent did not enforce the said right from the date of the maturity up to the date of application to the Tabou (viz. 13.2.23), and his claim is consequently barred by prescription.

Claimants apply therefore for an Order to be directed to the Tabou that the registration be corrected and the lands shown as free from any mortgage or sale. Moreover as both A. Arie and Estrangin are dead, for an injunction against their respective heirs, to refrain from interfering with the same, and against Mr. Richard Rughes, Syndic of Frutiger Bankruptcy, from considering the said heirs as acquirers of the mortgagee's heirs. It was submitted by counsel for Estrangin that his clients and their ancestor of Marseilles had never come to Palestine, during the whole period dealt with above.

Inasmuch as prescription is only avoided by indefinite absence, therefore no plea of prescription could serve in this case.

The Land Court held that the transactions executed between Estrangin and Arie, regarding the transfer of the mortgagee's rights

to another, are void, and in the light of Articles 26-37 of the Tabou Law, dated 27 Safar 78, both the vendor and the purchaser, under "Bei-Bil-Wafa" are forbidden to make a transfer of these lands to others and therefore Article 117 of the Tabou Law finds its right application in this case.

The Court held further, that the claim should be confined to the refund of the mortgage amount, or the sale of the lands which only Estrangin and his heirs are entitled to enforce and not Arie and his heirs or the Syndic of Frutiger Bankruptcy. The Court ruled, inter alia, that the Kushan held by Estrangin is similar to a Judgment of Court, and in view of the fact that a period of 15 years has elapsed, this instrument is, under article 144 of the Execution Law, inoperative and unenforceable. The Court held too, that the uninterrupted period is not a bar to prescription, owing to the existence in Palestine, of Mr. Estrangin's agent.

In my opinion, although this case is involving lengthy and successive transactions which the Court may have found difficult to go through owing to the length of time, the Court below, however reduced the matter at issue to a very simple question:

Whether the existence of an agent to a person indefinitely absent in a remote country, does interrupt the prescription or not.

As far as I see, although there are explicit provisions of law on this point, it is quite justifiable to consider the uninterrupted absence as a legal excuse to stop the cause of prescription. The unrepresented absentee may appoint an attorney, to act in his place and stead. There is a difference in meaning between the possibility of appointing an attorney and the appointment itself. The interruption of prescription when the appointment of an attorney is possible, is not allowing its course to continue, owing to the existence of an attorney, otherwise the uninterrupted absence would not be a legal excuse to interrupt the prescription although the law is explicit on that point. This apart from the consideration that if the Defendant's case upholds A's right, no prescription is possible and no such plea may be put forward.

Similarly, the lessee of a property by virtue of a contract of lease, is not entitled to set up a plea of prescription against his landlord unless he holds the property as an owner. So is the position as between depositor and depositary, lender and borrower.

Since the mortgagee left the mortgaged property in the hands of the mortgagor and authorised him to benefit thereby, as shown by the transactions executed between them, the sold property becomes, therefore, a deposit in the hands of the Vendor and

he cannot be considered as holding the same as true owner thereof.

Anyhow, no plea of prescription is maintainable in such circumstances, as held by Zohrab Eff. in his book on "Prescription".

Further, both Article 144 of the Execution Law and Article 20 of the Land Code, are restricted by the prescription which runs without legal excuses.

Likewise, the acquisitive title (Haq el-Quarar) is subject, according the Article 78, to any previous admissions by the occupier, whether unlawful or arbitrary either in the capacity of lessee or borrower.

Here we have a clear admission based on an official record that a mortgagor becomes after the execution of the mortgage, in possession of the mortgaged or sold property by way of borrowing or trust.

Therefore, there is no prescription and I hold that the judgment of the Court below be set aside on this point.

Delivered in presence the 1st day of April, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 98/25.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Bezalel Maxumoff
Rahamin Maxumoff — APPELLANTS.

vs

Mala Simkhayoff — RESPONDENT.

Loan made in 1909 in Russian Roubles—Date and place of repayment not fixed but interest made payable in Jerusalem—Rate of conversion—Discharge of loan by depreciated currency—Debt repayable at rate of exchange prevailing on day of contract.

Appeal from the judgment of the District Court of Jerusalem dated 29th day of April, 1925, whereby the Defendant, (Respondent) was ordered to pay 8000 Roubles to the Plaintiffs (Appellants) with interest in roubles at the rate of 6½% to the date of the said judgment.

JUDGMENT.

The subject of this appeal is a loan of 8,000 roubles made by the father of the Appellants to the Respondent in 1909. No date or place was fixed for the repayment of the loan, but interest at 6½ per cent per annum was made payable in Jerusalem. The debt is not denied. The question at issue is the rate of conversion into Egyptian currency.

The Appellant argues that at the date of the loan, the paper rouble was equivalent to gold, and that the value of the gold lent was about £P. 800.

On the other hand, it is clear that so long as the rouble was legal tender, the loan could have been dicharged by delivery of 8,000 roubles, however greatly they might have depreciated. The question therefore arises whether the fact that the rouble has ceased to be legal tender affects the position.

We are unable to see how this can be the case. It has been stated that when the present Russian unit of currency, the chervonitz, was introduced, a rate at which roubles could be converted into chervonitz was fixed.

If that is the case, the sum of 8,000 roubles should be converted into chervonitz at that rate, and the equivalent amount of chervonitz converted into Egyptian currency at the rate prevailing at the date of the judgment of the District Court.

If, however, no rate of conversion into chervonitz was fixed, the Appellants must accept whatever value, if any, is now equivalent to 8,000 Imperial roubles.

Interest on the principal sum due is payable at 6½ per cent up to the date of action, and at 9 per cent from that date, the value of the rouble being converted into Egyptian currency at the rate prevailing when each instalment of interest was payable.

The judgment of the District Court is set aside, and the case remitted for the amount due to be calculated in accordance with this judgment.

Costs of this appeal are to be paid by the parties equally.

Delivered the 29th day of March, 1926.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

P. C. No. 121/26.

BEFORE:

The Lord Chancellor, Lord Buckmaster and Lord Warrington of Clyffe.

IN THE CASE OF:

David Moyal
Haim Calmy — APPELLANTS.

vs

Ahmed Mohamed Halawe — RESPONDENT.

Currency—Contract for sale of land made in 1918 — Consideration expressed in Turkish pounds — Stipulation to refund monies paid if transfer not effected — Repayment made in gold—Denial of receipt of monies as provided in agreement — Circular Letter of Senior Judicial Officer to Courts of Palestine re liquidation of debts accepted as law—Competency of parties as witnesses—Agent held personally liable to refund monies in certain circumstances—True consideration in contract ascertained by evidence—Unexplained delay in commencing appeal considered by Court in assessing costs—Jurisdiction of Courts over absent Defendant—Usurious interest.

JUDGMENT OF THE SUPREME COURT OF PALESTINE.

As to Mr. Moyal's first point in defence we find that when this contract was made, Konia and Palestine were both within the Ottoman Empire and the Notary Public Law applied to both equally and reciprocally. As to the second, it was not necessary for the Appellant to go before the Land Court to get the contract for sale annulled. He had the right to go before the ordinary Civil Court on failure of the Respondent to fulfil his promise concerning the transfer of the land.

As regards the question of the kind of money in which the £3000 were to be paid, it is clear that the promise is to pay in gold and that the Respondent could have avoided this by an appeal to the Law about usurious interest claiming that this transaction was really one of loan, and that the agreement to pay in gold was a means of getting usurious interest. This was not done. The last point is that the Appellant never rightly demanded the transfer of the land as required by the contract. The promise was to transfer the land and the protest calls upon him to commence within 5 days transfer proceedings (12th March, 1921). He never did this and action was entered on 4th July, 1921.

Appeal allowed and judgment of District Court amended, judgment to be for the Appellant for L. T. 3,000 in gold with interest from the date of the contract.

Delivered the 9th day of September, 1925.

THE LORD CHANCELLOR.

On the 5th March, 1911, the Appellant Calmy, a Turkish subject, then resident at Jaffa, executed a power of attorney in wide terms in favour of the Appellant Moyal, a Spanish subject. The power expressly authorised Moyal to sell all lands registered in the name of Calmy in the districts of Jaffa and Gaza.

During the war Calmy removed to Smyrna and Moyal was deported by the Turkish Government to Konia in Turkey. The Turkish Government also deported to Konia the Respondent Halawe, who was also a Turkish subject.

On the 13th February, 1918, a contract was executed before the public notary in Konia between Moyal and Halawe. The contract was in the Turkish language, and a certified translation of it was before the Board. By its terms Moyal, in pursuance of his power of attorney, sold to Halawe one-half share out of $52^1/_2$ shares of land at Gaza registered in the name of Calmy. The sale was expressed to be "in consideration of a sum amounting to 3,000 Turkish pounds, which value he has taken and received in gold cash from the said Halawe". The contract went on to provide for the transfer of the land into the name of Halawe on demand, and stipulated that if such transfer was refused or could not be effected then "he undertakes to return the 3,000 pounds aforesaid received by him in cash on demand to him or to the person or in the place he indicates, together with their legal interest from the date of this deed".

At the date of the contract Turkish law provided that paper money should circulate and be admitted as cash in all payments and expenditures in Turkey and that failure to comply with this obligation rendered the offender liable to fine or imprisonment. The land referred to in the contract was at the date situate in a part of the Turkish Empire in the occupation of the British forces.

On the 17th February, 1919, a circular letter was sent by the Senior Judicial Officer at Jerusalem to the Courts in Palestine directing, inter alia, that in the case of debts contracted after the issue of Turkish paper currency, debts should be liquidated at the Egyptian equivalent of the Turkish paper currency on the date when the debt was contracted. This rule was stated by the

letter to be subject to certain exceptions, of which the only relevant one was in the following terms:—

> "If the contract stipulates for a payment to be made in gold or in any currency other than Ottoman, and the creditor proves that the consideration for such payment was not Ottoman currency notes, the terms of the contract should be carried out as regards gold, and as regards other currencies the sum should be paid in Egyptian currency at the rate of exchange current on the day of payment".

On the 9th March, 1921, notice was given in writing by Halawe to Moyal requiring the transfer of the land. At the date of the notice Moyal and Halawe had returned to Jaffa; Calmy was still in Smyrna.

The notice was not complied with, and on the 3rd July, 1921, this action was commenced in the District Court of Jaffa by Halawe against Moyal and Calmy, claiming the payment of 3,000 Turkish pounds in gold with legal interest. The Defendant Calmy did not appear to the writ; the Defendant Moyal appeared in person and raised an objection to the jurisdiction which was overruled by the Court. On the merits the Defendant Moyal asserted that the transaction was not accurately set out in the deed. His story was that the only sum he actually received was 399 Turkish paper pounds. He said that the meeting before the public notary was, as he described it, a "legal trick"; that what really happened was that at that meeting certain sacks containing an unspecified amount of gold were produced, but that after the meeting the parties adjourned to the shop of a neighbouring Turk where the real consideration was handed over in the shape of the 399 Turkish bank notes. Under the rules of procedure governing the Court neither the Plaintiff nor the Defendant were competent witnesses. The Defendant Moyal challenged the Plaintiff to produce his books in order to show how the transaction was recorded there, but that challenge was not accepted. A number of witnesses were called by the Defendant Moyal, but no one was produced to give any evidence as to the transaction at the shop. One witness was called who was present at the meeting before the notary, and who deposed to certain unopened sacks apparently containing gold being there produced and handed to Moyal. On the other hand, there were several witnesses called who proved that at the date of the transaction the market value of this land

would have been in the neighbourhood of 400 Turkish gold pounds and no more.

The Court of first instance delivered judgment on the 30th January, 1922, and decided that the Defendants were liable to pay to the Plaintiff 3,000 Turkish paper pounds and gave judgment for the Egyptian equivalent of that amount, calculated at the 13th February, 1918, with legal interest from that date until payment. The Plaintiff appealed from this judgment and cross-appeals were entered by both the Defendants. The Supreme Court of Palestine gave judgment on the 9th September, 1925, allowing the Plaintiff's appeal and decreeing that the judgment of the Court below should be amended by substituting 3,000 gold pounds for 3,000 paper pounds, and it dismissed the cross appeals. Both Defendants appeal to His Majesty in Council from this decision. Before the Board the Appellants contended that the action ought to have been dismissed on the ground that the Court had no jurisdiction to entertain the claim. It was alleged that since the Appellant Calmy was in Smyrna, and since the transaction took place at Konia in Turkey, Smyrna was the right Court to try the suit. The Board is satisfied that this objection is unfounded. The action was properly brought against the Appellant Moyal, who was resident in Jaffa; by the rules of Court prevailing in Palestine there is power to serve one of two Defendants who is out of the jurisdiction in such circumstances. But in addition it appears that, at the hearing before the Court of Appeal, Moyal expressly appeared as attorney for Calmy in addition to appearing in his own name, and the power of attorney of the 5th March, 1911, gave him full power to bind his principal by such an appearance.

It was further argued on behalf of the Appellant Moyal that he only executed the contract of the 13th February, 1918, as agent for his disclosed principal Calmy, and, therefore, that he incurred no personal liability to repay the sum named in the deed. Their Lordships do not agree with this contention. Although it is true that the contract was for the sale of land registered in the name of Calmy the consideration money was paid to Moyal, and on the true construction of the contract Moyal personally undertook to repay the money if the transfer of the land was not affected. It follows that judgment was rightly recovered by the Plaintiff against both Defendants. There remains the question which was very fully argued, as to whether the judgment should be for 3,000 Turkish paper pounds or 3,000 Turkish gold pounds in either case with appropriate interest. The Appellants contended

that on its true construction the consideration for the transfer was only the value in gold of 3,000 Turkish pounds, and that at the date of the contract, 3,000 Turkish paper pounds were only worth 399 pounds in gold. This contention does not seem to have been raised in either of the Courts below, whose members were presumably familiar with the Turkish language and who had the original deed before them, and it was suggested that if such a contention had been raised it would have been possible to show that the words relied on in the translation did not fairly bear the meaning sought to be placed upon them. In these circumstances their Lordships would hesitate to overrule the decision of the inferior Courts upon this ground; but, in truth, it does not appear to their Lordships that the construction suggested is consistent with the provisions of the Turkish law at the date of the contract. By that law paper money had to be received as cash in all payments, and it is difficult to see how the value of Turkish paper money in Turkey could be less than its equivalent in cash consistently with these provisions.

But a further point was taken on behalf of the Appellants. They contended that, since by virtue of Turkish law, paper money had to be accepted as cash in all payments, it followed that whatever construction was put upon the deed, the Defendants could have discharged their obligation by payment of 3,000 paper pounds, and, therefore, that this sum was the measure of their obligation. It was contended further that when proceedings were instituted in the Courts of Palestine to enforce the obligation the amount recoverable must be the 3,000 Turkish paper pounds which were the limit of the Defendants' obligation under the contract, and that the judgment of the Palestine Court must be for the equivalent of that amount in Palestinian currency. It was pointed out that under the circular letter of the 17th February, 1919, whose validity was not disputed, this debt had to be liquidated at the Egyptian equivalent of the Turkish paper currency on the date when the debt was contracted. The Respondent's answer to this contention was to rely upon the exception set out in the circular. He contended that the contract stipulated for a payment to be made in gold, and he said that by production of the deed he had proved that the consideration for the payment was not Ottoman currency notes.

In the view of this Board the Appellants are right upon this point and the Respondent's answer fails. Although it may be that the averments in the deed afford some evidence that the consideration was not notes but gold their Lordships do not think that the Courts

are precluded by the deed from ascertaining the true facts, and the evidence adduced before the Court of first instance certainly does not satisfy them that the consideration was gold and not currency notes. It appears that the Court of first instance, who had the advantage of seeing the witnesses, reached the same conclusion. It follows that the judgment of the Court of first instance ought to be restored. There remains the question of costs. The Respondent should have the costs awarded by the Court of first instance. In the Court of Appeal all the appeals ought to have been dismissed and their Lordships think that there should be no costs of any of these appeals.

Before their Lordships' Board the Appellants have succeeded in obtaining a variation of the judgment in their favour but have failed to get the action dismissed, and in these circumstances their Lordships think there should be no costs to either party of the appeal to His Majesty in Council. Their Lordships are strengthened in this conclusion by the fact that the judgment appealed against was delivered so long ago as the 9th September, 1925, and that, although invited to do so, the Appellants were unable to furnish any explanation why the appeal should have taken two and a half years to reach a hearing. In their Lordships' view delays of this kind are calculated to work hardship and even injustice, and such a delay, if unexplained, is a factor which may properly be taken into consideration in dealing with the question of costs. Their Lordships will humbly advise His Majesty accordingly.

Delivered the 10th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 25/30.

BEFORE:

The Senior Puisne Judge, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Muhammad Hassan Mamluk
Khader Hassan Mamluk — APPELLANTS.

vs

Mrs. Louisa Fakhoury — RESPONDENT.

Money due in Lebanese Republic in Tyre currency collected in Palestine — Method of converting foreign currency into Palestine currency—Rate of conversion.

Appeal from the judgment of the District Court of Haifa, dated the 11th day of July, 1929.

JUDGMENT.

The deposit with the Notary Public, Tyre, was not made until after action brought in the Haifa Court, and is therefore no defence to such action.

We hold therefore that the District Court was right in ordering payment by the Appellants to the Respondent of 17974½ piasters, Tyre currency, and interest as specified in their judgment.

As regards the method of computing the equivalent in Palestine currency, the Court holds, in accordance with its judgment in Maxumoff and another vs Simhayoff (Civil Appeal No. 98/25) that if a legal rate has been fixed in the Lebanese Republic for the conversion of Tyre currency into Syrian currency, the sum due should be converted into Syrian currency at such legal rate, and from Syrian currency into Palestinian currency.

If, however, no legal rate of conversion has been fixed, the amounts due are to be converted into Turkish currency as at their respective dates of maturity, and from Turkish currency into Palestine currency at the rate now prevailing.

The judgment of the District Court is therefore set aside and the case remitted for completion in accordance with this judgment.

No order is made as to costs.

Delivered the 11th day of September, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 39/32.

BEFORE:

The Acting Chief Justice, Khaldi, J. and Khayat J.

IN THE CASE OF:

Ahmed Hasan Abu Laban and Sons APPELLANTS.

vs

Fritz Bergmann RESPONDENT.

Action for monies due under promissory note made payable in Jaffa in Czecho-Slovakian currency—Monies held payable in Palestine currency at rate of exchange prevailing on day of payment — Secs. 72 (4), 89, Bills of Exchange Ordinance, 1929— Conflict of laws— First indorser of a note deemed to correspond with the drawer of an accepted bill payable to drawer's order — Legislative validity of circular letter issued by Senior Judicial Officer— Costs.

JUDGMENT.

This appeal arises out of an action by the Respondent, Fritz Bergmann, against the Appellant firm, A. H. Abu Laban and Sons, to recover (inter alia) a sum of 17,737.90 Kronen in Czecho-Slovak currency due under a promissory note made by the Appellants, dated 28th February, 1931, and maturing on the 28th July, 1931. The bill is made and expressed to be payable in Jaffa, for value received in goods.

The District Court gave judgment in favour of Respondent for the amount due upon the note and added the direction that "this item is payable in Palestine currency at the rate of exchange on the day of payment."

The debt is not denied, and the only question now raised is as to the rate of exchange.

Since the date of maturity, a considerable alteration has occurred in the exchange as between Czecho-Slovakia and Palestine, due mainly to the fact that Palestine currency is no longer on a gold basis; and the Appellants argue that the rate at which Kronen are to be translated into Palestine Pounds should be the rate prevailing at the date of maturity.

In support of this contention they rely upon Sections 72 (4) and 89 ot the Bills of Exchange Ordinance, 1929.

Section 72 (4) reads as follows:— "Where a bill is drawn out of but payable in Palestine and the sum payable is not expressed in the currency of Palestine, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable."

Section 89 is as follows:— "(1) Subject to the provisions of this Part, and except as by this Section provided, the provisions of this Ordinance relating to bills of exchange shall apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order."

The Appellants' argument is that, reading these two sections together, the rule laid down by the Bills of Exchange Ordinance with regard to promissory notes is that where the first indorsement of the note is out of Palestine, but the bill is payable in Palestine, the translation into Palestine currency shall be made at the rate of exchange prevailing on the day the note is payable.

It is to be observed, however, that this argument depends upon the assumption that not only is the first indorser of a note to be deemed to correspond with the drawer of an accepted bill payable to drawer's order, but also the first indorsement of a note is to be deemed to correspond with the drawing of such a bill.

It is obvious that such is not the case. The drawing of a bill of exchange payable to drawer's order is a step which, when completed by acceptance, puts the drawer himself in a position to recover the amount secured by the bill; while, on the other hand, the first indorsement of a note is a step which, when completed by delivery, renders the amount thereby secured payable to some person other than the indorser.

The Appellants have also cited in support of their appeal a decision of the Judicial Committee of the Privy Council in David Moyal and Another v. Ahmed Mohamed Halawe (Privy Council Appeal No. 121 of 1926). We are unable to see how that judgment assists the Appellants.

The judgment in question was based upon a circular letter issued by the Senior Judicial Officer to the Courts in Palestine on the 17th day of February, 1919, directing, inter alia, that in the case of debts "contracted after the issue of Turkish paper currency, debts should be liquidated at the Egyptian equivalent of the Turkish paper currency on the date when the debt was contracted. This rule was stated by the letter to be subject to certain exceptions of which the only relevant one was in the following terms:—

> "If the contract stipulates for a payment to be made in gold or in any currency other than Ottoman, and the creditor proves that the consideration for such payment was not Ottoman currency notes, the terms of the contract should be carried out as regards gold, and, as regards other currencies the sum should be paid in Egyptian currency at the rate of exchange current on the day of payment."

The question whether or not this circular letter has the force of law was not determined by the Judicial Committee who state in their judgment that its "validity was not disputed."

Assuming the letter to have legislative force and to be applicable to a debt of the kind under consideration, the present case would come under the exception quoted, which directs that in the case of a contract which stipulates for payment to be made in a currency other than Ottoman, "the sum should be paid in

Egyptian currency at the rate of exchange current on the date of payment."

And this would be fatal to the Appellants' contention.

It appears more than doubtful whether, if the legislative validity of this letter were contested, it could be upheld.

By Section 28 of Proclamation No. 42, issued by the Chief Administrator, O. E. T. A., on the 24th June, 1918, the superintendence and control of Civil Courts was vested in the Senior Judicial Officer "who with the sanction of the Chief Administrator, may from time to time make rules as to any of the following matters."

Assuming that the question of translation of Ottoman currency into the Egyptian currency which was at that time legal tender in Palestine, came within the matters enumerated in this Section as being within the rule-making power of the Senior Judicial Officer, the Section requires that rules made by him should be issued with the sanction of the Chief Administrator.

No copy of the letter in question is before this Court, but from the references to it in the judgment of the Privy Council already cited it does not appear that the circular was issued with the Chief Administrator's sanction.

But even if it be assumed, as was assumed in the case of Moyal v. Halawe, that the letter in question has legislative force, we hold that it does not cover the present case.

That letter related solely to debts contracted before the British Occupation, when Turkish currency was the legal currency of this Territory, and laid down rules for translation of such debts into Egyptian currency, which was the legal currency here at the time the letter was written. It cannot, therefore, be held to govern the question of the translation into the currency now in use in Palestine of a debt expressed in foreign currency contracted since the present currency came into use.

Apart, however, from the consideration of the effect of the circular letter, it appears to us that the principle upon which our judgment should be based is that the Respondent ought to be placed, as nearly as circumstances permit, in the position in which he would have been if the Appellants had paid their debt at the date when it was due.

The agreement between the parties was that the Respondent should receive 17,737.90 Kronen and further that he should receive that sum on the 28th July, 1931.

The fact that the Appellants failed to fulfil their obligation as to the date upon which payment was to be made, is no reason why they should be excused from fulfilling their obligation as to the amount payable. What the Respondent is entitled to receive is the agreed sum in Kronen or the amount of Palestine currency which would be required to purchase Kronen to the agreed amount.

Clearly, the Respondent is not put in the position he would have occupied had the debt been paid at maturity if he is adjudged entitled to receive now only so much Palestine currency as would have been sufficient to purchase the agreed amount of Kronen at the date of maturity. The result of such a judgment would be that, instead of receiving upwards of seventeen thousand Kronen, the Respondent would receive Palestine currency sufficient to purchase only about two thirds of that amount.

The appeal upon this ground, therefore, fails.

The Respondent's action also included a claim for 8,280 Kronen arising out of a settlement made between the Respondent's agents and the Appellants.

On this claim the District Court has given judgment for the Respondent for £P. 50., the value of a cheque given by the Respondent which was not met. The Court further ordered that the Appellants should pay half of the costs of the action.

The Respondent has entered a cross-appeal claiming interest on the sum of £P. 50. from the 30th May, 1931, the date when the cheque was drawn, until payment. He also claims that he is entitled to the whole of his costs.

With regard to the first of these claims, we hold that interest on the sum of £P. 50. is payable, but only from the date of commencement of action.

Having regard to the extent to which the Respondent has been successful in this action, we see no ground for depriving him of any part of his costs.

The judgment of the District Court will be varied accordingly.

The costs of this appeal including £P. 5. advocate's fees and expenses are to be paid by the Appellants.

In the High Court of Justice.

H. C. No. 78/32.

BEFORE:

The Chief Justice and Khaldi, J.

IN THE CASE OF:

David Moyal — PETITIONER.

vs

The Chief Execution Officer, Jaffa
Ahmed Halawe — RESPONDENTS.

Conversion of foreign currency — Documentary evidence as to rate of exchange in Turkey— Fluctuation at time of the Great War — Necessity of service of judgment—Article 19 Law of Execution.

Application for an Order to issue to the Chief Execution Officer in the District Court of Jaffa, directing him to show cause why his Order for execution based on documentary evidence of foreign Banks should not be set aside.

JUDGMENT.

We hold that the Chief Execution Officer had before him documentary evidence as to the rate of exchange in Turkey. The Petitioner has brought evidence as to fluctuation of the rate from place to place in Palestine, which at the times in question was invaded by the Allies; but has brought no rebutting evidence as to the rate in Constantinople or as to variation as between the rate in Konia and the capital.

We also see no reason to differ from the view taken by the Chief Execution Officer as to liability of the judgment debtor for the whole amount.

There is a conflict between the Petitioner and Respondent as to whether service of the judgment has been effected. If this has not been done it must be done as provided by Article 19 of the Law of Execution.

The rule is discharged with costs to include £P. 2. advocate's fees.

Delivered the 23rd day of January, 1933.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 85/32.

BEFORE:

Baker, J. Frumkin, J. and Khayat J.

IN THE CASE OF:

Abu Laban and Sons — APPELLANTS.

vs

Lieder and Fisher — RESPONDENTS.

Action on promissory note made payable in Swiss Francs—Monies held payable in Palestine currency at rate of exchange prevailing on day of actual payment.

JUDGMENT.

This appeal arises out of an action brought by Respondents against the Appellant firm to recover (inter alia) a sum of 2,490.10 Swiss Francs due under a promissory note made by Appellants dated May 14, 1931. The bill is made and expressed to be payable in Jaffa for value received. The debt is not denied and the only question before the Court below and this Court of Appeal is whether the Appellants should be adjudged to pay the bill at the rate of exchange prevailing upon the maturity of the bill, i. e., July 30, 1931, the rate of exchange prevailing at the date of action, or the rate of exchange prevailing at the actual date of payment.

The District Court of Jaffa, in its judgment on the 9th day of May, 1932, gave judgment for Plaintiffs for the sum of £P. 137. basing its judgment on the rate of exchange prevailing at the time the action was entered and from this judgment Defendants have now appealed arguing that the rate at which Swiss francs should be translated into Palestine Pounds should be the rate prevailing at the time the bill matured, viz., the 30th July, 1931.

The Jaffa District Court in a Civil Case between Fritz Bergmann and present Appellants when the same issue was raised, awarded judgment to Plaintiff for a sum therein mentioned to be paid in Palestine currency, at the rate of exchange prevailing on the day of payment, and the judgment, on appeal, was upheld, see (Ahmad Hassan Abu Laban and Sons, Civil Appeal No. 39/32)*.

There is nothing in the present appeal at variance with the facts upon which the before mentioned appellate judgment was based,

* See ante p. 658.

or to distinguish it therefrom. Accordingly the appeal must be allowed and the judgment of the Lower Court quashed and judgment be entered in favour of Respondents for the sum of 2490.10 Swiss Francs payable at the rate of exchange prevailing at the actual date of payment.

No costs.

In the District Court of Jerusalem.

C. D. C. Jm. No. 134/33.

BEFORE:

The President and Valero, J.

IN THE CASE OF:

Selim Ayoub — PLAINTIFF.

vs

Europidi Mavromatis — DEFENDANT.

Amounts under agreement made payable in gold francs—Agreement to obtain public concessions—Remuneration for services rendered—Subsequent failure of the consideration—Evidence heard to establish meaning of "francs" as used and understood by the parties—Examination of accounts by experts—Different composition of Court to hear report of experts—Execution of part of final judgment.

JUDGMENT.

In this action the Plaintiff, Selim Bey Ayoub, is claiming from Defendant, Mr. E. Mavromatis, the sum of LP. 5415.240 and interest from May 25, 1924, the date when the action was lodged, together with costs and advocate's fees.

The said amount of LP. 5415.240 is made up of four separate claims of:

a. 7500 gold francs.
b. 107,000 gold francs.
c. 1707 gold francs.
d. 20,665.80 gold francs,

making a total of 136,872.80 gold francs. At the rate of 20 gold francs—77.15 P.T., the 136,872.80 gold francs—LT. 5,279.86 equal LP. 5,415.240.

The rates of conversion have not been disputed. The claims have arisen out of what are widely known as the "Mavromatis Concessions" in Palestine. The history of the concessions is fully set out in the documents filed by both parties to this action, including the Publication of the Permanent Court of International

Justice (Series C: The Memoire of the Greek Government pp. 92–438 "Mavromatis Palestine Concessions").

The claim for 7,500 gold francs is based on a letter from the Defendant to the Plaintiff dated December 31, 1931.

After at first denying the authenticity of the letter, the Defendant's advocate subsequently admitted the letter but contended that the words "Je vous déclare" did not amount to a legal undertaking or promise. We do not uphold the contention. The Defendant was granted the Jerusalem Concession. He never formed a company to carry out the concession, so he has not reserved an administrative part for Plaintiff. We hold that the Plaintiff succeeds in his claim for 7,500 gold francs. We now come to the claim for 107,000 gold francs. Eleven bills dated December 10, 1915, payable three months after the "signature de la paix" and signed by Yousef Bey Selaheddin for the total amount of 97,000 francs have been produced by Plaintiff, who alleges that one bill for 10,000 francs has been lost. It is not denied that Yusef Bey Selaheddin issued the bill alleged to have been lost.

The Defendant admits that he would have met the claim for 107,000 francs — not gold francs — had he been granted the Jaffa Concession: in fact, he would have paid Plaintiff 130,000 francs.

The defences to the claim are:

(1) Defendant promised Plaintiff an amount in francs not gold francs.

We are quite satisfied that throughout the dealings between the parties reference to francs was understood by both parties to mean gold francs.

(2) Youseff Eff. Selaheddin had no authority to sign the bills.

We find as a fact on the evidence, that Yusef Bey was from time to time authorised to sign bills, and further that Defendant ratified the act of Yuseff Bey Selaheddin in signing the bills for 107,00 francs.

(3) The bills signed by Yusef Bey were valueless until the Jaffa Concession were definitely granted to Defendant.

The Court, after quoting from letters written by Defendant to Plaintiff, continues:

The Jaffa concessions were submitted to the Permanent Court of International Justice. It is a fact that the concessions were not confirmed by Imperial Irade, which was required under a provision of a Turkish Law which came into force during the War and before the concessions were signed. It is also a fact that the

British Government did not recognise the Jaffa concessions because they were signed by the Local Authorities in Palestine on January 28, 1916, after the outbreak of war.

The Plaintiff claims however that he did all that he had to do in respect of the concessions and we support him. It was not incumbent on him to obtain the Sultan's Irade, nor to anticipate the provisions of the Treaty of Peace.

Defendant demanded of Plaintiff the concession signed by the Local Authorities in Palestine and agreed to pay 130,000 francs to the Plaintiff for obtaining the signatures of the Local Authorities. It is undoubtedly unfortunate for the Defendant that he is called upon to pay for something which subsequently proved valueless, but such is the fortune of war. We hold that Defendant must pay to Plaintiff 107,000 gold francs.

There remain the claims for 1,707 gold francs and 20,665.80 gold francs. These claims are based on a current account between the parties. The parties have agreed to the examination of the accounts between the parties by experts.

The Plaintiff has nominated Mr. Yanovsky, Chief Accountant, Anglo-Palestine Bank. The Defendant has nominated Fouad Eff. Saba.

The Court nominates Mr. Young of Russel and Co. as neutral expert and orders that Plaintiff should deposit £P. 20 into Court in respect of Mr. Young's fees, which will be assessed by the Court on receipt of the Experts' report, provided that the Plaintiff may, if he so desire, furnish a suitable guarantee for £P. 20. instead of depositing cash. Further, we order the experts to submit their report not later than July 15, 1933. In view of the fact that the parties have agreed to the submission of the examination of the accounts between them to experts we see no reason why a Court differently composed should not deal with the claim after the report of the experts has been lodged in Court.

With regard to the claim for 7,500 gold francs and 107,000 gold francs—LT. 4416.84, (converted into Palestine currency), we give judgment for the Plaintiff with interest at 9 per cent from May 24, 1924, to date of settlement, together with costs and advocate's fees assessed at £P. 50.

If Plaintiff desires to execute this part of our judgment before judgment is given on the claims for 1,707 gold francs and 20,665.80 gold francs, the Defendant may deposit the amount of the judgment in Court pending the issue of a judgment in respect of the claims for 1,707 gold francs and 20,665.80 gold francs or file a bank guarantee to cover the amount of the judgment, as (should the experts

find that the Plaintiff is in the Defendant's debt) the amount due by Plaintiff to Defendant shall be set off against the amount awarded to Plaintiff on the claim for 7,500 gold francs and 107,000 gold francs with interest, costs and advocate's fees.

Delivered the 3rd day of January, 1933.

CUSTOM.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 7/28.

BEFORE:

Corrie, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

'Ashur Hassan Bayummi Abu Ras,
Mohye Din Hassan Bayummi Abu Ras,
Sha'ban Hassan Bayummi Abu Ras — APPELLANTS.

vs

'Ashur Mahmud Abu Ras
Suleiman Salim Musleh Abu Ras — RESPONDENTS.

Custom that lands held in common by the members of a family are registered in name of eldest brother — Land purchased by two members of one family and registered in one — Evidence of joint user insufficient to establish joint ownership.

JUDGMENT.

The judgment of the Land Court was based on evidence of joint user supported by the custom that the lands held in common by members of a family are registered in the name of the eldest brother.

In the course of argument before this Court, however, it appeared that the Respondents' claim was not that the land so registered had been inherited from the common ancestor of Appellants and Respondents, but that the Respondents' ancestor, Misleh, and his brother the Appellants' ancestor, Saleh, had purchased the land in equal shares.

We know of no custom that where land is purchased by two or more members of a family, it is registered in the name of one of them only. But whether such custom exists or not in this country, the fact that it is not observed in the family of the parties to this case was proved conclusively by the production of a

Land Registry Certificate showing that two houses, one inherited from their father and the other purchased, were registered in the joint names of Saleh and Misleh three years after the registration, in the name of Saleh, of the land in dispute.

All, therefore, that is left of the Respondents' case is some evidence of joint possession which is not undisputed; and which without any evidence of title is insufficient to establish their claim.

The appeal and the application of the Third Party are allowed, the judgment of the Land Court is set aside and the Respondents' action is dismissed with costs here and below. Advocates' fees in Court of Appeal fixed at £P. 4.

Delivered the 27th day of June, 1928.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 43/28.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Abd El-Latiff Hussein
Abd El-Karim Saleh — APPELLANTS.

vs

El-Haj Abd Er-Rahman Mour'i
El-Haj Hassan Allan — RESPONDENTS.

Claim by inhabitants of village of the right to use water of spring in other village — Shari'a Law principle of Mubah — Ancient right from time immemorial—Articles 1267, 1268, Mejelle.

Appeal from the judgment of the Land Court of Jerusalem dated the 26th day of March, 1928.

JUDGMENT.

In this case, the Respondents, on behalf of the inhabitants of the village of Silwad, claimed the right to use the water of a spring situated within a well in the Appellants' village 'Ein Yabrud for personal purposes and for watering their animals. They admitted that they have no claim to the ownership of the well, but rely on the principle of the Shari'a Law embodied in the Mejelle — that water is free to be used by all (Mubah). They also rely on ancient right from time immemorial. They in fact succeeded in getting a jugment in their favour—the Court below relying on Articles 1267

and 1268 of the Mejelleh without dealing with their claim as to ancient right.

According to the interpretation given by the Land Court to these Articles it would appear that, provided there is no water near by, and provided no damage is done to the well, all the inhabitants of a village, however many there may be, have an established right to come daily in their hundreds into the private property of an individual or village to take their supply of water for drinking, washing and laundry purposes (all this being included in "Shuf'a") and may also bring their sheep, camels and other animals which may amount to thousands in number, merely because the owner of the property gets the water from a natural spring. The only remedy for such owner, if he wants to avoid these frequent visits, would be to employ a staff of labourers to take the water out of his boundaries, or nowadays to go to the expense of putting up a water installation with pumps and pipes to take the water into the village claiming the right to enjoy it.

This can certainly not have been the intention of the legislature, having regard to the primitive conditions of the epoch in which these rules were laid down.

It is true that, according to the Mejelle, water, like fire and grass, is Mubah, the principle being that a person who appropriates Mubah things is not liable to pay compensation. In a series of Articles the Mejelle provides measures to keep up a balance between the rights of ownership of the person or persons within whose boundaries such a Mubah happens to be, and it is only in cases of emergency that the common right of Mubah snpersedes the private right of property.

If we turn to Article 1268, with which we are now mainly concerned, we find that it begins by declaring that notwithstanding the water coming from a spring, the owner can prevent anyone who wishes to drink water from entering into his property. In cases of emergency, e.g., where there is no water nearby, if a person comes and asks for some water for himself or his animals, an alternative is given to the owner either to take the water to that person or to allow him to enter into his private property and take water himself. If the owner does not choose the first alternative, the person who wants water may enter and take the water only if he does not cause damage. "Spoiling the edge of the tank, or well or river" at the end of the Section is only an example of damage likely to be caused, and not the only sort of damage which the Mejelle provides must be avoided.

There is no difficulty in reading this Article as intented to meet only isolated cases which may happen from time to time, such as travellers or caravans happening to pass by the property in which a well is situated. Even so, the owner is not under an obligation to take the water out, but he may allow the person to come in, provided he causes no damage.

This Article in our opinion does not apply to a case like the one before us, where a whole community claims the right of constant and permanent use. If spoiling the edge of a well is considered damage, to avoid which people may be prevented from using the water, how much more must be the constant frequenting by dozens of persons and hundreds of animals of the private property surrounding the well, which the owner may at any time wish to turn into cultivated fields or gardens.

On this ground the appeal must be allowed and the inhabitants of Silwad prevented from using the water of the well of 'Ein Yabroud; but we must point out that the Court below has omitted to deal with the other claim of the inhabitants of Silwad, namely that they have an ancient right from time immemorial to the use of the water of the said well. The case is, therefore, remitted to the Land Court to hear evidence as to that claim and to give judgment accordingly.

Delivered the 13th day of December, 1928.

In the District Court of Jerusalem sitting as a Court of Appeal.

C. A. D. C. Jm. No. 27/30.

BEFORE:

De Freitas, J., Valero, J. and Baraday, J.

IN THE CASE OF:

Daoud El-Arnaouti — APPELLANT.

vs

Haim Reinitz — RESPONDENT.

Agreement customarily reduced to writing — Article 80, Civil Procedure Code — Proof of alleged custom — Proof of claim.

Appeal from the judgment of the Magistrate of Jerusalem, dated the 18th day of December, 1929.

JUDGMENT.

The defence before the Magistrate was that it is customary for an agreement as sued upon by Plaintiff to be proved as a Sanad.

We are of opinion that the Magistrate should have allowed the defence to prove the alleged custom, and if the defence failed to prove the alleged custom, then the Magistrate should have called upon the Plaintiff to prove by parol evidence the delivery of the bricks.

The Magistrate's judgment is therefore set aside and the proceedings returned to him to comply with the above.

Costs to be costs in the cause.

Delivered the 25th day of February, 1930.

In the Land Court of Jaffa sitting as a Court of Appeal.

L. S. Ja. No. 18/32.

BEFORE :

Copland, J. and Shehadeh, J.

IN THE CASE OF :

Government of Palestine — APPELLANT.

vs

Villagers of Sajad and Qazaza Represented by the Village Settlement Committee of Sajad and Qazaza Villages — RESPONDENTS.

Ancient and invariable custom as having the force of law—Hereditary and assignable rights of occupancy and tenancy — Nature of rights enjoyed by tenants of Jiftlik lands— Equitable rights in miri land—Grazing rights—Article 23, Ottoman Land Code—Protection of Cultivators Ordinances, 1929-31—Article 10 (3), Land Settlement Ordinance, 1928—Creation of rights by customary tenure—Creation of Waqf by user.

Appeal from the judgment of the Settlement Officer, Ramleh Settlement Area, dated the 27th day of January, 1932.

JUDGMENT.

This case raises interesting and important points of law concerning the nature of the rights enjoyed by tenants of the Jiftlik lands in Sajad and Qazaza villages.

The facts are not in dispute and are set out in detail by the Settlement Officer in his reasons for his decisions. For the purpose of this appeal they may be summarized as follows:—

The ownership of these Jiftlik lands which had previously been registered in the name of the Sultan Abdul Hamid, as Miri, were later, on 1st September, 1324, transferred by the Ottoman Government to itself together with their revenue and income.

From the establishment of the Jiftlik a Mamur of the Jiftlik kept a record of tenants, who inherited rights of occupancy and tenancy, who sub-let the lands, who mortgaged their rights and who bought and sold their rights. This was done sometimes with the written consent of the Mamur and sometimes without it.

The tenant paid a double tithe, one to the State as overlord and one to the State as landlord. If he sub-let he received himself the difference between this double tithe and the share agreed upon with the sub-tenant.

If cultivable lands in the village were not cultivated, new tenants would sometimes be brought in and they would either add thereby to the total number of Maha' units under cultivation or, in rare instances, they would cultivate a new and defined tract. In most cases, the new tenants thereafter continued on the basis of customary, hereditary and assignable tenancy, like their older co-tenants. The tenants have continuously exercised hereditary and assignable rights of occupancy and tenancy as against, in the case of cultivated lands, the payment of rental tithe, and in the case of sites of and for buildings, as against the payment of Werko on the building. Grazing lands have been used during the same period by the villagers free of any charge for grazing.

Since the Occupation the tenants have continued to enjoy these rights, without any objection by and with the apparent acquiescence of the Palestine Government. No instance is known of any eviction carried out by the Palestine Government against a tenant of Jiftlik lands, nor is there any known case of the application of the Protection of Cultivators Ordinance to a tenant of such lands, who does not hold a lease.

On these facts the Settlement Officer ordered the registration of the lands as Miri in the name of the High Commissioner in trust for and on behalf of the Palestine Government subject in the case of cultivated lands to the following observation:

> "The land of this parcel is subject to hereditary and assignable rights of occupancy and tenancy in favour of the undermentioned person(s) against payment of rental tithe to

the Government of Palestine or such equivalent or substitute as may from time to time be required by law or agreed upon".

In the case of grazing lands he added the following remarks :—

"Used by tenants of Government and residents of Sajad as grazing ground since the establishment of the Jiftlik about 1300 A. H. free of any charge for grazing.

The same entry was made on the decision forms for the sites of buildings as in the case of cultivated lands except that the words "against payment of rental tithe to the Government of Palestine or such equivalent or substitute as may from time to time be required by law or agreed upon" were omitted, because there was no evidence that any rent had been paid but only that the sites were occupied on the basis of payment of Werko on the buildings.

Against this decision the Government has applied asking that the observations as regards the hereditary and assignable occupancy and tenancy rights should be deleted from the Schedule of Rights on the ground that there is nothing in the Legislation of this country which would justify the existence of such rights, that the decision creates a form of tenure which is unknown here and which is contrary to Article 23 of the Land Code and that the rights, if any, of the cultivators are governed by the provisions of the Protection of Cultivators Ordinance, 1929-31.

The issues involved, therefore, appear to me to be:—

(1) Are the tenants of Jiftlik lands in possession of occupancy and tenancy rights which are hereditary and assignable and recognisable by the Courts of this country?

(2) If such rights exist, are they such as require or are capable of registration under the Land Settlement Ordinance?

Section 10 (3) of the Land Settlement Ordinance, 1928, states that the 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 in land. If it were not for this provision I should have no hesitation in holding hat such hereditary and assignable occupancy and tenancy rights did not exist and that they were a form of tenure unknown to the Law, as being contrary to Article 23 of the Land Code. They are certainly not a legal right which can only be brought into

being by being founded on legislation or created by some written instrument. Can they be said to come within the description of equitable rights?

As this Court has had occasion to remark on another appeal which has recently come before its, the doctrines of equity are foreign to the original jurisprudence of this country, but the Land Settlement Ordinances and the Land Courts Ordinance lay down definitely that the Land Settlement Courts and the Land Courts shall apply them and they cannot therefore be disregarded. It is perfectly true as the Settlement Officer states, that an equitable right cannot be established in contradiction to the clearly expressed provisions of substantive law, or, in other words, that Equity cannot create a right that the Law prohibits.

Equitable rights arise in many ways and are of varying descriptions. The only phase of them which it is necessary to consider in the case before us is whether such a right should be recognised as regards these lands on the ground of customary user—that is to say, whether the undisputed user for a period of something over fifty years is such that the Courts should, in the exercise of their equitable jurisdiction, recognise this customary tenure and give effect to it. I think that there is no doubt that, except in the case of those tenants who are leaseholders—and I gather that the number of such leaseholders is small, the lands have been held by the tenants on the customary basis of hereditary and assignable occupancy and tenancy rights, without hindrance or objection, since the establishment of the Jiftlik and on no other basis. But a custom, in order to obtain the force of law, or a customary right in order to be enforced as an equitable right, must be both ancient and invariable. In this case it is undoubtedly invariable and the point that requires determination is whether it has been exercised over such a sufficiently lengthy period that it may be described as ancient.

Very little help is to be obtained from any Ottoman Law. The Mejelle, as quoted by Mr. Justice Tute in his work on the Land Law, at page 57, in his note 3 to Article 54, lays down that what is sanctioned by Custom is sanctioned by Law and that continuous and preponderate custom should be given effect to. The learned author is there discussing the question of customary inheritance. I know of no cases which have been decided by the Courts of this country on the point before us now.

The only authorities which I can find are certain cases decided by the Privy Council, which, though not dealing with the specific

point, have some bearing on the subject. In the case of the Wards for the property of Makhdum Hassan Bakh (Defendants) v. Ilshi Bakhsh and others (Plaintiffs) (40 Indian Appeals, p. 18) it was held that the user from time immemorial of land as a graveyard made that land, by user, if not by dedication, Waqf.

The decision was followed in Khawaja Mohammad Hamid (Appellant) v. Niam Mahmoud and others (Respondents) (50 Indian Appeals p. 92) where it was held that a shrine was Waqf by long user as such, though there was no Waqfieh.

And again in Ahmad Khan and others (Appellants) v. Chammi Bibi (Respondent) (50 Indian Appeals p. 379) where the issue was the validity of a local tribal custom it was held that a custom of immemorial standing, whereby a sister or daughter was excluded from the inheritance of ancestral property, to which she would have been otherwise entitled under the Moslem Law of Inheritance, was a valid custom and was upheld. The principle underlying all these cases is that the user or custom must be from time immemorial and that, if that is so, then the user or custom will be recognised and endorsed by the Courts.

I think, therefore, that the correct rule is that a custom with regard to a right or interest in land, in order to be clothed with the force of Law, must have existed for such a period that its origin has been lost sight of so that it may be said to have existed ab antiquo or as the English expression goes for such a period that "the memory of man runneth not to the contrary". And that cannot be said to be the case here. It is impossible to lay down any definite period of time over which such a custom must be proved to have existed for everything depends upon the nature of the custom claimed and the circumstances of each particular case, but I find it difficult to conceive of the necessary period in any case being less than one hundred years and in many instances it would have to be much longer.

I think, therefore, that the learned Settlement Officer has misdirected himself, and that the equitable or customary rights as claimed by the Respondents are not such as can be recognised by the Courts, since they have not been exercised from time immemorial.

The Respondents are tenants, and merely tenants of the Government in these Jiftlik lands, and have not acquired any legal or equitable rights as against the Government.

This, in my opinion, disposes of the appeal, and it is unnecessary, therefore, that I should discuss the second issue, namely,

whether the rights claimed requires or are capable of registration under the Land Settlement Ordinances, since, in the view I take on the first issue, the second one does not arise.

The appeal must be allowed and the observations made by the Settlement Officer in the Schedule of Rights with regard to hereditary and assignable rights of occupancy and tenancy must be deleted. No order as to costs.

Dated the 4th day of December, 1933.

CUSTOMS DUTIES.

In the Court of Appeal.

CR. A. No. 19/21.

BEFORE:

Haycraft, C. J. and Corrie, J.

IN THE CASE OF:

Public Prosecutor, Phoenicia — APPELLANT.

vs

Benjamin Maschieff
Elias Nikolas
Mousa Soury — RESPONDENTS.

Cigarettes smuggled through the Customs House Haifa—Falsification of bill of lading — False declarations used to defraud Customs Authorities — Credibility of witness is matter for Trial Court — Fresh evidence presented on appeal — Admissibility of affidavit evidence—Jurisdiction of District Court in Customs Prosecutions—Bribery of officials—Abuse of office—Articles 12, 15 and 153, Ottoman Penal Code.

Appeal from the judgment of the District Court of Phoenicia delivered the third day of August, 1921, on the ground that the sentences passed on the three accused were inadequate in view of the magnitude of the fraud.

JUDGMENT.

In this case four persons were charged and three convicted of offences in connection with a smuggling operation through the Customs House at Haifa under the following circumstances:

On the night of the 23rd June 70 cases of Egyptian Cigarettes arrived by rail at Haifa from Cairo and were ready to be cleared on the following day. The goods were accompanied by a document

described as a consignment note on which the cigarettes were correctly stated, and as consigned from Matossian, a cigarette manufacturer in Cairo, to "himself". The actual consignee was the principal accused Maschieff, Matossian's agent at Haifa, and to whom the duplicate had been already forwarded. The guard of the train handed over the document to the Inward Booking Clerk, Mousa Soury (the third convict) whose business it was to make out a way bill in triplicate containing among other particulars the name of the consignee and the description of the goods. One of them was to be returned for the Railway and the other two handed to the Customs Authorities.

Mousa made out all these with the consignee's name as "himself" repeated in carbon. On the third copy of the bill the goods appeared as "Egyptian Cigarettes" while on the first two the description appeared as "Sugar". The three were countersigned by Elias Nikolas (the second convict) who took over the first two for the Customs. The signature of Mousa and Nikolas on the first bill were repeated by carbon on the two copies as also all the particulars except the words "Egyptian Cigarettes" which appeared on the third copy only. The third copy was retained for the Railway and the two containing the word "Sugar" were passed to Nikolas who was an Examiner in the Customs. Yudi Forti whose duty was to register the way bills of the Customs says in his evidence that when he asked Nikolas the meaning of "himself" the latter replied: "It means the Provisioning Department of the Railway".

It is not necessary to follow all the operations in the Customs. It is sufficient to state here that the description "70 bags of sugar" was repeated in the Importation Declaration and in the Examination Note and other documents.

There is no dispute that the cigarettes were imported by Maschieff, but when the Importation Declaration was handed in there was according to the evidence of Avil Medani, manifest clerk who had received the way bill from Nikolas, a man unknown to anyone present who was supposed to be the importer, and who was instructed by Maschieff as to filling up the Declaration and whose signature "Jack Loubri" appears in Arabic over the stamp. Another Clerk Yusef Rohana swore that he also was present and saw Maschieff put the paper in a try out, but there was no one with him.

The next step was to get the goods examined by an examiner. Michael Makhlouf, the Estimator and a witness in the case stated

that he gave the order for the examination. This was taken to Nikolas, who according to the evidence of Bishara Sayhoun, the gate-keeper, at first objected that he could not examine them because he had to attend the Court, but finally without examination gave an examination note to the effect that the goods were 70 bags of sugar weighing 101 Kls each, but that he did examine a sample of sugar which was brought to him by a man Aziz, employed by Maschieff, and passed the note to an unknown man.

The examination note was taken to the Estimator,—according to that witness' statement, by an unknown man who also produced a sample of sugar. The estimation was made and the papers were then taken to the Accountant Yusef Hattoum, as the latter says, by an unknown man accompanied by Maschieff. Since it was after 4 o'clock the accountant objected to doing customs business at that hour, but on a promise by Maschieff that he would be paid for overtime, he made the necessary calculation which came to LE. 32.900 duty. The duty payable on the cigarettes would have been LE. 1,409.

The Cashier has his table in the same office, but his counter is at another opening in the screen. He swore that Maschieff presented the papers to him and that an unknown man paid him the money. The operations concluded, a delivery order and receipt were given and from that moment the unknown man disappeared from the scene.

On production of the gate pass given by Nikolas the truck was run out to what is known as the Palestine Siding where 70 cases of cigarettes were unloaded and taken to the store of Maschieff.

It was important for the success of the transaction that the cigarettes should not be unloaded in the Customs enclosure. They had already escaped the general notice because Nikolas had given the Examination Note without disturbing the contents of the truck. It was customary for sugar to be unloaded outside the Customs, but it was not necessary for a truck containing official goods to be taken to the Palestine Siding for unloading.

Later in the day the Asst. Supt. of Customs, Jamil Attallah noticed the empty truck at the Palestine Siding and on receiving information from the chief porter he made enquiries and discovered what had taken place. On the following day he called Maschieff to his office and spoke to him about the matter, and according to his evidence the latter had said "don't inform Jerusalem about this case". This is denied by Maschieff. The cigarettes were taken possession of by the Asst. Supt. and replaced in the Customs.

These are the main facts of the case. It is not necessary to go into minute detail, because this Court does not retry cases on the papers. What we have to determine, apart from points of Law, is whether there was evidence on which the District Court could, if it believed the evidence, find the facts necessary to establish the judgment.

The judgment was as follows:

The Accused Maschieff was represented by Mr. Golding and Tewfik Eff. Ades. That there was a smuggling transaction by which cigarettes were imported into Palestine as 70 bags of sugar was not questioned. It is also clear that this was done by means of the following documents: The way bill which contained a false declaration that the consignment consisted of 70 bags of sugar, the Importation Declaration to the same effect, the Examination Note to the same effect.

These three false documents were necessary elements in the transaction and the first question to arise is this:

Was there evidence before the Court on which Maschieff could be convicted of knowingly deceiving the Customs?

Now Maschieff was the importer and there was evidence that he was present when the false Importation Declaration was presented to Medani, the manifest clerk, signed "Jack Loubri" and that he must have seen that the cigarettes that he was importing were described therein as sugar, because he helped the unknown man to fill in the form, if the evidence of Adil Mudani is to be believed. It is said for the defence that the unknown Jack Loubri is non-existent, that he is an invention of the Custom Officials. He certainly was not an importer. There is evidence that Maschieff was present when the false declaration and the false examination note were presented to the accountant, that he urged the latter to complete the transaction, and that he was present when the LE. 32.900 were paid to the Cashier. It was for the District Court to decide whether this evidence was to be believed, and on this evidence they were justified in finding that Maschieff was guilty of producing or making use of the false declarations for the purpose of deceiving the Customs authorities and defrauding the Government.

The defence was this:— Nikolas had presented himself to Maschieff on the same morning pretending that he had quitted the service of the Customs and that he wished to become a clearer of goods, and that Maschieff without making any enquiry consented to give him the job of clearing the 70 cases of cigarettes, that he paid Nikolas LE. 1,326.30 for customs duty and had nothing more

to do with the transaction, that the smuggling was carried through by a conspiracy of Customs House officials without his knowledge and for their own benefit. He produced a cash book on which a payment of LE. 1,326.30 appeared under the date 24th June. This book has been before us, and as all the entries on the same page look as though they may have been written at the same time and as a sheet has been apparently removed from the book we do not find it a convincing document, and think that the District Court was justified in disregarding it. However, the District Court was to judge the value of the evidence and was not bound to credit the honesty of an entry.

We have been asked to hear the following fresh evidence of one Aziz who was charged in the same case with being an accessory to the same fraud and acquitted, but who could not be allowed as a witness. It is said that he is prepared to swear to the payment of LE. 1,326.30 by Maschieff to Nikolas. This man was in the employment of Maschieff and we do not believe that his evidence, if given, would have affected the verdict. Moreover, when Maschieff made his statement before the District Court he admitted having taken no receipt from Nikolas for the money, but said nothing about a witness having been present at the time of payment. We were also asked to hear evidence from the Anglo-Palestine Company to the effect that Maschieff had paid LE. 500 to that Company on the same day. That was to show that Maschieff had plenty of cash on hand and could have paid so large an amount as LE. 1,326 to Nikolas. We do not think this sufficiently important. Mr. Golding also asked us to hear evidence to show that it is the practice for the accountant of the Customs when he received declarations and other papers to hand them after examination direct to the cashier inside the office and not to hand them back to the importer to take to the cashier, also that the accountant does not do overtime work unless a petition is made and countersigned by the Superintendant. We do not wish to hear the evidence. We had the evidence of the accountant and Cashier who had described what actually took place, and we consider more evidence of routine would be of little value.

Mr. Golding applied for leave to read an affidavit from the manager of the firm of Matossian at Cairo and a statement from Cairo Customs officials to the effect that a Certificate from the Palestine Customs is required before the Cairo Customs authorities will refund the drawback of PT. 40 per kilo on consignments exported by rail to Palestine. In the first place, this sort of evidence

is not strictly admissible. In the second place, if Maschieff had been an innocent person and the fraud had been concocted and carried out by officials of the Customs without his knowledge, then, if a certificate was necessary in order that he might obtain the drawback, it would be a necessary part of the operation that such a certificate should be provided by some means, otherwise Maschieff would apply to the Chief Customs authority and insist on getting it and the fraud would be exposed. Nikolas, who according to the story of the defence was in charge of the affair, would have to get the certificate, before Maschieff became uneasy and began to make enquiries. If that could be done in the case of Maschieff's innocence, it could be equally done if he were a party to the fraud, unless as it has been suggested for the defence, other higher officials of the Customs were carrying out this fraud in which Nikolas and Soury were subordinate instruments, a state of things which if it existed would mean that the Customs House at Haifa was permeated with corruption, a proposition which the District Court obviously did not entertain, amounts to this, that it is not worth while for a merchant to smuggle cigarettes, because he will loose his drawback of PT.40 per kilo and be reduced to a profit of PT. 7 per kilo less what he may have to pay in duty and tips. This evidence if produced without the opportunity of cross-examination would be most unsatisfactory and would be of little value in the face of evidence of what actually occurred.

We now come to the legal argument put forward by Mr. Golding. He argued that the District Court had no jurisdiction to inflict the penalty of double duty, nor to confiscate the goods, because the Customs Regulations which deal with contraband, provide a special tribunal for this procedure, and that smuggling generally is not made an offence under the Ottoman Penal Code. We are of opinion that he is right in this connection, and that the penalty provided by the Customs Regulations is not intended to be imposed by the District Court, but by the Customs Authorities subject to an appeal to the District Court.

His further argument is that there is no evidence of bribery. In such a case as the one under discussion it is almost inconceivable that a fraud of this kind could be carried out through the aid of Customs officials without bribery. But an offence must be proved by evidence and we find none at this head. A witness stated that Mousa had told him that he had received a tip of LP. 5. But this is not the sort of evidence on which Maschieff could be convicted. There was also evidence of Nikolas having received from

Maschieff 3 boxes of cigarettes. Such a trifling gift might be somewhat over and above a bribe, but would not be the bribe that would satisfy an official who was engaging in a criminal conspiracy of this magnitude. The conviction for bribery, or rather for having made a corrupt bargain consequently falls not because it is improbable but because it is not proved. There remains the conviction for having produced or issued or having caused to be produced or issued a false declaration and for this there was ample evidence, if the witnesses were believed, and that was a matter for the District Court. For that offence the maximum penalty would be one year's imprisonment. We see no reason why a lesser punishment than this maximum should be imposed, and we reduce the sentence on Maschieff to one of a year's imprisonment; this will be without prejudice to any right the Customs House my have to deal with the charge of contraband under their regulations.

The only conviction that can be upheld against Mousa Soury is one of issuing a false declaration when the way bill was made out for the use in the Customs House as for 70 bags of sugar. This was obviously a part of the fraud and was done by some one concerned in the smuggling transaction. There was evidence on which the District Court was justified in finding that the guilty person was Mousa Soury. His defence was conducted by Mr. Auster, whose argument was based on a statement that the words "Egyptian Cigarettes" originally appeared on the three copies and were erased from two copies and the word sugar substituted by some one other than Mousa Soury. That was a question for the District Court to judge from the evidence and the documents. It may be added that the Court has heard the evidence of the Chief Porter who swore that it was Mousa who had prevented the truck from being unloaded in the Customs enclosures, by stating that the goods were for the Provisioning Department of the Railways. We find no reason for reducing the sentence of 7 months' imprisonment imposed. The case of Nikolas is more difficult. He put his signature on these false documents, the way bill, the importation declaration and the examination note. The last he signed without examining the goods. His excuse was that he had an engagement and had no time to examine and he was satisfied to trust a merchant in the position of Maschieff. Juda Forti, Assistant Examiner, when registering the way bill, brought by Nikolas, and noticing the unusual word "himself" as the name of the consignee, asked him (according to his evidence) what "himself" meant. Now "himself" meant Matossian, a well known tobacco merchant, and had that name appeared as the

importer of sugar, suspicion would have been aroused. Nikolas replied "it means the Provisioning Department of the Railways". This statement was not true, but it was apparently sufficient answer to satisfy Forti. Mousa Soury made the same statement to the Chief Porter. Either this was an explanation agreed upon between Mousa and Nikolas, or it was invented by the one and repeated by the other. There is evidence that he visited Maschieff on the morning before the smuggling took place, at which time he received the three boxes of cigarettes. Maschieff says that it was at this interview that Nikolas applied to clear the 70 cases of cigarettes, but that was a statement made by an accused person and not evidence given on oath. Nevertheless, the fact of that early interview remains. All these facts were before the Court and they believed that Nikolas was implicated in the fraud. We cannot say that there was not evidence on which the Court could so find, and we cannot interfere with the finding that Nikolas was a party to the false declarations and liable to punishment under the first Addendum to Article 15 of the Penal Code and even liable under the more severe Article 153 in regard to which he was actually convicted. He was also guilty under Article 12 of the Ottoman Penal Code for abuse of office for having signed the examination note without having examined or weighed the goods. We do not feel justified in reducing the light sentence of one year's imprisonment imposed. Notwithstanding that, the conviction for having been a party to an agreement for bribery must fail together with the similar conviction of Maschieff.

The period which the convicts have already been in custody will be taken into account.

In the District Court of Haifa.

M. A. D. C. Ha. No. 158/23.

BEFORE:

Litt, J.

IN THE CASE OF:

The Attorney-General

vs

Kamal Eff. Sallah ACCUSED.

Customs prosecution— Import of arms into Palestine — Custody or possession of arms registered as luggage with the Railway Authorities.

JUDGMENT.

In this case for some reason the clearance declaration presented to the Customs when the accused sought to get the rifle and pistols out of the Customs has not been produced to the Court and is in fact in Jerusalem. This must be a very important document but the Court could not get it. They only evidence before the Court is that when asked what the luggage contained the accused said "Household furniture and personal effects" and it is a fact that the moment he was asked if he had any arms he at once pointed out in what packages they were contained. It has been proved to the Court that these arms were accused's personal effects as a Syrian Gendarmary Officer. It may be that the clearance declaration deliberately omitted all mention of these arms but the prosecution has kept the Court completly ignorant on this point. The Court is satisfied that at the time when these arms were being dealt with in the Customs they were not in the custody or possession of the accused and had never been whilst in Palestine, as they were registered luggage in the custody of the Railway and Customs authorities.

It would therefore appear that para. 4 Section 13 of the Regulations re import of arms does not apply in this case and that the arms in question had quite properly come to Haifa.

In no case would the Court, even had it decided that the accused was guilty in law, have passed more than a nominal penalty after hearing the defence and in the absence of the clearance declaration the Court thinks itself justified in giving the accused the benefit of the doubt and declaring him not guilty.

The pistols, rifle and ammunition will be retained by the authorities until the accused obtains license therefore.

Delivered the 8th day of December, 1923.

In the Supreme Court sitting as a Court of Appeal,

M. A. No. 31/28.

BEFORE:
The Chief Justice, the Acting Senior British Judge and Khaldi, J.
IN THE CASE OF:

Nakleh Talamas — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Abetting and procuring importation of hashish — Dangerous Drugs Ordinance, 1925— Smuggling — Request by Prosecution for fresh evidence—Territorial Waters Jurisdiction Act—Territorial jurisdiction of Courts—Act committed within three miles maritime belt—Sections 4, 36, Trial Upon Information Ordinance, 1924—Secs. 6 (2), 8 (1), 13, Customs Prosecution Ordinance, 1925 — Meaning of "importation" — Corroboration of evidence — Plea of autrefois convict — Admissibility of deposition of absent person.

Appeal from the judgment of the District Court of Jaffa, dated 20th March, 1928, whereby the Appellant was sentenced to twelve month's imprisonment and fine of £P. 200 under the Dangerous Drugs Ordinance and a fine of £P. 1000 under the Customs Ordinance.

JUDGMENT.

The accused in this case was charged with abetting and procuring the import of hashish contrary to Para. 6 of the Dangerous Drugs Ordinance, 1925, and also with being concerned in smuggling goods and in conveying such goods with intent to evade the prohibition of their import contrary to paragraphs (a) and (f) of Section 8(1) of the Customs Prosecution Ordinance, 1925.

The Appellant was convicted of both offences and sentenced for the offence under the Dangerous Drugs Ordinance to be imprisoned and kept to hard labour for 12 months and to pay a fine of £P. 200 or in default of payment to be kept to hard labour for a further three months.

For the offence under the Customs Prosecution Ordinance he was sentenced to a fine of £P. 1000 or in default to imprisonment for an additional three months. The sentences of imprisonment for default to run consecutively and to be in addition to the term of 12 months.

The accused was also ordered to pay the costs of the prosecution.

The Solicitor-General at the outset of the appeal stated that, in view of the recent proceedings in the High Court* in which two persons namely a Police Officer and his agent had been committed for contempt for their participation in a scheme to secure the non-attendance at the trial of this charge of a defence witness named Nassif Odeh, he would not defend the conviction on the present evidence and asked the Court to remit the case to the District Court for calling fresh evidence by the prosecution and giving the defence a new opportunity of calling Nassif Odeh.

This Court decided to hear the case for the Appellant before ruling upon the Solicitor-General's application.

The first argument of the Appellant was to the effect that since the Territorial Waters Jurisdiction Act had no force in Palestine the rule as to the three miles maritime belt had never been applied to Palestine so as to make crimes committed therein justiciable, and again, that since the Customs frontier under the unrepealed Ottoman Reglement Douanier is the littoral of the sea, there was no importation of which the accused could be convicted of aiding and abetting.

As to the first point, paragraph 4 of the Trial Upon Information Ordinance, 1924, appears to me absolutely to dispose of it, and I cannot agree with counsel for the Appellant that the jurisdiction there given over territorial waters must be read as confined to inland waters such as the Dead Sea and the Sea of Galilee. The intention of the legislature, as I hold, was to extend the criminal jurisdiction of the Courts named to cover the three miles maritime belt.

Again, as to the question of whether importation had actually taken place, the Solicitor-General points to para. 13 of the Customs Prosecution Ordinance, 1925, which provides that any Ottoman regulations repugnant to the provisions of that Ordinance shall cease to have effect, and at the same time to para. 6 (2) which provides, inter alia, that goods liable to forfeiture may be seized by the Customs in territorial waters, and he argues that the right of seizure implies the fact of importation and that importation must have taken place on the crossing of the three mile limit.

To say so does not appear to me to go one inch further than did Lord Haldane in A.-G. for British Columbia v. A.-G. for Canada, L.R. (1915) A. C. at p. 175, for it implies no assertion that the three miles belt below the low water mark forms part of the territory of Mandatory, but merely that, to use Lord Haldane's

* Reference is to H. C. No. 52/28; see ante p. 364.

words, it is "subject to special powers necessary for protective and police purposes".

I am satisfied, therefore, that there was an importation bringing the contraband within the territorial waters, and the fact that the agent of the accused handed the material to a revenue cutter under the impression that it belonged to his accomplice does not, in my opinion, help him to escape the consequences of his act, for Para. 8 (1) (a) of the Customs Prosecution Ordinance prohibits the acts not merely of smugglers of goods but also of those who are concerned in the smuggling of the goods; while Para. 8 (1) (f) goes still further in prohibiting the acts of those who are concerned in conveying goods with intent to evade the prohibition of their import, both of which provisions seem to me to be a complete answer to the argument that since importation although unknown to the accused was by the Government and not by his accomplice the accused can escape liability, for no question of the Customs having made use of a rule can get over the fact that the accused was concerned in two acts, whoever may have effected their completion.

We come now to Mr. Samuel's third argument that the acts of the accused in connection with this charge were all performed in Beyrouth outside the jurisdiction and are in consequence not justiciable. The answer of the Solicitor-General to this point is that Samaan Spiro was engaged in Palestine.

Samaan Spiro himself, according to the President, District Court's note said as follows:—

> "First met Talamas in Cafe in Haifa about a week or two before we went into prison. He asked me my job, I told him. Asked me to go with him to Beyrouth."

The evidence shows that Talamas then introduced Samaan Spiro to the Shaya, the boat owner,and told him to go with him and do what was necessary.

Mr. Samuel has argued that this is the evidence of a single uncorroborated witness who does not depose to an overt act on which a conviction of aiding, abetting, counselling or procuring could be maintained. I cannot agree that we must reject any special details of the evidence of an accomplice unless it has been corroborated in that especial particular, and I hold that Samaan Spiro is sufficiently corroborated by Saad Shaya to enable the prosecution to say that they have established one act done within the jurisdiction of aiding and abetting the importation of the forbidden drug.

Next we have to deal with the argument based upon Para. 8 (2) of the Customs Prosecution Ordinance, 1925, which contains a provision that a person shall not be convicted twice for the same offence.

The Solicitor-General endeavoured to distinguish between a revenue offence involving liability to a fine and criminal offence of importing drugs declared dangerous by Ordinance.

Here, the accused was charged with being concerned in conveying goods with intent to evade the prohibition of their import, and since the only prohibition of import of Hashish lies in the provisions of Paragraph 3 of the Dangerous Drugs Ordinance, 1925, I am bound to hold that the accused was, in spite of the proviso to Para. 8 (2) of the Customs Prosecution Ordinance, convicted twice of the same offence.

As regards the admissibility of the depositions of Hassuneh and Zeptieh, I hold that the District Court had good ground for allowing them in its discretion to be read under the provisions of Para. 36 of the Trial Upon Information Ordinance, 1924, since it had evidence before it that they were absent from Palestine, the witness Basmajian having said that he had seen them sick in Beyrouth a few days before.

I have now to consider what course should be taken by this Court. We clearly cannot uphold the conviction, the Solicitor-General does not ask for that: and in any case I have held that the Court below erred in spite of the proviso to Para. 8 (2) of the Customs Prosecution Ordinance by convicting twice of the same offence.

The Solicitor-General asks us to remit the case for more evidence to be heared, the Appellant naturally resists this.

The High Court has committed for contempt a Police Officer and his agent for spiriting away a witness who was to give evidence in the lower Court, and for my part I hold that the whole evidence for the prosecution has been too much tainted by that to justify us in putting the Appellant once more in jeopardy on one or other of the charges, and I hold therefore that the appeal must be allowed and the conviction quashed.

Delivered in presence the 16th day of January, 1929.

DAMAGES—

SEE CONTRACT.

DEBTOR.

In the Supreme Court sitting as a Court of Appeal.

L. A. of 28.2.1924.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Zarifeh Najid — APPELLANT.

vs

Iskawar Kafo — RESPONDENT.

Necessaries of execution debtor and family—Execution sale of debtor's dwelling house — Article 90, Execution law — Discretion of Chief Execution Officer.

JUDGMENT.

It is proved that there is nothing to set aside the judgment concerning the lands. It is therefore decided to dismiss the appeal and to confirm the judgment. But as regard the old house, as it is a dwelling house and as the law in force during the time of the sale is the old Execution Law; and as Article 90 of the said Law forbids the sale of a dwelling house if it does not exceed the necessities of the debtor and his family, the sale must therefore be cancelled and the house delivered to the Respondent. If the house is in excess of the necessities of the debtor it could be sold, but the Execution Office has to keep part of the price which will suffice for the purchase of a smaller house to fit the necessities of the debtor. But if the Execution Office has shown negligence in the matter, the purchaser must not be blamed for this negligence and the sale is valid.

It is therefore decided to set aside the judgment concerning the house and to return the documents to the Land Court in order to investigate whether the house is more than the necessities of the debtor considering his position and the position of his family at that time, and consequently to issue a judgment.

Delivered the 28th day of February, 1924.

In the High Court of Justice.

H. C. No. 22/27.

BEFORE:

The Senior British Judge and Frumkin, J.

IN THE APPLICATION OF:

Salomon Jacobson, Curator of the Estate of Josef Bey Moyal — PETITIONER.

vs

The Chief Execution Officer of Jaffa
Ahmad Nothia Bamia
Mohamad Bamia — RESPONDENTS.

Judgment debtor—Application for reduction of amount of instalments payable to Execution Office — Reduction granted where satisfactory evidence produced that financial condition of debtor has altered for the worse — Chief Execution Officer not to act on his general knowledge of financial conditions—Arts. 133, 136, Law of Execution.

Application for an order to issue setting aside the Order of the Chief Execution Officer of Jaffa dated 23rd March 1927 made in execution of a judgment No. 171/371 dated 30th September 1920 in favour of the Petitioner against the Respondents Ahmad Nothia Bamia and Mohamad Bamia.

JUDGMENT.

In accordance with our order in High Court No. 23/27, Ex parte S. Rapoport, we held that general knowledge as to the financial condition of the inhabitants of the locality is not sufficient to entitle the Chief Execution Officer to refuse to give effect to Article 133 of the Law of Execution.

He must have before him satisfactory evidence that the financial condition of the judgment debtor has altered in such manner as to render him unable to fulfill his undertaking.

As regards the second Respondent who is a guarantor the provisions of Article 136 of the Law of Execution apply.

As regards both Petitioners therefore the order prayed will issue with costs including advocate's fees £. 2.

Delivered in presence of the Petitioners the 16th day of May, 1927.

In the High Court of Justice.

H. C. No. 23/27.

BEFORE:

The Senior British Judge and Frumkin, J.

IN THE APPLICATION OF:

S. Rappaport — PETITIONER.

VS

The Chief Execution Officer, Jaffa,
Simon Friedman — RESPONDENTS.

Judgment debtor—Application for reduction of amount of instalments payable to Execution Office—Reduction granted where satisfactory evidence produced that financial condition of debtor has altered for the worse—Burden of proving alteration of financial condition is on debtor—Chief Execution Officer not to act on his general knowledge of financial conditions—Article 133, Law of Execution.

ORDER.

Where a judgment debtor has made an offer to pay his debt by instalments which has been accepted by the judgment creditor and approved by the Chief Execution Officer, the judgment debtor is not precluded by Article 133 of the Law of Execution from applying subsequently to the Chief Execution Officer for the modification of the terms of settlement.

The burden of proving that his financial circumstances have altered in such a way as to destroy his ability to pay the instalments proposed is upon the judgment debtor.

In the present case, however, in granting the judgment debtor's application, the Chief Execution Officer has relied upon his knowledge as to the financial condition of the inhabitants of the locality generally and not upon evidence as to an alteration in the financial position of the debtor.

In default of such evidence we hold that the Chief Execution Officer's Order must be set aside. Order will issue accordingly. Advocate's fees £E. 2.

Delivered the 16th day of May, 1927.

In the High Court of Justice.

H. C. No. 65/27.

BEFORE:

The Senior British Judge and Jarallah, J.

IN THE APPLICATION OF:

Levy Geller — PETITIONER.

vs

The Chief Execution Officer, Haifa

Baruch Reznik — RESPONDENTS.

Imprisonment of judgment debtor— Effect on prior debts of service of term of imprisonment—Meaning of "debt" in Article 135, Law of Execution.

Application for an order to issued setting aside the Order made by the Chief Execution Officer Haifa for the commitment of the Petitioner to prison.

JUDGMENT.

We hold that the word "debt" in Article 135 of the Law of Execution does not mean a judgment-debt only but includes any debt due before the date when the period of imprisonment began.

In this case the Petitioner was imprisoned on the 15th June 1924. The debt due from the Petitioner to the Respondent Reznik matured on the 1st January, 1924. The Petitioner therefore cannot be imprisoned for non-payment of such debt.

The order of the Court is that the order dated 7th August, 1927, of the Chief Execution Officer Haifa directing the imprisonment of the Petitioner for non-payment of his debt to Respondent Reznik be set aside.

Costs to be paid by the Respondent Reznik including £P.2. advocate's fees.

Delivered in presence, the 24th day of December, 1927.

In the High Court of Justice.

H. C. No. 76/30.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE APPLICATION OF:

Hamedan Salem — PETITIONER.

VS

The Chief Exucution Officer, Jerusalem,
Hannah Hazboun — RESPONDENTS.

Suitability of dwelling-house of judgment debtor to his social position— Exemption from attachment in execution— Art. 90, Law of Execution — Discretion of Chief Execution Officer — Right of High Court to interfere in case discretion unreasonably exercised.

Application for an order to issue to the first Respondent directing him to show cause why his order dated the 2nd October, 1930, should not be set aside.

JUDGMENT.

The Court, after hearing Ibrahim Eff. Kamel for the Petitioner and George Eff. Salah for second Respondent, holds that the question whether the Petitioner's house is or is not suitable to his position within the meaning of Article 90 of the Law of Execution is one within the discretion of the Chief Execution Officer. In this case it cannot be maintained that the discretion has been exercised unreasonably.

The petition must be dismissed with costs including £P. 1 advocate's fees.

Delivered the 4th day of December, 1930.

In the High Court of Justice.

H. C. No. 24/31.

BEFORE:

The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF:

Meyer Alchemister — PETITIONER.

vs

The Chief Execution Officer, Jaffa, Ismojik and Zisling — RESPONDENTS.

Suitability of dwelling house of judgment debtor to his social position—Exemption from attachment and sale in execution — Art. 90, Law of Execution— Discretion of Chief Execution Officer.

Application for an Order to issue to the first Respondent directing him to show cause why his Order dated 31st January, 1931, refusing to stay sale of the Petitioner's property should not be set aside.

ORDER.

It is for the Chief Execution Officer to decide under Article 90 of the Law of Execution, whether the house is suitable to the debtor's position or not.

In the event of the Chief Execution Officer deciding that the house is larger than is required for the judgment debtor and his dependents (if any), it is for him to determine what part of the house shall be excluded from the sale and reserved for the occupation of the judgment debtor and his dependents; or alternatively to determine what sum is to be reserved out of the price of the house for the purpose of providing accommodation for the judgment debtor and his dependents: and to order accordingly.

The Order nisi will be made absolute.

Costs will be paid by the Respondent including £P. 3 advocate's fees and expenses.

Delivered the 20th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 48/31.

BEFORE:

Corrie, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Khalil Saqqa — APPELLANT.

vs

The Curator of the Estate of Sheikh Tewfik Dajani — RESPONDENT.

Application to set aside appointment of Curator of estate under Art. 999 Mejelle—Duties of Curator of estate—Method of realizing assets of insolvent debtor—Question of fitness of Curator is in discretion of Court—Curator distinguished from Syndic.

JUDGMENT.

This is an appeal against the refusal of the District Court of Jaffa to set aside the appointment of the Respondent as Curator of the estate of Sheikh Tewfik Dajani, who has been declared to be an insolvent debtor under Article 999 of the Mejelle.

This Court holds that, while the normal method of realising the assets of an insolvent debtor under Article 999 is through the Execution Office of the Court, there is nothing in the law which renders it obligatory that this course should be adopted.

Accordingly it was open to the District Court, if in the circumstances of the case it thought fit so to do, to appoint some person other than an Execution Officer to get in and sell the debtor's assets.

The question of the fitness of the Respondent to be so appointed is one for the exercise of the District Court's discretion and there is no evidence before this Court to prove that such discretion has been exercised unreasonably.

The person appointed Curator under Article 999 is appointed for the purpose only of selling the property of the debtor and distributing the proceeds of sale among the creditors under the supervision of the Court, and he is not invested with the powers conferred by law upon a syndic in bankruptcy.

The appeal must be dismissed.

Delivered the 21st day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 83/31.

BEFORE:

The Senior Puisne Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Musa Ishaq Matalon — APPELLANT.

vs

M. Wolfe
Syndict of Bankruptcy
of Yusef Dajani — RESPONDENTS.

Nature of debts for purposes of declaration of bankruptcy thereon—Debt arisen in the course of trade or business—Sec. 3 (1) Assignment of Debt Ordinance, 1928—Notice of assignment of debt given to Syndic in bankruptcy,

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Appeal from the judgment of the District Court of Jaffa, dated 31st day of May, 1931.

JUDGMENT.

This Court has held in the case of Ali Mustakim vs. the Estate of Yusef Dajani (C. A. No. 26/29) that the debt due from the estate of Yusef Dajani to Ali Mustaqim was of such a nature that the estate of Yusef Dajani could be declared insolvent in respect of such debt; i.e. that it had arisen in the course of trade or business within the terms of Section 3 (1) of the Assignment of Debts Ordinance, 1928.

Notice of the assignment was duly given to the Syndics in the bankruptcy of Yusef Dajani by whom the debt is payable. Hence the assignment was good against the Appellant and he is not entitled to an attachment on the debt in respect of his claim against Ali Mustaqim.

The appeal is dismissed with costs, including advocate's fees and expenses.

The Appellant will pay to each of the Syndics who have appeared the sum of £P.1 in respect of their expenses.

Delivered the 28th day of January, 1932.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 147/32.

BEFORE:

The Senior Puisne Judge, Frumkin, J. and Khayat, J.

IN THE CASE OF:

The Syndic of the Bankruptcy of Salim Nasrallah Khoury, Yusef Khoury and Nasrallah Khoury. — APPELLANTS.

vs

Hassan Bey Shoukri. — RESPONDENT.

Renewal by heir of debt incurred by ancestor—Bills given in substitution of old bills— Art. 6, Law of Interest, 9th Rajab, 1304— Claim for the reduction of interest to the legal rate.

Appeal from the judgment of the District Court of Haifa, dated the 11th July, 1932.

JUDGMENT.

It is admitted by Respondent that the bills signed by Nasrallah Khoury, who was one of the heirs of Yusef Khoury, deceased, were given in settlement of the bills previously signed by Yusef Khoury.

Under these circumstances it is immaterial whether the bills were given on behalf of the firm S. N. Khoury or not.

The bills given by Nasrallah were a renewal of the debt owing by Yusef. Accordingly, Section 6 of the Law of Interest is applicable, and the claim that excessive interest was included can be extended to the bills given by Yusef Khoury.

The appeal must be allowed and the judgment of the District Court set aside and the case remitted with costs here and below.

Delivered the 30th day of January, 1933.

In the High Court of Justice.

N. C. No. 39/33.

BEFORE:

Baker, J. and Khayat, J.

IN THE APPLICATION OF:

Badr Qutteineh — PETITIONER.

vs

The Chief Execution Officer, Jerusalem,
The General Motors — RESPONDENTS.

Provisional attachment of immovable property—Attachment released by Magistrate and re-attached by Chief Execution Officer—Suitability of dwelling-house of judgment debtor—Exemption from attachment and sale in execution—Art. 90, Law of Execution—Discretion of Chief Execution Officer not to be unreasonably exercised.

Application for an order to issue to the Chief Execution Officer to show cause why his order for attachment of property previously adjudged by the Magistrate to be the debtor's dwelling house and so exempted from sale, should not be set aside.

ORDER.

The Magistrate in his decision of the 23rd April released the attachment made on the dwelling-house of Petitioner. This judgment was not appealed against, however. Subsequently the Chief Execution Officer re-attached and ordered the sale of the said property, which we hold, whilst the judgment of the Magistrate remained unappealed, he has not entitled to do unless he had been clearly shown that the circumstances of the judgment debtor had changed, which the Chief Execution Officer does not allege in his order. The question whether the Petitioner's house is or is not suitable to his position within the meaning of Article 90 of the Law of Execution is one within the discretion of the Chief Execution Officer, provided the same is exercised reasonably.

The Order is made absolute with costs and advocate's fees assessed at £P.1.

Delivered the 16th day of October, 1933.

In the High Court of Justice.

H. C. No. 52/33.

BEFORE:

The Acting Chief Justice and Khaldi, J.

IN THE APPLICATION OF:

Nassan Awad El Ali Falash — PETITIONER.

vs

The Chief Execution Officer, Nablus — RESPONDENT.

Question of sufficiency of land left for support of judgment debtor— Exercise of discretion by Chief Execution Officer — Jurisdiction of High Court.

Application for an Order to issue to Respondent directing him to show cause why his Order dated the 16th June, 1933, should not be set aside.

ORDER.

The question whether sufficient land was left for the support of the Petitioner has been inquired into before the Magistrate and his finding has been approved by the President of the District Court. This Court does not go behind a finding of this nature.

No other question arises on this petition, which is, therefore, dismissed.

Delivered the 12th day of September, 1933.

DEBTOR—

SEE ALSO EXECUTION.

DEBTS.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 79/25.

BEFORE:

The Acting Chief Justice, Khaldi, J. and Abdel Hadi, J.

IN THE CASE of:

Wadie Tamari — APPELLANT.

vs

M. Karamano — RESPONDENT.

Action on admission of debt—Bill prescribed by lapse of time held valid as an admission of debt — Third Judge called in by Court to discuss question of law — New plea not alleged in Lower Court refused by Court of Appeal.

Appeal from the judgment of the District Court of Jaffa, dated March 3rd, 1925, whereby the Defendant was ordered to pay the sum of £E. 130 with interest from the date of the action, costs, and £E. 10 advocate's fees.

JUDGMENT.

This is in an action on an admission of debt, in discharge of which the Appellant gave the Respondent a bill which has never been paid, and is now barred by lapse of time. The District Court by a majority held that the action might be maintained, and has given judgment for the Respondent.

It is alleged that the procedure in the District Court was irregular, and it would appear that the rule whereby a third Judge may be called in when two members of Court disagree is not now in force.

There was however no issue of fact to be decided and the only points raised is a single question of law.

In accordance with the judgment of the Court in Daoud Rahim vs Suleiman Handal, Civil Appeal No. 129/23 we hold that the Respondent can sue on the admission of debt.

The Appellant now alleges that he has a defence to the admission of debt.

He did not set this up either in the Court below or on presenting his appeal, and this Court cannot now go into any such alleged defence.

The appeal is dismissed with costs of £E. 2 travelling expenses and advocate's fees.

Delivered in presence the 23rd day of February, 1926.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 169/26.

BEFORE:

The Senior British Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Isaac Cohen — APPELLANT.

vs

Commission on the Finances of the Greek Orthodox Patriarchate — RESPONDENT.

Set-off of debts— Effect of moratorium on payment of debts—Debt legally enforceable at some future unascertained date — Orthodox Patriarchate Ordinance, 1921.

JUDGMENT.

The Appellant owes a debt to the Respondent which is payable forthwith. He also has a right against the Respondent which is not denied.

Under the Ordinance for the liquidation of the debts of the Orthodox Patriarchate published on 17th June, 1921, it is clear that a moratorium now exists with regard to debts due from the Patriarchate. The Appellant's right against the Respondent, therefore, is one which is only legally enforceable at some future unascertained date.

In these circumstances we hold that such right cannot be set off against the debt now due from the Appellant to the Respondent.

The appeal is dismissed with costs, including £E. 2 advocates' fees.

Delivered the 31st day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 20/27.

BEFORE:

The Senior British Judge, Baker, J. and Frumkin, J.

IN THE CASE OF:

Mohamed Tewfiq Eff. El-Dajani — APPELLANT.

vs

Solomon Jacobson — RESPONDENT.

Agreement to release from judgment debt in consideration of payment of amount by fixed instalments — Release of debtor by judgment creditor of all remedies by way of attachment or otherwise — Renewal of debt — Usurious Loans (Evidence) Ordinance, 1922 — Ottoman Law of Interest of 9th Rajab, 1304.

Appeal from the judgment of the District Court of Jaffa, dated the 25th day of November, 1926.

JUDGMENT.

The agreement of 7th April, 1921, on which this action is based, was an agreement for the settlement of the debt then due from the Appellant to the estate of Joseph Moyal upon two bills.

In consideration of his undertaking to pay the sum of £E. 1800 by the instalments therein stated, the Appellant was released from the original debts, for which there was then a judgment against him, and from all the remedies of the judgment creditor for enforcement of the debt by way of attachment or otherwise.

The agreement of the 7th April, 1921, is in effect a renewal of the debt and we are unable to see any reason why the Usurious Loans (Evidence) Ordinance, 1922, and the Ottoman Law of Interest of 9th Rajab, 1304, should not apply to it.

The appeal is allowed, the judgment of the District Court is set aside and the case remitted.

Costs to be costs in the case.

Delivered in presence the 16th day of May, 1927.

In the District Court of Jaffa.

C. E. O. Ja. No. 4937/27.

BEFORE:

The Chief Execution Officer, Jaffa.

IN THE CASE OF:

Michael Hakim — APPLICANT.

vs

Joseph Kandinoff et al — RESPONDENT.

and

Barclay's Bank (D. C. & O.)
The Attorney-General for the
Central Housing Commission — INTERVENORS.

Monies attached by Execution Officer and paid into Execution Office—Prior undertaking by garnishee to pay monies of the debtor to third person—Suit against garnishee for wrongful payment out of money—Creation of hawale—Transfer of debt.

ORDER.

This is an application for payment out to Michael Hakim of certain moneys which were paid by the Central Housing Commission into the Execution Office in virtue of an order of provisional attachment given by the District Court, Jaffa, dated 19.5.27 which provisional attachment was subsequently confirmed by the Court on the 15th day of September, 1927.

These moneys were rent payable by the Central Housing Commission to Kandinoffs in respect of certain property leased by them from the Kandinoffs. Barclay's Bank have intervened alleging that by letter dated 20.10.27 from the Central Housing Commission the latter bound themselves to pay these rents to the Bank, and on the strength of this undertaking the Bank has advanced money to the Kandinoffs.

The Bank sued the Central Housing Commission in the District Court Jerusalem, for the money paid by the latter into the Execution Office Jaffa, alleging that it was wrongly so paid. The District Court, Jerusalem, by a judgment dated 1.3.29 dismissed the plaintiff's claim holding that the letter of 20.10.27 by Kandinoff to the Central Housing Commission was not a hawale.

However, whether or not this judgment be confirmed on appeal, the attachment made by Hakim being prior in date to the purported assignment of 20.10.27 is not affected by the latter.

I therefore order that the amount of the judgment with costs be paid out to Michael Hakim and that the balance, if any, be returned to the Central Housing Commission.

Michael Hakim having offered to provide a guarantee for repayment if called upon to do so I order that this be done.

Dated the 20th day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 7/28.

BEFORE:

The Chief Justice, Frumkin, J, and Khayat, J.

IN THE CASE OF:

Nimer El-Ahwal — APPELLANT.

vs

Khalil El-Nunu — RESPONDENT.

Commercial debt contracted by merchant – Declaration of bankruptcy of person not a merchant at time of adjudication—Art. 147. Commercial Code.

JUDGMENT.

The Court below dismissed the action on the ground that at the time of the action, the Respondent was not a merchant, without considering the fact whether or not he was a merchant at the time of the contracting of the debt and whether the debt was a commercial one.

We hold that if a merchant contracts a commercial debt, he can be declared bankrupt, even if at the time of adjudication he is no more a merchant.

The case is therefore remitted for the Court below to hear evidence as to the status of the Respondent at the time of contract, and as to whether the debt was incurred in connection with his commercial affairs, and give judgment accordingly. Costs to follow the event.

Delivered the 7th day of March, 1928.

In the District Court of Jaffa.

C. D. C. Ja. No. 152/28.

BEFORE:

Copland, J. and R. Khaldi, J.

IN THE CASE OF:

Agudath Hakormim — PLAINTIFF.

vs

Eliezer Lahovsky — DEFENDANT.

Action on contract brought by unregistered Society—Action against heirs of debtor to be brought against all the heirs—Debt contracted with predecessors of Society and taken over by Society held improperly transferred — Transfer of debt without consent of all concerned held void.

JUDGMENT.

There are three reasons why the Plaintiff cannot succeed in this action. In the first place the Plaintiff Society not having been registered until 1927 cannot sue in respect of contracts made prior to registration. In the second place the Defendant is only an heir of the debtor and therefore cannot be sued alone, the proper course is to sue the heirs jointly. And lastly the debt was admittedly not contracted with the Plaintiff Society but with their predecessors and was taken over by the Plaintiffs. A transfer of a debt without the consent of all concerned is void and cannot be sued on.

For all these reasons therefore the action fails and must be dismissed with costs and £P. 2 advocate's fees.

Delivered the 7th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 25/29.

BEFORE:

The Senior Puisne Judge, Jarallah, J. and Daoudi, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Bnei Benyamin Bank
Joseph Kandinoff — RESPONDENTS.

Set off of debts due on different accounts—Assignment to creditor of monies due as rent—Payment of monies to the Execution Officer pursuant to an order as discharge of person accepting assignment.

Appeal from the judgment of the District Court of Jaffa dated the 5th day of December, 1928.

JUDGMENT.

The only question raised by this action was whether the Government of Palestine of which the Central Housing Commission is a Department was bound to pay to the Plaintiff, the Bnei Benyamin Bank, the whole of a sum of LP. 179.487 due from the Government as rent or whether the Government was entitled to deduct from that sum LP. 112 due to the Government as Werko. The District Court gave judgment in favour of the Bank and against that judgment the Attorney-General on behalf of the Government has appealed.

The Appellant states that no claim is now made by the Government to deduct the sum of LP. 112 for Werko; but the judgment in favour of the Bank is resisted on the ground that the whole sum of LP. 179.487, has been paid to the Execution Office under an order of the Chief Execution Officer made in other proceedings.

The Attorney-General is now asking the Court to say that such payment to the Execution Office extinguishes the right of the Bank to judgment against the Government, for the amount in claim.

This Court is unable to take the view that such a payment can affect the rights of the Bank. The only objection originally put forward by the Government to paying the Bank namely the claim to deduct Werko—has been withdrawn and it must follow that this Court, without entering into the question whether the grounds upon which the District Court's judgment was based

were right or not, must confirm the judgment in favour of the Bank.

The legal consequences of the payment to the Execution Office cannot be taken into account in these proceedings.

Judgment will be entered dismissing the appeal. The costs of this appeal are to be paid by the Appellant.

Delivered the 3rd day of February, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 135/33.

BEFORE:

The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Giocanda Miara — APPELLANT.

vs

Henry Zimmerman — RESPONDENT.

Debt assigned in part — Debt arising out of trade or business of assignor—Validity of assignment—Sections 2 (1), 3, Assignment of Debts Ordinance, 1928—Interpretation of Palestine Ordinance based on English Act in pari materia—Interpretation of Statutes—Section 136, Law of Property Act, 1926.

JUDGMENT.

The Appellant in this action received from the Respondent a communication in the following terms: "Please pay to Mr. H. Zimmerman the amount of £P. 400.- out of the sum you have to pay me upon the completion of the house I am building for you on the Hadar Hacarmel, on Gilead Street, namely, after completion of the fence and clearing of the yard in accordance with the agreement. This draft is irrevocable. It was issued in two copies having the same effect."

The first question that arises in the appeal is the question whether this is a valid assignment of a debt under the Assignment of Debts Ordinance (20 of 1928). Clause 3 of that Ordinance confines its operation to the assignment of a debt which has arisen in the course of trade or business, and the Appellant urges that this means trade or business as between the assignor and the debtor. The section, however, does not say one word which can be taken to extend the limitation of the operation of the Ordinance to that degree, and we are satisfied that if the debt arises, as in

this case, out of the trade or business of the assignor, it is within the ambit of the Ordinance.

It is next pleaded that part of a debt cannot be assigned under the Ordinance.

The Court below, after considering the leading cases in England upon the provisions in the Judicature Act, 1873, replaced by others in the Law of Property Act, 1925, upon which the Ordinance in question is based, came to the conclusion that part of a debt could be assigned under the Ordinance in question.

The District Court, however, had not the benefit of having before it the most recently reported English case, namely, Williams v. Atlantic Assurance Co. Ltd. 1933, 1 K. B. p. 81, in which the Court of Appeal held that an assignment of part of a debt is merely an equitable assignment and is not effectual to transfer the legal right to the debt under Section 136 of the Law of Property Act, 1925.

Our attention has, however, been drawn by Mr. Eliash to the very marked variation between the relevant words used in the Section in question in our Ordinance as compared with the Section in the English Act.

Section 136 (1) of the Act provides that:—

> "Any absolute assignment by writing under the hand of the Assignor . . . of any debt . . . of which express notice in writing has been given to the debtor . . . is effectual in Law . . . to pass . . . the legal right to such debt".

Section 2 (1) of our Ordinance provides that:

> "Any absolute assignment by writing under the hand of the Assignor . . . of any debt due or to become due to him or of any claim for a liquidated sum of money of which assignment express notice in writing shall have been given to the debtor . . . shall be valid to pass and transfer from the date of such notice the legal right to such debt".

It was laid down by Cockburn, C. J. in Regina v. Price (1871) L. R. 6 Q. B. at p. 416 that "when the legislature in legislating in pari materia substitutes certain provisions in the new Act for those which existed in the earlier statute and in consequence has entirely changed the language of the enactment it must be taken to have done so with some intention and motive".

It is immaterial, if this principle is applied, that in the present case it was the Legislature of Palestine that was passing an Ordinance in pari materia with Section 136 of the English Law

of Property Act, 1925. There must have been intention in, and motive for, the introduction in the Palestine Section, of the words "of any claim for a liquidated sum of money"; and we hold that these words serve to take the Palestine section out of the interpretation in Williams v. Atlantic Assurance Co. Ltd. and empower an assignor to assign a part of a debt so long as it is a liquidated sum.

With regard to the argument that the indebtedness of Appellant to the builder arose, as stated in the assignment, only upon the completion of the house and fence and the clearing of the yard, which were not in fact accomplished. The assignment was dated May 16, 1930. The receipt produced by the Appellant was the very day upon which the action was commenced, ran as follows:—

> "This is to certify that until today I have received from Mrs. G. Miara the sum of £P. 2998.980 mils on the account of building her house on the Hadar Hacarmel".

In view of this we are of opinion that there was evidence to enable the District Court to conclude that there were payments made by the Appellant after the receipt by her of the notice of the assignment although the building had not been completed.

For these reasons we dismiss the appeal with costs, to include £P. 2.- advocate's fees.

Delivered the 25th day of May, 1933.

DISTRICT COMMISSIONER.

In the High Court of Justice.

H. C. No. 26/27.

BEFORE:

Corrie, J., Khayat, J. and Khaldi, J.

IN THE APPLICATION OF:

Hassan Husein Ayesh — PETITIONER.

vs

District Officer, Majdal — RESPONDENT.

Order issued by District Officer withdrawing Petition writer's licence — Powers of Military Governor vested in District Commissioner— Delegation of powers by District Commissioner to District Officer — Jurisdiction of District Officer.

ORDER.

The Petitioner Hassan Husein Ayesh is asking this Court to set aside the order made by the District Officer of Gaza on the 15th January, 1927, withdrawing from Petitioner his licence as a Petitioner Writer.

The District Officer's order is in the following terms:—

"To Hassan Ayesh—Majdal.

In view of the judgment that was given against you by the Magistrate's Court of Majdal on 27 January, 1926, whereby you were sentenced to 10 days' imprisonment, it was decided to prohibit you from pursuing the line of writing petitions and to withdraw the licence from you.

You are therefore required to bring the old licence to the office for cancellation thereof.

(Sgd.).....
District Officer, Gaza."

The licensing of petition writers is governed by a Public Notice No. 132 issued by the Chief Administrator on the 26th August, 1919. By Section 3 of that Notice "a licence may be cancelled at any time by the Military Governor, for misconduct or the use of improper or abusive language in petitions by the holder of a licence."

Under a Notice headed "Changes of Designation" published in Official Gazette No. 24 issued on the 25th July, 1920, and a Notice published in Official Gazette No. 141 issued on the 15th June, 1925, the duties and powers of a Military Governor are now vested in the District Commissioner of the District.

The first point raised by the Petitioner is that the power of revoking a licence is one which the District Commissioner cannot delegate to one of his subordinates, and hence that the District Officer had no jurisdiction.

The Government Advocate, appearing on behalf of the District Commissioner, has informed us that upon receipt of the District Officer's order the Petitioner applied to the District Commissioner and that an enquiry in the nature of an appeal from the District Officer was held by the Assistant District Commissioner, the result being that the District Officer's order was confirmed. We have not, however, before us any confirmatory order and this Petition is limited to the order of the District Officer.

We are not aware of any Regulations as to the duties which may properly be delegated by the District Commissioner to his subordinates nor has any authority on this point been quoted to us. In the absence of any such regulations or authority we hold that where the power of imposing a penalty is invested in the District Commissioner, such power cannot, without express authority, be delegated by him to a subordinate Officer.

The withdrawal of a Petition Writer's licence, involving as it does the loss of his means of livelihood, is clearly a penalty of a severe nature.

We therefore hold that the District Officer had no jurisdiction to make the order of 15th January, 1927.

We are thus not called upon to decide whether the offence of which the Petitioner was convicted, namely, orally insulting the Police, does or does not constitute misconduct of such a nature as would justify the District Commissioner in revoking the Petitioner's licence.

The order of the District Officer must be set aside.

Delivered the 15th day of September, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 120/28.

BEFORE:

Baker, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Export and Import Company — APPELLANT.

vs

The Township of Tel-Aviv — RESPONDENT.

Appeal to District Commissioner from assessment of value of land—No appeal from decision of District Commissioner—Tax on undeveloped land levied by Municipality—Local Councils Ordinance, 1921.

JUDGMENT.

An Order under the Local Councils Ordinance, 1921, Township of Tel-Aviv, dated 23rd February, 1926, prescribes under Section 4 that an appeal may be brought from the assessment of the land for the purpose of the tax on undeveloped land to the District Commissioner. There does not appear to be any provision allowing an appeal to any Court from the decision of the District

Commissioner and the appeal cannot lie. The appeal must be dismissed on this point.

A cross-appeal has been lodged asking the Court to remedy a defect in the judgment of the District Court which does not exist, i.e., the award of a sum of money which is specifically stated in the judgment in lieu of a fictitious sum which only appears to exist in the mind of the advocate and the cross-appeal. The cross-appeal is dismissed. No costs in either appeal.

Delivered the 23rd day of July, 1929.

In the High Court of Justice.

H.C. No. 75/30.

BEFORE:

The Chief Justice, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Subhi Khadra — PETITIONER.

vs

Attorney-General and Deputy District Commissioner, Jerusalem — RESPONDENTS.

Application for rale nisi to issue to Deputy District Commissioner—Secs. 3, 4, 6, Prevention of Crime Ordinance, 1920-29—Powers of District Commissioner acting magisterially—Powers of Deputy District Commissioner—Appeal from Orders under Prevention of Crime Ordinance—Arts. 38, 73, 74 Palestine Order-in-Council, 1922—Prevention of Crime, Additional Powers, Ordinance, 1921.

ORDER.

We are asked to issue a rule nisi to the Deputy District Commissioner to show cause why he should not cancel his order under the Prevention of Crime Ordinance, 1920-1929, against Subhi Bey El-Khadra, ordering the latter to give a bond for good behaviour, to be under police supervision, to reside in Safad, and so forth.

This Court has held in High Court No. 39/27 that a power such as this is exercised by a District Commissioner acting Magisterially. Section 2 of Ordinance No. 7 of 1927 gives the Deputy District Commissioner of Jerusalem the powers of a District Commissioner so that, so far as the Deputy District Commissioner of

Jerusalem is concerned, Section 2 of Ordinance No. 45 of 1929 need not detain us.

Mr. Moghannam urges that Article 38 of the Palestine Order-in-Council confers exclusive jurisdiction in all matters only on the Courts mentioned in Part V headed "Judiciary" of the Order-in-Council, and that a District Commissioner or Deputy District Commissioner cannot be invested with judicial powers save when he is constituted a Magistrate and sits in a Magistrate's Court as established under Order-in-Council.

Counsel ignores the fact that the Prevention of Crime Ordinance, 1920, was passed before 1st September, 1922, the date of the Palestine Order-in-Council and that by Arts. 73 and 74 of that Order-in-Council Legislative Acts, Ordinances, etc.... with certain scheduled exceptions passed before that date, "shall be deemed to be and always to have been valid and of full effect and all acts thereunder shall be deemed to be valid".

Section 6 of Ordinance No. 45 of 1929 expressly excludes a right of appeal from orders under the Prevention of Crime Ordinance and we cannot listen for one moment to Mr. Moghannam's unsupported assertion that there is anything preventing the legislature from excluding a right of appeal from any penal or other decision.

We are asked to issue a rule calling upon the Deputy District Commissioner to show cause why he should not cancel an order given by him in the proper exercise of his legitimate judicial discretion. This we have no power to do. The petition is dismissed.

Delivered the 5th day of November, 1930.

DIVORCE—

SEE MARRIAGE AND DIVORCE.

DIYET.

In the Supreme Court sitting as a Court of Appeal.

C.R.A. No. 67/26.

BEFORE:

Corrie, J., Khayat, J. and Abdel Hadi, J.

IN THE CASE OF:

Khalil Yusef El-Basta — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Appeal from award of compensation in lieu of diyet—Question of compensation held to be one for appreciation by Trial Court—Jurisdiction of Court of Appeal.

JUDGMENT.

The finding of the District Court must be read to mean that there was not evidence upon which they were prepared to rely as supporting a finding on the question whether the blow given to the accused was or was not struck before the shooting.

As regards the defence that Article 189 should be applied, there is the further difficulty that it has not been proved that the deceased or his party were originally the aggressors.

On these grounds the appeal against the conviction and sentence must be dismissed.

The question of compensation is one for appreciation by the District Court, and there is no ground for any interference by this Court.

The appeal is dismissed with costs.

Delivered the 27th day of July, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.R.A. No. 6/27.

BEFORE:

Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Ali Hassan Sheikh Ali and Hassan Sheikh Ali, Guardian of Appellant Ali—being his Father — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Compensation in lieu of diyet for loss of eye—Award of Trial Court held by Court of Appeal to be excessive—Amount awarded in case of death and under Workmen's Compensation Ordinance, 1927, considered by Court in estimating compensation.

JUDGMENT.

The complainant has to all intent and purposes lost the sight of one eye. The other does not appear to be impaired and is not likely to be affected by the injury of the left eye. After considering the amount awarded by the law in case of death and the amounts to be awarded under the Workmen's Compensation Ordinance, 1927, in the case of the loss of a member, we are of opinion that the award of £E. 150 as compensation is excessive and decide to reduce this amount to £E.75; other than this, the judgment of the lower Court is confirmed.

Delivered the 24th day of February, 1927.

DOCUMENTS.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 85/22.

BEFORE:

Seton, J., Jarallah, J. and Frumkin, J.

Proof of document—Deed of sale not signed nor stamped with thumb print held invalid.

JUDGMENT.

It was shown that the deed of sale produced by the Appellants was not signed by the claimants and there is no finger print which is put when illiteracy is proved, also it was not proved that the signature which is on the suffix of the said document is a signature or a special note.

The Court finds that not considering the said deed of sale and issuing a judgment in favour of the Respondent in her share in the inheritence in the claimed land is according to law. Therefore it was decided to dismiss the appeal.

Delivered the 17th day of January, 1923.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 17/23

BEFORE:

The Chief Justice, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Anton Sfeir — APPELLANT.

vs

Haj Faiq Dajani — RESPONDENT.

Partly destroyed document produced as evidence—Oral evidence admitted to explain contents of written agreement.

JUDGMENT.

In view of the partly destroyed document produced before the Court, its appearing to bear the signature and seal of the Respondent, also the same date as the lease—and its reference to conditions, this case is sent back to the Land Court for further consideration to enquire whether the document bears in fact the signature of Respondent and to hear evidence to show whether it is part of a document containing conditions which would go to prove that the transaction, the subject-matter of this action, was a mortgage and not a sale.

Delivered the 15th day of May, 1923.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 122/23.

BEFORE:

The Senior British Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Jamile wife of Abdul Ahad Yacoub Wakeem the trustee of Abdul Ahad the absentee of Ain-Karem — APPELLANTS.

vs

Ismail Khalil Zihdan, Kubeiba — RESPONDENT.

Proof of documents — Deed of sale alleged to have been burnt — Admissibility of oral evidence to prove contents of destroyed document — Rule of evidence held not binding on Land Court — Oral evidence of purchase.

Appeal from the judgment of the Land Court of Jerusalem, dated the 23rd day of June, 1923.

JUDGMENT.

The Court finds:

1. That as the Respondent has alleged that the deed of sale to him was burnt, before witnesses as to the contents of the alleged deed and sale can be heard, the Court should hear evidence to prove the alleged destruction of the said deed by burning.

2. That the Land Court is not bound by any rule as to the preference of evidence for purchase over that for loan, and hence that if evidence of witnesses is heard to establish an alleged purchase, the Court should also hear the witnesses in support of the Appellants' claim and the evidence of possession by both parties since the date of the alleged sale.

The judgment of the Land Court is set aside and the case remitted.

Judgment delivered in presence of parties the 11th day of February, 1924.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 141/23.

BEFORE:

Corrie, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Mahmoud Ibn Mustafa Khalil — APPELLANT.

vs

Ayishe Bint Mustafa Khalil,
Nafiseh Mohamed Ajaj,
Khalil Mohamed El Wawi,
Mohamed Mohamed el Wawi — RESPONDENTS.

Proof of documents — Estoppel by contradictory claim previously made — Claim based on deed of sale alleged to be destroyed — Necessity of evidence of execution and destruction of deed — Proof of deed by oath.

Appeal from judgment of the Land Court of Jaffa, dated 20th July, 1923, in action No. 94/22.

JUDGMENT.

As regards the Respondents Khalil and Mohamed, the Appellant has previously made a contradictory claim and cannot now be heard and as regards their shares, the appeal is dismissed.

As regards the Respondents Ayishe and Nafiseh, the Appellant's claim is based on an alleged ordinary deed of sale which he stated has since been destroyed by fire.

He has not tendered any evidence of the execution or destruction of this alleged deed.

He is entitled to produce such evidence if it is forthcoming, and in default of evidence, to administer an oath to the two Respondents.

The judgment of the Land Court is set aside and the case remitted. Costs as between the Appellant and the Respondents Khalil and Mohamed to be paid by the Appellant.

Costs as between Appellant and Respondents Ayishe and Nafiseh to follow the event.

Delivered the 1st day of May, 1924.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 112/26.

BEFORE:

The Chief Justice, Jarallah, J. and Khaldi, J.

New evidence—Documents produced after the issue of judgment—Amendment of claim— Documents claiming immovable property to give correct legal description of such property.

JUDGMENT.

After considering the case it was decided to return the case to the Land Court, in order to scrutinise some of the documents produced after the issue of the judgment.

1. Document dated .....
2. Documents in connection with the transaction of mortgage made in the Land Registry etc.
3. Letter from the Inspector of Agriculture etc.

The petition of claim has to be amended and the Court has to show in detail the claimed plots whereas the numbers are insufficient, therefore it was decided to set aside the judgment.

Delivered the 21st day of January, 1927.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 182/26

BEFORE:

Corrie, J., Jarallah J. and Frumkin J.

IN THE CASE OF:

Darwish Ibn El-Sheikh Abdel Razak El-Daoudi — APPELLANT.

VS

Mme. Victoria Khayat — RESPONDENT.

Receipt endorsed on invalid document—Receipt held valid as a distinct and separate document—Lease not registered—Receipt for payment in cash admitted not to have been received held invalid to establish receipt of cash.

JUDGMENT.

The receipt upon which the Appellant relies is endorsed upon an unregistered lease in favour of the Respondent signed by the Appellant. The Respondent alleges that the lease never took effect, having been replaced by a lease in registered form, and she relies upon the document marked "K" as evidence.

Even if, however, the unregistered lease is invalid, it does not follow that the receipt is invalid, as the receipt, although for convenience it is endorsed upon the lease, is a distinct and separate document.

The receipt, however, is for payment in cash, and in the course of the pleadings it was alleged by the Appellant that the consideration for the grant of the lease was not a cash payment, but was in part the settlement of a debt due to him from the Respondent, and in part payments made by the Appellant to other persons on the instructions and on behalf of the Respondent.

In these circumstances we hold that the Appellant cannot rely upon the receipt, but must prove the existence of such debt and payments. The judgment of the District Court is therefore set aside and the case is remitted for accounts to be submitted and fresh judgment given. The costs of this appeal are to follow the event.

Delivered the 15th day of September, 1927.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 106/30.

BEFORE:

The Senior Puisne Judge, Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Salem Hassan Jibreen	APPELLANT.
VS	
Aysheh Ahmed Ihleleh	RESPONDENT.
Nakhelh Jirjes Kubti	3RD PARTY.

Criminal proceedings instituted with regard to document which is basis of civil action—Result of criminal proceedings to be proven before continuation of civil suit.

Appeal from the judgment of the District Court of Jaffa dated the 18th September, 1930.

JUDGMENT.

It is agreed by the parties that criminal proceedings have been instituted with regard to the document which is the basis of this action.

We think that the District Court should have required production of evidence as to the result of such proceedings before giving judgment.

The judgment of the District Court is therefore set aside and the case remitted.

Delivered the 29th day of November, 1930.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C. Ja. No. 163/31

IN THE CASE OF:

Indrawes Mekhail Tartarah — APPELLANT.

vs

Yacov Rabinovitz — RESPONDENT.

Proof of documents in civil action—Unsigned documents as evidence—Proof of document by oath or affidavit.

Appeal from the judgment of the Magistrate's Court of Tel-Aviv dated the 18th day of May, 1931, whereby the Appellant was ordered to pay to the Respondent the sum of LP. 83.362 and interest thereon as from 25th day of July, 1931, with costs.

JUDGMENT.

After consideration the Court holds that the documents produced by the Respondent and which are not signed by Appellant do not constitute evidence against Appellant unless they are proved by evidence on oath or by affidavit.

The judgment of the Court below is therefore set aside and the case remitted for re-hearing.

Delivered the 8th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.R.A. No. 92/32.

BEFORE:

The Chief Justice, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Rafael Lewi Turpashwili
Yehezkiel Sion Mizrahi
Reuben Sion Levi — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Plea that documents forged—Procedure under Art. 366 of Ottoman Code of Criminal Procedure—Committee of experts to verify handwriting and signature—Necessity of explicit charge of forgery—Prosecution for arson—Question of credibility of witness is for Trial Court—Sufficiency of evidence to justify conviction.

Appeal from the judgment of the District Court of Jerusalem, dated the 2nd August, 1932, whereby the Appellants were convicted, under Article 163, of the Penal Code and Section 3 of the Criminal Law Amendment Ordinance (2), and sentenced the first and third accused to three years, penal servitude and the second accused to eighteen months, imprisonment.

JUDGMENT.

The appeal in this case turns mainly on the genuineness of two documents called S.D. 1 and S.D. 2 which the District Court found as a fact were respectively written and signed by the first accused.

On his behalf it has been argued that in the Court below he pleaded that the two documents were two forgeries and that upon such charge the Court was bound under the last paragraph of Article 366 of the Ottoman Code of Criminal Procedure to give a preliminary decision whether to proceed with the case or to postpone it pending a trial on the charge of forgery.

It has also been argued in the alternative that the verification of the handwriting and signature ought to have been referred by the Court to a Committee of Experts.

We are unable to trace any reference in the proceedings to any charge of forgery and it is obvious that unless there is an explicit charge of actual forgery of the documents or at least of using them knowing them to be forged levelled against a particular

person, no proceedings could be instituted and hence there was no occasion for an adjournment and no need for a preliminary decision by the Court on the matter. The criminal proceedings instituted against one Diskin in connection with these documents were not concerned with forgery but were on a charge under Article 233 of the Ottoman Penal Code for trying to obtain money by means of tricks and swindles; but even if it were assumed that the first Appellant in the Court below attributed the forgery to Z. Diskin, as he does now, the fact that the Court proceeded with the case without adjourning is sufficient to indicate to us that it decided so to do, and the lack of a formal decision on this point is not of a nature to invalidate the proceedings.

On the alternative point, we know of no authority in Criminal Law under which the Court of Trial was bound to refer to a Committee of Experts the verification of the disputed signature and/or hand-writing. In the course of proceedings against the accused for arson two documents of relevance to the case were produced by the prosecution through one of its witnesses, Diskin, which purported to be written and signed respectively by the first Appellant. The latter denied any knowledge of the documents. The prosecution tendered evidence to prove their genuineness. Unreliable as he seems to us to be, the Court believed the evidence of Diskin and his evidence was supported by the evidence of an expert witness for the prosecution which the Court also believed. The learned judges also relied on their own eyes. An opportunity was given to the accused to rebut the evidence for the prosecution which he did by producing expert evidence in his favour. The Court of trial however, did not believe it. This is conclusive, as we cannot interfere with a question involving the credibility of witnesses.

We hold that there was before the Court sufficient evidence, which they believed to justify the conviction arrived at as regards the genuineness of the writing attributed to the first Appellant. We further hold that there was before the Court sufficient evidence to justify the conviction of all the three Appellants.

For these reasons the appeal must be dismissed with costs and the convictions and sentences must be affirmed.

Delivered the 17th day of November, 1932.

JUDGMENT OF MR. JUSTICE KHAYAT.

This case turns on the point that there are two documents which are alleged to be forged and in respect of which the Court

of trial heard evidence. It is argued that the last paragraph of Article 366 of the Criminal Procedure Code requires the Court to refer the matter of forgery for investigation and keep the case pending the result of the investigations. The wording of the said paragraph, its origin and the commentaries on the subject do not say that the Court must keep a criminal case pending for the result of the investigation. But the preferred opinion is that if the allegation of the Plaintiff, on the face of it, is found to be true, the procedure would be to refer the matter for investigation.

In the case before us a charge is filed in the British Magisrate's Court in respect of the genuineness and the use of the two documents under Article 233, Ottoman Penal Code, which charge would require an inquiry as to the validity of the said documents.

Whereas this charge is still pending, and whereas, if a judgment be given by the Court of Appeal it will terminate the proceedings in the said charge and would render it chose jugé;

And whereas that charge if tried first will have bearing on this case;

Therefore I am of opinion that the judgment of the lower Court should be set aside and the case remitted to be re-tried after a decision has been passed on the charge against Z. Diskin.

EASEMENT.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 20/27.

BEFORE:

Baker, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Tewfiq Haddad — APPELLANT.

vs

Haj Husein Bakeer — RESPONDENT.

Application to enjoin passage over certain road — Plea of title to right of way—Jurisdiction of Land Court to hear action concerning right of way—Section 2 (d), Land Courts Ordinance, 1921.

JUDGMENT.

The Appellant, in his original action before the Land Court of Haifa, applied, inter alia, that the Respondent be prevented from passing over a certain road. Respondent alleged that Appellant

did not possess the road or alternatively that the Respondent had a right of way over the said road, thereby disclosing an action of title to a right of way.

The Land Court dismissed the action on the ground that the cause of action was not within their jurisdiction.

However, by a decision of the Court of Appeal in Land Appeal No. 139/1926 it was decided that Section 2 (d) of the Land Courts Ordinance, 1921, must be construed to include "rights of way" and that therefore such claims are within the jurisdiction of the Land Courts.

We accordingly quash the judgment of the Haifa Land Court and return the case for trial.

Delivered the 2nd day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 87/27.

BEFORE:

The Senior British Judge, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Shukri Aref el-Ghussein — APPELLANT.

vs

Abraham Schwartz — RESPONDENT.

Alleged user of land for period over ten years — Ab antiquo user of land — Declaratory judgment requested re right of way — Article 13, Land Code.

Appeal from the judgment of the Land Court of Jaffa, dated the 21st day of June, 1927.

JUDGMENT.

The Appellant Shukri Aref el-Ghusseini claims a declaration that he is entitled to a right of way from his property to the public road over land of which the Respondent is the owner.

The claim is based on alleged user of the right for a period of more than ten years.

The Land Court has heard the evidence of witnesses among others Mr. Eisenberg, the Respondent's predecessor in title, who testified that he first made the road over which a right is claimed, for his own convenience and that adjoining owners had no right over it.

Where a claim to a right of way based on user, it is clear from Article 13 of the Land Code that such user must be ab antiquo.

Such user has not been established in this case and the appeal must be dismissed with costs, and advocate's fee of £P. 3.

Delivered in presence the 23rd day of January, 1928.

ELECTIONS.

In the High Court of Justice.

H. C. No. 54/26.

BEFORE:

The Chief Justice and Corrie, J.

IN THE CASE OF:

Saadia Shoshani & Morris Meoden, both in their capacity as private citizens of Tel Aviv and as representatives of the Landlords of Tel Aviv — PETITIONERS.

vs

Council of Tel Aviv Township — RESPONDENTS.

Term "rate-payer" defined in accordance with English law — Interpretation of Statutes—Ordinary and actual sense of word used in law — Principles of taxation — New principles of law cannot be introduced by subordinate bodies like Municipal Councils—Progressive rating held to be ultra vires and unlawful — Levy of House Rate, Cleaning Rates, and Water Rates — Municipal Councils Validation Ordinance, 1925.

PRELIMINARY JUDGMENT.

The term rate payer is taken from English Law and should be interpreted in the English sense. We do not find any general definition in the authorities we have had the opportunity of consulting but we do find that in English the term rate is always used in relation to some rate or tax levied on owners or occupiers of immovable property. If it was intended to give the franchise to all persons paying any sort of tax or imposition of a public nature the Township Order would have said so. As it used the word rate payer we must assume that it used it in the only sense in which that word is actually employed.

We then come to consider whether the word includes all persons liable to pay or only those who do actually pay, and as we have been asked to give a definition we are inclined to take the larger view. We include for the purpose of voting at Township elections all persons of either sex who are of or over 21 years of age and are liable to pay or do actually pay rates assessed on immovable property, whether as owners or occupiers.

Mr. Gorodisky at this point states that he is instructed not to proceed any further in his application on the undertaking given by the Respondent which Mr. Dunkelblum offers that new elections shall take place in October next.

No order.

Delivered the 30th day of July, 1926.

JUDGMENT OF THE CHIEF JUSTICE.

I am of the same opinion as my brother Corrie in all but one matter and that is the charges of rates on different scales to persons who occupy a greater or less number of rooms. That a man who occupies two rooms should be charged twice as much as one who occupies one is not unsound because it is an attempt to fix the charge in accordance with the value of the service rendered. But when the Council charges a man who occupies two rooms not only twice as much but also on a scale higher than that charged to a man who occupies one room, that is an attempt to introduce a fresh element into rating. Such fresh element has been used in England in charging persons for income tax, but that was a change in the principle of taxation which was introduced by legislature. It is not within the power of subordinate bodies to introduce new principles of taxation. They are bound to work on recognized lines until the principles that regulated their action are changed by law and in my opinion it was not within the powers of the Local Council to introduce nor for the District Commissioner to sanction any change so important as this system of progressive rating.

Moreover, this is not an attempt to fix the rate according to the service rendered but to obtain something less or something more on some other ground which appeals to the local governing body.

I therefore hold that the progressive rating is unlawful and should be disallowed. It must also be borne in mind that these special service rating are only payable by the persons actually enjoying the service.

No orders as to rates for special services rendered.
Order disallowing progressive rates for a house tax.

JUDGMENT OF MR. JUSTICE CORRIE.

Objection has been taken by the petitioners to the manner in which the Local Council of Tel Aviv seeks to levy:—

(a) House rate
(b) Services rate for cleaning and
(c) Water rate.

"The rates, taxes, and fees" which the Local Council has power to levy are enumerated in Section 5 of the Order dated 11th May, 1921, constituting the Local Council.

(a). As regards house rate the Local Council is bound by the terms of Sub-Section (a) of that Section which gives it power to levy:—

> "A house tax assessed on the rental value of the property at a rate not exceeding 12½% payable in accordance with the regulations for the payment of house rate in force from time to time".

The regulations for the payment of house rate now in force appear to have been contained in instructions issued by the Military Administration dated 14th January, 1919, No. 3026/F. No copy of these instructions is before this Court, but the practice based upon them is not disputed. Rates are levied in accordance with the annual value of the property on a uniform scale and not upon a scale graduated according to the value of the property. This practice has been given legislative authority by the Municipal Councils Validation Ordinance, 1925. Hence the rate which the Local Council proposes to collect upon a graduated scale is ultra vires and in respect of this rate the Order which the Petitioners seek must issue.

(b) and (c). Services rate and water are governed by Sub-Section (g) of Section 5 of the Order.

> "Rates for services of lighting and water and other services provided by the Council payable by persons enjoying such service".

The Sub-Section makes no reference to any regulations for the time being in force nor indeed are there any general regulations applying to such services.

Subject, therefore, to the condiction that the rates are approved by the District Commissioner under Section 4 of the Order there would appear to be no objection to the leaving of services rates on a graduated scale upon the persons enjoying such services.

As regards the services rate for cleaning therefore and the water rate the petition must in my opinion be dismissed.

Delivered the 1st day of October, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 17/28.

BEFORE:

The Chief Justice, Corrie, J. and Khayat, J.

IN THE CASE OF:

'Abdel Nur, Isma'il aby Lutfi — APPELLANTS.

vs

Suria El-Shawa — RESPONDENT.

Appeal from Magistrate sitting in appellate capacity—Application for inclusion of name in electoral voters' list—Municipal Franchise Ordinance, 1926—Jurisdiction of Magistrate—Leave to appeal from judgment of Magistrate granted by President District Court—Sec. 3, Magistrates' Courts Jurisdiction Ordinance, 1924 — Jurisdiction of President, District Court to grant leave to appeal—Interpretation of Statutes— Court not to speculate on intention of Legislature.

JUDGMENT OF THE DISTRICT COURT.

This is an appeal from a decision given by the Magistrate of Gaza on an application submitted by the Appellant that his name be included in the electoral voters' list for the municipality of Gaza. The electoral committee appointed to prepare the voters' list has excluded the Appellant's name and under Section 7 of the Municipal Franchise Orninance, 1926, he made an application to the Magistrate to reverse the decision of the committee. The Magistrate dismissed this application and it is from that dismissal that this present appeal is made.

The first point which arises is does an appeal lie from the Magistrate in this case. The jurisdiction of the Magistrate is laid down by the Magistrates' Courts Jurisdiction Ordinance, 1924, which Ordinance also defines the conditions under which an appeal may be made from a magistrate. Section 4 Sub-Sec. 5 of this Ordinance

says that leave to appeal may be granted by the President of the District Court in any case in which an appeal does not lie as of right. But the jurisdiction of the magistrate is limited to the types of cases and of offences which were in existence at the time that this Ordinance became law. Fresh types of offences, are continually being added and created and the magistrate's jurisdiction is extended accordingly and the right of appeal also extends by this Ordinance and I can see no reason why the right to grant leave to appeal should be restricted to such cases as are mentioned in the Magistrates' Courts Jurisdiction Ordinance, only. Unless the right to grant leave to appeal by a President of a District Court is restricted by statute, then this right exists. We are unanimously of opinion that right to grant leave to appeal does exist in this case and that leave having been granted by me the appeal is in order.

I now turn to the subject matter of this appeal. Section 3 (d) of this Municipal Franchise Ordinance reads as follows:— "Every male person who has within the period of 12 months preceding the date of preparation of register of voters, paid taxes to an annual amount of at least P.T. 50 upon immovable property owned by him within the municipal area on which municipal rates to an amount of at least P.T. 100 are paid, or is at the date of this Ordinance a separate occupant of premises within the municipal rates to an amount of at least P.T. 100 have been paid within the preceding 12 months shall be entitled to vote"..... The only point that arises in this is,- is a person who has paid as municipal rates P.T.100 during the preceding year entitled to be entered on the list of voters or must this payment have been made in respect of rates during the preceding years? We must examine the wording of the Ordinance very carefully and we find the law states that the taxes upon immovable property must be an "annual amount" of P.T.50 while in the case of municipal rates it states that they must be to an amount of P.T.100 and the word "annual" in front of the word "amount" was intended to be inserted by the legislature, but it is a strange thing to read into an Ordinance, words which are not there and in the absence of clear necessity it is a wrong thing to do (per Lord Mersey, Thompson v. Gould 79 L. J.K.B. 94). Here there is no necessity because they make sense as they stand. The principle of interpreting an Ordinance is that the meaning and intention must be collected from the words used therein rather than from any notions which may be entertained by the Court as to what is just, or in other words, a Court is not at liberty to speculate on the intention of the legislator and to

construe an Ordinance according to its own notions as to what ought to be enacted. To do so would be not to construe an Ordinance but to alter it. If the legislature had intended that qualification in respect of municipal rates was to be an annual payment then it could have said so.

We are therefore of opinion that the Magistrate was wrong and his decision must be set aside. We declare that the Appellant is entitled to have his name placed upon the Electoral List of the Municipality of Gaza.

This is a test case and I understand that there are some 200 similar cases pending. The Electoral Committee should follow this ruling in regard to such pending cases.

Special leave is given to the third party to appeal to the Supreme Court on the following point of law:—

Upon the true construction of Section 3 (d) of the Ordinance, is a person entitled to vote who has paid P.T.100 during the preceding years as municipal rates, or must the payment have been made in respect of rates arising during the preceding year.

The Respondent must pay the costs of the Appellant both here and below.

Dated the 8th day of February, 1928.

JUDGMENT.

The first point which we have to decide in this case is whether there is any appeal from a decision of a Magistrate's Court under Section 7 (2) of the Municipal Franchise Ordinance (No. 45) of 1926, which deals with corrections by the Magistrate's Court of the Registers of voters settled in each Municipality by the Electoral Committee.

The Respondent relies upon the fifth paragraph of Section 3 of the Magistrates' Courts Jurisdiction Ordinance, 1924, which lays it down that leave to appeal may be granted by the President of the District Court in any case in which an appeal does not lie as of right. The section, it should be noted, is concerned throughout with appeals from the Magistrates' Courts sitting as a Court of first instance. In our opinion the fifth paragraph must be read in connection with the remainder of the section, especially the first and fourth paragraphs. The first of these gives a right of appeal in

criminal cases if the penalty exceeds a fine of ten pounds or imprisonment exceeds fifteen days; the fourth paragraph gives a right of appeal in civil cases where the value of the subject-matter is not less than £.20.

The result then, as we conceive it, is that the President of the District Court may grant leave to appeal in criminal cases even though the penalty does not exceed ten pounds or fifteen days' imprisonment, and in civil cases even though the value of the subject-matter is less than £.20.

The jurisdiction of the Magistrates' Court in appeals from Electoral Committees cannot be said to come within either of these heads and the direction in Section 7 (2) that the Magistrate's Court shall decide the appeal within 15 days of its entry is clear indication that the intention of the Legislature was that the register should be settled with the least possible delay. The precisely opposite consequence would follow the contention of the Respondent, if it were correct, for there would be appeals from the Magistrate's Court to District Court, with no limitation of time within which the appeal was to be decided, that the same would be true of appeals from the District Court to the Supreme Court.

In these circumstances the insertion of a direction that the appeals should be heard by the Magistrate's Court within fifteen days of its entry could do little to accelerate the final decision, since delays could occur in the appeals to the higher Courts.

The object of the provision can only be to prevent a register, incorrect through the improper presence on it or absence from it of names, being, when an election comes on, in force owing to there being still sub judice on appeal, claims for or against the inclusion of names.

For these reasons judgment must be given for the Appellant. It is unnecessary for us to deal with the point raised in the second part of the learned President's judgment.

Delivered the 7th day of March, 1928.

In the High Court of Justice.

H. C. No. 21/32.

BEFORE:

The Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

David Krubi — PETITIONER.

VS

District Officer, Jaffa, in his capacity of Returning Officer, and Chairman of the Electoral Committee for the Local Council of Tel-Aviv — RESPONDENTS.

Right to be registered as a voter — Application to High Court for order against District Officer in his capacity of Returning Officer — Section 6, Courts Ordinance, 1924 — Jurisdiction of High Court in application not within the jurisdiction of any other Court — Article 43, Palestine Order-in-Council, 1922 — Finality of decision of Electoral Committee — Jurisdiction of High Court not barred by provision in Ordinance — Joint occupancy of premises for purposes of registration as a voter — Sub-tenant or lodger held to be joint tenant — "Occupier" defined.

JUDGMENT OF MR. JUSTICE McDONNELL.

I am satisfied that whether or not we are concerned with a request for an order directed to a public officer or a public body in regard to the performance of their public duties, as contemplated by Section 6 of the Courts Ordinance, 1924, the present application is one not within the jurisdiction of any other Court and necessary to be decided for the administration of justice, and is, in consequence, one within the contemplation of Article 43 of the Palestine Order-in-Council.

I am further satisfied that the provision in Section 4 (3) of the Schedule to the Order under the Local Councils Ordinance of the 11th October, 1928, which provides that the decision of the Electoral Committee of Tel Aviv, as to the names to be included in the Register, shall be final, does not exclude the jurisdiction conferred upon the High Court by the above cited article of the Palestine Order-in-Council.

The second Respondent in this case, as Chairman of the Electoral Committee for the Local Council of Tel-Aviv is summoned to show cause why the Electoral Committee should not include in the Register of Voters the name of the Petitioner, who has occupied during the course of the year in question one room in two successive flats in the occupancy of one Dr. Sinai.

The application is made under the last paragraph of Section 1 of the Schedule to the Order of the High Commissioner of 11th October, 1928, dealing with the Local Council of Tel-Aviv, made under the Local Councils Ordinance, 1921. The paragraph in question runs as follows:—

> "Where land or premises are in the joint occupancy "of two or more persons, each of the occupiers shall, for "the purpose of registration as a voter and of enjoying the "right of voting, be treated as occupying the premises, provided "that the amount of rates paid in respect of the land or "premises when divided between the joint occupiers is such "as to give a sum of not less than 500 mils for each occupant".

There is no dispute as to the fact that a sum of more than 1,000 mils has been paid by way of rates in respect of the flats in which the Petitioner has occupied one room and Dr. Sinai has occupied the remaining rooms. What we have to decide is whether a sub-tenant or lodger, such as the Petitioner, can be held to be a joint occupier with the landlord of his lodging.

The arguments of counsel on either side have not been of great assistance to us inasmuch as they have given us no authority as to the interpretation of the words "joint occupancy" or "joint occupier", occurring in statutes of the Imperial Parliament, and have contented themselves with arguments based upon the meaning of the term "joint tenancy" and the applicability or non-applicability to the paragraph in question of the definition of the word "occupier" occurring in the Order of the 31st July, 1929, which relates to the levying of rates by the Local Council of Tel-Aviv.

Expressions relating to joint occupancy occur in several British Franchise Acts, e.g.:—

Section 6 (3) of the Parliamentary and Municipal Registration Act, 1878, 41 and 42 Vict. Cap. 26, refers to cases "where lodgings are jointly occupied by more than one lodger".

I have, moreover, found a decision in the English reports, which appears to me to put the matter beyond argument, based upon the interpretation of the Representation of the People Act, 1867, 30 and 31 Vict. Cap. 102.

Section 3 of the Act in question provides that every man shall be entitled to be registered as a voter who is qualified in one or other of certain modes, and then follows this proviso: "provided that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling house".

In the case of Brewer v. McGowen (1869), 5 C. P., page 239, it was held that a person otherwise qualified did not become a joint occupier within this proviso, and so lose his qualification, by letting to a lodger the exclusive use of a bedroom and the joint use of a sitting room. In the case in question the bedroom, which the lodger occupied, was a furnished bedroom. In the present case the lodger occupied a single unfurnished room.

It appears to me that if the landlord of lodgings under the English statute does not become a joint occupier and so lose his qualification by letting to a lodger not merely the exclusive use of a furnished bedroom, but also the joint use of a furnished sitting room, by a parity of reasoning a lodger cannot, under the Order which we have to interpret, become a joint occupier and so claim a qualification by having had let to him by the landlord of his lodgings the exclusive use merely of an unfurnished room.

For this reason I hold that the Rule Nisi must be discharged with costs to include £P. 2 advocate's fee.

JUDGMENT OF MR. JUSTICE FRUMKIN.

In concurring with the judgment of the learned Chief Justice, I would like to add that the interpretation given to the meaning of "joint occupancy" and "joint occupier" in the sense that these terms do not include sub-tenants and lodgers is also the most suitable interpretation corresponding to what could, to my mind, be the only intention of the legislator.

The grant of franchise to sub-tenants and lodgers involves numerous questions both of principle and technicalities which would normally have been dealt with in an enactment granting such franchise. To start with, a definition as to who is a sub-tenant or lodger; is there a difference to be drawn between occupiers of furnished and unfurnished rooms; is occupation for any given period at one particular place requisite for obtaining the qualification of franchise; and finally, what are the measures of control as regards persons who by the nature of the accommodation selected are likely to move about from place to place quite frequently. The absence of any particulars regarding these and similar questions in the Schedule to the Order of 1928 clearly indicates that it could not have been the intention of the legislator to include sub-tenants and lodgers in the term "joint occupier" of the last paragraph of Section 1 (e) of the said Schedule.

Delivered the 7th day of April, 1932.

In the High Court of Justice.

H.C. No. 22/32

BEFORE:

The Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

Nathan Sharf — PETITIONER.

vs

Returning Officer for the Elections to the Local Council of Ramath Gan
Chairman of the Electoral Committee for the Local Council of Ramath Gan — RESPONDENTS.

Failure of Electoral Committee to include name in Register of Voters—Qualification of voter by payment of poll tax—Jurisdiction of High Court—Time for payment of poll tax—Local Councils Ordinance, 1921—Approval of District Commissioner of appointment of Electoral Committee—Levy of discriminatory tax by Local Council on some residents in a community.

JUDGMENT.

This is a return to a rule, directed to the Electoral Committee of the village of Ramath Gan, calling upon them to show cause why the name of the Petitioner should not be inserted in the Register of the Local Council of that village.

The Petitioner claims to have paid, to the amount of £P.1, poll tax levied under the authority of Section 5 (a) of the Order, under the Local Councils Ordinance, 1921, made on the 10th March, 1926, and he claims further that this poll tax was paid during the twelve months before the appointment of the Electoral Committee and that, in consequence, under Section 1 (e) of the Schedule to the Order under the Local Councils Ordinance, 1921, made on 28th October, 1931, and published in Gazette of 16th November, 1931, he is entitled to vote in the election of members of the Local Council of the village in question.

In the first place, on the authority of High Court No. 24 of 1932,* we are satisfied that the High Court has jurisdiction in this matter.

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* See post page 743.

It is urged that the payment of poll tax which was made by the Petitioner, though it conforms to the amount prescribed by the Order of the 28th October, 1931, was not paid during the prescribed time, namely, during the twelve months before the date of the appointment of the Electoral Committee.

Section 4 (1) of the Schedule to the last-named Order lays it down that the Local Council, with the approval of the District Commissioner, shall appoint an Electoral Committee from among the persons who are entitled to vote.

The payment in question was made on the 3rd December, 1931. On 30th November, 1931, the Local Council nominated certain voters to form an Electoral Committee. The District Commissioner approved the names of the nominees on the 12th January, 1932.

It appears to us clear that Section 4 (1) of the Schedule to the Order of the 28th October, 1931, requires the approval of the District Commissioner to be antecedent to the Electoral Committee having any powers and that therefore the date of "appointment" of the Electoral Committee, under Section 4 (1) must be subsequent to the approval of the District Commissioner.

This being so it is quite clear that the payment of the £P.1 by the Petitioner on account of the poll tax was during the twelve months before the date of the appointment of the Electoral Committee.

A further ground urged by the Respondents against the Petitioner is that although it is admitted that the Petitioner paid £P.1 poll tax and was given a receipt for it by the clerk of the Local Council, on the 3rd December, 1931, the tax was not due from him as contemplated by Section 1 (e) of the Order inasmuch as such tax had not been levied.

It is quite clear that under Section 5 (a) of the Order of the 10th March, 1926, the Local Council are entitled to levy a poll tax, and we have not doubt, after examining the budget of the revenue and expenditure of the Council, which has been produced by the District Commissioner, having been submitted to him for approval, under Section 4 of the Order of 10th March, 1926, that a poll tax has been in the past levied from persons having a right to vote in the village of Ramath Gan.

The estimates of revenue for 1930 and 1931 both contain estimates of the amount expected to be received in virtue of poll tax. It has been argued on behalf of the Electoral Committee that in comparing the amounts included in these estimates under the head of poll tax with the number of adults in Ramath Gan it would appear that it was not the intention to levy that tax from all the residents of Ramath Gan and that it was therefore a discriminatory tax which the Local Council could not be allowed to levy. There might be something in this argument if it were brought forward by a resident refusing to pay such tax on the ground of discrimination: but this argument can clearly not be seriously advanced by the Electoral Committee which derives its authority from the Local Council if the Council has for some reason or another chosen not to levy the tax from all the residents but from a part of them.

We heard contradictory evidence as to whether such a tax had in fact been imposed since the year 1927, but we would refer to our decision in High Court No. 24 of 1932 on the interpretation of Section 1 (e) of the Schedule to the Tel Aviv Local Council Order of the 11th October, 1928, which though not in exactly the same words, is to the same effect as Section 1 (e) of the Schedule to the Ramath Gan Local Council Order of 28th October, 1931. In that case we held that in the absence of words, in the Order creating the franchise, expressly requiring the payments of rates or taxes to the prescribed amount to be in respect of the current year, a payment within the prescribed year of rates or taxes to this amount, no matter when they accrued due, would secure the franchise.

This being so, even if the amount paid by the Petitioner was in respect of poll tax due ever since the year 1927, the fact that he has paid it and that it has been received by the Local Council puts beyond doubt the fact that he is entitled to have his named placed upon the Register.

The Rule, therefore, must be made absolute with costs to include £P.4 advocates' fees.

Delivered the 15th day of April, 1932.

In the High Court of Justice.

H. C. No. 23/32.

BEFORE:

The Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

Binyamin Kaufman — PETITIONER.

VS

District Officer, Jaffa, in his capacity of Returning Officer, Chairman of the Electoral Committee for the Local Council of Tel-Aviv — RESPONDENTS.

Failure of Electoral Committee to include name in Register of Voters—Qualification of voter by payment of rates and taxes—"Water Rates" held to be included within the term "rates and/or taxes"—Payment for water held to be municipal tax — Rights of Local Council to levy rates for services, etc. —Interpretation of Statutes—Statute to be construed so that no clause, sentence or word is superfluous—Same words to be construed in same sense in different parts of the Statute—Words in pari materia.

JUDGMENT.

In this case the Petitioner asks for an order directing the Electoral Committee of Tel-Aviv to include his name in the Register of Voters.

He claims to be a person who, under Section 1 (e) of the Schedule to the Order under the Local Councils Ordinance, of the 11th October, 1928, has, within the prescribed period, paid rates and taxes due from him to the Council to the amount of 500 mils and he claims to be thereby entitled to vote at the election of members to the Local Council of Tel-Aviv.

It is not disputed that the Petitioner has paid a sum of 750 mils to the Local Council for the year 1931. Of this sum 480 mils is an impost in respect of education and hospitals and 270 mils is in respect of water rates. If, therefore, water rates are not included within the term "rates and/or taxes" employed in Section 1 (e) of the Schedule to the Order of 11th October, 1928, the consequence follows that an amount of 500 mils has not been paid by the Petitioner and that, as a result, he is not entitled to be placed on the Register of Voters.

The argument of the Electoral Committee in excluding the Petitioner's name from the Register of Voters is that payments for

water are not in the nature of a municipal tax but are payments for goods supplied to which all the inhabitants of the township are not liable, since in one part of Tel-Aviv the water is taken not from the Municipality but from Rutenberg's Works, while in another quarter municipal water has only been supplied for the last year. Again, it is said that some residents in Jaffa get water from Tel-Aviv and that some Tel-Aviv residents pay for water according to the amount supplied measured by meter.

We have, however, to look in the Orders governing the grant of the franchise.

Under Section 1 (e) of the Schedule to the Order of the 11th October, 1928, the payment of rates and/or taxes to the prescribed amount, other things being equal, secures a vote. We must then see what are the rates and what are the taxes which the Council levies. Under Section 5 (1) of the Order of the 11th May, 1921, published in the Gazette of the 1st June, 1921, the Council is empowered to levy certain taxes, rates and fees on property and persons within the area of the township. The only imposts entitled "rates" in the different categories there enumerated are rates for services of lighting and water and other services provided by the Council, which can be imposed under Section 5 (1) (g).

This subsection has been repealed and replaced by Section 2 of the Order under the Local Councils Ordinance of 27th June, 1929, which provides that "the Council may levy rates for services of lighting and water, and other services provided by the Council, other than scavenging and general purposes of the Local Authority, payable by persons enjoying such services".

Section 5 (1) of the Order of 1921 enables the Council to levy certain taxes, entitled respectively a house tax, an undeveloped land tax, an education tax, a shop, hotel and business premises tax and a road improvement tax. In addition to these, Section 5 (1) enables the Council to levy a building licences fee and a Public Health licences fee. The only imposts entitled "rates" which it or the amending Order of 1929 contemplate are rates for services of lighting and water and other services other than scavenging and general purposes of the Local Authority.

In the interpretation of a statutory order, such as this, we have to be governed according to the words of Cockburn, C.J. in Reg. v. Bishop of Oxford (1879), 4 Q. B. D. at page 261, by

"A settled canon of construction, namely, that a statute "ought to be so construed that, if it can be prevented, no "clause, sentence, or word shall be superfluous, void, or "insignificant."

This being so, we must, in the Order of 1928, give a meaning to the word "rates" different from that which is applied to the word "taxes".

Again, it is a general rule in the construing of statutes that the same words must be prima facie construed in the same sense in different parts of the statute. It may be said that we are dealing here with two separate orders: one made in 1921 and another in 1928, but it must not be forgotten that the legislator in Section 2 of his Order of 27th June, 1929, in repealing and replacing Section 5 (1) (g) of the Order of 1921, still continued the use of the word "rates" nominatim for services of lighting and water and for these alone.

It was said by Lord Esher in Hodgson v. Bell (1890), 24 Q.B.D. at p. 528, "It is a clear rule of construction that where you find a construction has been put upon words in a former Act which is in pari materia with the one under consideration, and when you find that the same words are used in the later Act as in the former, you must apply the same construction to the later Act".

The payment of the fees prescribed by the Order of the 1st June, 1921, clearly cannot entitle a resident to vote, for "fees" are not mentioned in Section 1 (e) of the Schedule to the Order of 1928; but if we hold that the payment of water rates levied by the Council do not entitle a resident to vote while the payment of taxes do so entitle him, we shall be so construing Section 1 (e) of the Schedule to the Order of the 11th October, 1928, that the words "rates" occurring therein are rendered void, and, at the same time, we shall be applying a different construction to the word "rates" in two orders in pari materia.

For these reasons we are of opinion that the Rule Nisi must be made absolute, with £P.2 advocate's fee and costs.

Dated the 7th day of April, 1932.

In the High Court of Justice.

H.C. No. 24/32.

BEFORE:

The Chief Justice, and Frumkin, J.

IN THE APPLICATION OF:

Yehuda Horin — PETITIONER.

vs

District Officer, Jaffa, in his capacity of Returning Officer,
The Chairman of the Electoral Committee for the Local Council of Tel-Aviv — RESPONDENTS.

Name not included by Electoral Committee in Register of Voters—Qualification of voter under Local Councils Ordinance, 1928—Payment of rates and/or taxes within first 12 months preceding date of appointment of Electoral Committee — Interpretation of Statutes—Sensible meaning of words of enactment to be given them.

JUDGMENT.

In this case the Petitioner asks for a rule to be directed to the Electoral Committee of Tel-Aviv, ordering them to include his name in the Register of Voters, inasmuch as he claims to be qualified under Section 1 (e) of the Schedule to the Order under the Local Councils Ordinance dated 11th October, 1928.

The point in dispute is confined within very narrow limits, concerning the Petitioner's qualification under Section 1 (e) of the Schedule. This subsection runs as follows:—

> "Every male or female person who has, within the "period of 12 months preceding the date of the appointment "of the Electoral Committee, paid rates and/or taxes due "from him to the Council to an amount of at least 500 "mils, shall be entitled to vote in the election of members "of the Council of Tel-Aviv".

It is not in dispute that the Petitioner has within 12 months paid sums due from him to the Council amounting to 500 mils, but the payment which he made was not in respect of the current year but in respect of 1929. He paid this sum two years in arrear, and though he has remained a resident within the township,

having become a lodger, he has not been liable for any amount in respect of the years 1930 or 1931.

The view taken by the Electoral Committee is that the sub-section in question must intend the qualification to be acquired only by the payment of rates and/or taxes due in respect of the current year and that the payment, such as this, of arrears of rates and/or taxes, due in respect of a previous year, does not constitute a qualification.

We have, however, to look at the words used in the enactment in question and if they are capable of a sensible meaning we cannot read into them other words. In effect, what the Electoral Committee ask us to do is to import into the section the words which, in a similar connection, occur in Section 2 of the Municipal Franchise (Amendment) Ordinance, 1926, No. 46 of 1926, where it is provided that "any person . . . . who has paid . . . . taxes . . . . to an amount of at least P.T. 50 in respect of the current financial year shall be entitled to vote.

In was said by Lord Mersey in Thompson v. Goold (1910), 79 L.J.K.B., p. 911: "It is a strong thing to read into an Act of Parliament words which are not there and, in the absence of clear necessity, it is a wrong thing to do.

The result of holding that the Electoral Committee is wrong may lead to some unexpected consequences, such, for example, as the right of a person owing arrears of rates or taxes amounting to, let us say, several pounds, to secure a vote by paying only 500 mils, while still remaining a debtor to the Council in respect of the balance of what is due. The remedy, however, is not for us but for the Legislature.

We must construe the order as it is, without regard to the consequences.

The Rule Nisi is to be made absolute with £P. 2 advocate's fee and costs.

Delivered the 7th day of April, 1932.

EQUITABLE RIGHTS.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 102/24.

BEFORE:

The Senior British Judge, Khaldi, J. and Khayat, J.

Immovable property leased for ten years—Transfer made by owner of land to two different transferees—Title under Ottoman law of transferee under later registered transfer—Interest of unregistered purchaser of immovable property—Regard of Court to equitable rights in land—Sec. 7 (1), Land Courts Ordinance, 1921—Rights of purchaser without notice of prior equitable title—Effect of entry of caveat—Presence of facts which would have put reasonable purchaser on enquiries held to constitute notice.

JUDGMENT.

The Respondent Sara bought the property in dispute from the Appellant Rahel by unregistered deed.

On the following day, the Respondent's husband took a lease of the same property from the Appellant Rahel for a term of 10 years, the rent for the whole period being expressed to have been paid in advance.

From that date, the Respondent and her husband have been in occupation of the house, or in receipt of the rents and profits.

By a transfer registered in the Land Registry on the 20th June, 1922, the Appellant Rahel transferred the property to the Appellant Izhak by a registered transfer on sale.

It has been held by this Court in cases in which both transactions took place before the British Occupation, that a transferee under a later registered transfer got a good title to the immovable property transferred as against a purchaser under an earlier unregistered deed, irrespective of whether the registered transferee had notice of the earlier transaction or not, as by Ottoman Law the effect of the registered transfer was to destroy any interest that the unregistered purchaser might have in the immovable property.

We hold, however, that this principle does not apply to a case in which the registered transfer was not made until after the issue of the Land Courts Ordinance, 1921.

Section 7 (1) of that Ordinance provides that "The Courts shall have regard to equitable as well as to legal rights in land and shall not be bound by any rule of the Ottoman Law prohibiting the Courts from hearing actions based on unregistered documents". It is clear that the purchaser under the earlier registered document had an equitable title to the property.

If, however, the subsequent registered transferee bought without notice of the earlier transaction no equitable unregistered claim can be set up against him. The rights of the parties therefore depend upon the answer to the question; Had the Appellant Izhak notice when he purchased of the sale to the Respondent, or if he had not actual knowledge of it, were there facts which would have put a reasonable purchaser upon enquiries which would have led to his discovery of the earlier transaction.

The lease for 10 years to the Respondent's husband does not expire until 1926 and as the Appellant Izhak has made no attempt to get possession of the property or of the rents, it is to be inferred that he had notice of the lease. Notice of the lease, however, is not notice of the sale to the Respondent.

There is also the fact that under an order from the District Court dated 22nd May, 1932, a caveat was entered on the Register against any dealing with the property for a period of 15 days, to enable the Respondent to bring action to prove her title.

At the date of transfer to Izhak, the 15 days had expired and the Respondent had not commenced an action.

Nevertheless the fact that a caveat in favour of the Respondent had been entered would be apparent on inspection of the register, and would reasonably give rise to enquiry by an intending purchaser.

I hold that the Appellant Izhak must be held to have had notice of any fact that would have been disclosed if he had made the proper enquiry, and that in consequence he took a transfer with notice, actual or constructive, of the sale of the Respondent.

Hence as against the Appellants, the Respondent is entitled to registration as owner upon payment of the prescribed fees.

The appeal is dismissed with costs.

Delivered the 15th day of July, 1925.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 91/26.

BEFORE:

The Chief Justice, Corrie, J. and Frumkin, J.

IN THE CASE OF:

Shukri Kerdahy — APPELLANT.

vs

Madam Y. Tempelton — RESPONDENT.

Contract for sale of land made before the British Occupation — Long possession of land as licensee of owner—Limitation of actions—Alternative plea of prescription—Equitable rights in land—Application of Section 7 (1), Land Courts Ordinance, 1921 — Agreement to receive half share of land in consideration of planting and cultivating—Damages for non-performance of agreement.

Appeal from the judgment of the Land Court of Haifa, dated the 30th day of March, 1926, whereby Appellant's claim to half a share of certain land was dismissed with costs.

JUDGMENT.

The Appellant is applying for a declaration that he is entitled to registration as owner of one half of a certain piece of land, under a contract entered into by him on 12th February, 1900, with the Respondent, who held a power of attorney from the registered owner, Mr. Foster.

Alternatively, the Appellant claims the declaration on the ground of prescription.

With regard to the claim by prescription, all that need be said is that the Appellant's possession is based upon the contract between the parties and that he was in possession as the licensee of the Respondent.

On the 5th May, 1925, the Respondent became registered as owner of the property in dispute.

Since the commencement of this action the property has been transferred into the name of Miss F. E. Newton, who has been joined as a third party.

The contract was made before the British Occupation; and under Ottoman Law the Appellant could not obtain registration by virtue of such a contract.

The Appellant has thus to rely upon Section 7 (1) of the Land Courts Ordinance, 1921.

The Courts have, in certain cases, applied this Section in favour of the purchaser under an unregistered document, and have declared that, as against the vendor, the purchaser was entitled to registration.

In such cases, however, the whole or part of the purchase money has been paid and delivery of possession of the land made at or before the date of the deed; and the Court has been satisfied that the parties intended the transaction to be an out-and-out sale of the land, and not merely a preliminary to a registered sale at some later date.

In the present case, the consideration for the sale was not paid at the time of signing the contract: in fact the consideration was that the purchaser was to plant and cultivate the other half of the land on the vendor's behalf, for a period of five years, and the registration of the half share in the purchaser's name was postponed for that period.

The Respondent denies that the Appellant has performed the terms of the contract as regards cultivation.

In our opinion the meaning of the contract was that the registration in favour of the Appellant was to be conditional upon his performing to the satisfaction of the Respondent the conditions of the contract: and such an agreement is not of a kind to which the Courts will apply Section 7 (1) of the Land Courts Ordinance, 1921.

If the Appellant has any rights against the Respondent or Mr. Foster, they are to be enforced by an action for damages.

The appeal must be dismissed with costs.

Delivered the 15th day of February, 1927.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 83/27.

BEFORE:

The Senior British Judge, Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Mahmoud Said el Mousa — APPELLANT.

vs

Miriam Said Mousa — RESPONDENT.

Articles 3, 36, Land Code to be read subject to Section 7 (1), Land Courts Ordinance, 1921 — Equitable rights in land obtained by unregistered transaction in the nature of a gift — Rights under transaction based on unregistered documents.

Appeal from the judgment of the Land Court of Haifa, dated April 13th, 1927.

JUDGMENT.

The provisions of Articles 3 and 36 of the Land Code must be read subject to those of Section 7 (1) of the Land Courts Ordinance, 1921, which provides that the Courts:

> "Shall have regard to equitable as well as to legal rights to land, and shall not be bound by any rule of Ottoman Law prohibiting the Courts from hearing actions based on unregistered documents".

There can be no doubt that if the transaction upon which the Appellant relies had been a transfer for value, the Courts would give effect to it.

The only question to be decided therefore, is whether a different rule applies where the unregistered transaction is made by way of gift or transfer without consideration. We are unable to see any reason for so holding.

There is clear evidence that possession of five of the twenty-two plots claimed by the Respondent passed to the Appellant by virtue of the gift and was enjoyed by him during the lifetime of his father. As regards the remainder, the Court can give no judgment without action brought against the other registered owners or their heirs.

The appeal must be allowed, the judgment of the Land Court set aside and the Respondent's action dismissed with costs here and below.

Delivered in presence the 3rd day of November, 1927.

In the Land Court of Nablus.

L. Na. No. 29/29.

Claims of ownership in Wadi Hawareth Lands—Arts. 3, 115, Law of Execution—Rights of purchasers under Mortgage Sale—Equitable rights in land—Arts. 42, 46, Palestine Order-in-Council, 1922—Admission of doctrines of equity—Secs. 2, 7, Land Courts Ordinance, 1921—Estoppel by laches—Procedure on sale of mortgaged property in satisfaction of mortgage ordered under Sec. 13 (2), Land Transfer Ordinance, 1920-21—Provisional Law for the mortgage of Immovable Property—Sec. 7, Mortgage Law Amendment Ordinance, 1920—Effect of sale of mortgaged property—Defeasibility of purchaser's title.

INTERLOCUTORY JUDGMENT.

This is an application by the Plaintiffs who are eight persons in Land Suit No. 29/29.

The Defendants have raised here as a preliminary point the objection that this Court has no jurisdiction to deal with the application which is now before it.

Substantially the important contentions of the Defendants are as follows: First by reason of the application of Articles 3 and 115 of the Execution Law (and subject only to the possibility of instituting proceedings against the Execution Officer before the High Court) the Plaintiffs have lost their only legal remedy which was to lodge their claims before the final order for sale was made: Secondly, though this is really a corollary to their first contention, there is no law in force in Palestine or rule of procedure or practice in the Courts which allows the applicants to apply to this Court: Thirdly, neither the provisions of paragraph 46 of the Palestine Order-in-Council, 1922, as amended by the Palestine (Amendment) Order-in-Council, 1923, nor the provisions of Section 1 of the Lands Courts Ordinance, 1921, in so far as the said provisions refer to the admission of the doctrines of equity, can legally be applied in this application: Fourthly, if doctrines of equity are applicable here the Plaintiffs are estopped from seeking such remedy as they might have found here by reason of their own delay; Fifthly and last—Equity and Justice are on the side of the Defendants.

In fact substantially the same arguments have been addressed to the Court by the Defendants as regards the main issues and the merits of the Application and they accordingly ask for the dismissal of this Application.

Now as regards the preliminary question of jurisdiction the Court is unanimously of the opinion that the contentions of the Defendants fail and the Court holds that it has jurisdiction to deal with the Application before it for the following reasons.

This is an Application in land Suit No. 29/29 in which the parties are the same, and which is pending before this Court.

It is an Application arising out of a question as to the ownership of certain lands, the subject matter of the said land suit. The Land Courts are the Courts in Palestine which are entitled to deal with such matters, Vide para 42 of the above mentioned Order-in-Council, 1922, and the Land Courts Ordinance, 1921, in particular, Section 2 thereof. Section 18 of this Ordinance has no application here. The plaintiffs can find no remedy before the Magistrate's Court because the question of possession here depends on a dispute (pending before this Court) as to the ownership of the lands (vide Section 2 (d) of the said Ordinance) and this question has to be settled before the Magistrate's Court can interfere.

It appears to have been lost sight of that the sale in question was a sale of certain mortgaged properties ordered by the President District Court in accordance with Section 13 (2) of the Land Transfer Ordinance, 1920-21, and therefore the procedure and rules to be followed differ from those in the case of a sale in execution of a judgment.

This was a sale in satisfaction of a mortgage and as such is subject to the Provisional Law for the Mortgage of Immovable Property, 18th Rabi Thani, 1331, as amended by the Mortgage Law Amendment Ordinance, 1920. It is clear when Section 7 of this Ordinance is examined in its relation to sales under the Mortgage Law that the purchaser's title is indefeasible only as against the Mortgagor, and therefore the rights of third parties are not prejudiced by such sale under the Mortgage Law. From which it follows that Articles 3 and 115 of the Execution Law do not apply in the case of the Plaintiffs.

With regard to the Defendant's third point. In our opinion para 46 of the Palestine Order-in-Council must be construed and applied in accordance with the spirit as well as the letter of its provisions. Further, looking at Section 7 of the Land Courts Ordinance, 1921, we can find nothing therein which limits this Court to taking cognisance of legal merely and not of equitable rights as the Defendants contend. Subsection (1) of Section 7 of the Ordinance includes a provision which is divided into two separate parts, the first of these provides that the Land Courts

shall have regard to equitable as well as to legal rights to land and the second provides that the Land Courts shall not be bound by any rule of the Ottoman Law prohibiting the Courts from hearing actions based or unregistered documents. Moreover, Subsection (2) goes on to show that the Legislature gave and intended to give those Courts an extremely wide latitude in dealing with any matters within its jurisdiction.

There remain then the last two contentions of the Defendants; these now, having regard to what has been said above only to the merits of the case; it is therefore necessary to refer to some of the mere important facts of the case.

The Court has referred to the Records of the Execution Offices of the Land Registry and of these proceedings. The eight Plaintiffs here are peasants and the Defendants are a Company. (For facts see History of Execution Case attached) 4. 8. 1928. Order of Sale. In the Mortgage deed, 4 separate plots are mentioned with the boundaries as follows:

(1) ARD THULTH EL MIRI. ELWAD EL THAMALY.

BOUNDARIES:- The whole of the third of Wad el Hawareth bought from the Miri. South; Elwad; East; the lands of the two villages of Sheikeh and Kakou; North; the lands of the two villages of Kakoun and Caeil up to Malsab El Guslan; West; road of Maharat which divides the said land from the land of Amirel Harithi.

(2) ARD THULTH AMIR NASIR. ELWAD EL GHARBY.

BOUNDARIES: All the third of Amir Nassir in Wad el Hawareth. South; lands of the village of Khalif. East; Wadi el Nijar, North; share of Tayan. West; Sea shore.

(3) ARD NUEF THULTH EL AMIR.

BOUNDARIES: All the shares in common in the land of Nusf Thulth el Amir Nasir is 45 out of 60 shares in Wadi el Hawareth. South; Wad Abou Hakkf, East; Road el Maharat, North; Sidrit Ras Kous el Raml up to Ras Birkit At, West; Sea shore.

(4) ARD EL KURDISH.

BOUNDARIES:- All the shares in common in the lands of Kurdish which is 45 shares out of 60 in Wad el Hawareth. South; Kharab Mashraa el Raml, East; Road of Maharat, North; Wad Abou Hakkaf, West; Ain Abou Rajy.

These plots are separately identified into an approximate area of 5800 dunams and those are the particulars appearing in the Tabu Registry.

When the Execution Officer Tulkarem entered into possession, a copy of a map of a section of Ordinance Survey Map of Palestine, was produced to him with the allegation that it was a survey of the four plots. The area of the four plots was estimated by the experts, in accordance with the copy map, to be about 30,826 dunams and the alleged boundaries of the four plots when combined together on the map, according to the Execution Officer, were as follows;

W. The sea.

S. Ard Um Khaldi.

E. Road of el Maharat separating Tyan and Kabbani extending the river Iskandron & Kakoun.

N. Atteel and el Khudeira.

It is to be noted here that in the Mortgage Deed the Eastern Boundaries of plots 3 and 4 were shown as Tarik el Maharat and the Eastern boundary of plot 2 as Wadi el Mafjar.

The lands it seems were sold to the Defendant Company and they were issued on their request, with the one Kushan for the first three plots and the fourth plot was entered in their name in a separate Kushan. In spite of the separate Kushans and separate Tabou Registrations for these three plots when held in the single ownership of the Tyan family with the separate boundaries of each individual plot identified, and further in spite of the separate registration of Plot No. 4 to the Defendant Company with its Eastern boundary as Tarik el Maharat, yet for some reason which is not clear now to the Court the first three plots were combined in a single Kushan and were given the same boundaries as those alleged when the four plots had been combined. There is no proof yet or suggestion even that the copy map was made a survey of these actual four plots with their boundaries as a defined in the Mortgage Deed and Kushans.

Plot No. 2 is the Southern Plot of all these. Its Eastern boundary, Wadi el Mafjar, by the process of combining or "consolidation" has dropped out and a new boundary is substituted therefor,— viz. Tarik el Maharat.

The Court has doubts as to whether the Wadi el Mafjar and Tarik el Maharat are the same. If they were the same it seems strange that the Mortgage Deed adopted different names of the same boundary. Further, we notice that if the Eastern boundary

of the second plots is accepted (when the plots are combined in accordance with the copy-map suggestion) as being the Tarik el Maharat, then it must follow that the Southern boundary of the said plot will not be Ard Um Khalid alone as shown in the Mortgage Deed but Ard Um Khalid and Ard Khirbet Beit Lid which is to the East of the former. In the "combined" boundaries however, the Southern boundary still remains Ard Um Khalid.

The Plaintiffs have always denied that the lands which they claim in this case were either mortgaged by Tyan or sold to the Defendant Company. As early as 19th September, 1926, they were parties to a petition submitted to the Chief Execution Officer Nablus, by the Mukhtars on behalf of 239 families on the Wadi Hawareth lands calling attention (inter alia) to their claims to ownership and rights of cultivation from time immemorial in the lands of Wadi el Hawareth other than the 5000 old dunams registered to Tyan, and expressing the apprehension they felt in regard to the intentions of Tyan, who, they alleged, had (wrongfully semble) entered into agreement with the Defendants for the sale and purchase of the lands of Wadi el Hawareth in prejudice of their rights.

It is further important to refer to the orders of the Chief Execution Officer on 30th November, 1929, and 19th July, 1930, in which the boundaries of the three plots Nos. 1, 2 and 3 are still given in accordance with those mentioned in the mortgage deed - the boundary Wadi el Mafjar is specially referred to and has not been changed to Tarik el Maharat. This, in our opinion, indicated it was the intention of the Chief Execution Officer or President to sell, transfer, evict and vacate the three plots according to their original and individual boundaries as stated in the Mortgage Deeds.

Delivery, however, seems to have been carried out in accordance with a single new Kushan dated 27th May, 1929, and the copy map.

After careful perusal of the records previously mentioned, the Court has further doubt as to whether the lands claimed by the Plaintiffs were either included in the aforesaid mortgage deed and sold to the Defendant Company or whether these Plaintiffs with and certain others to the number of 166 persons with their families dependants, were lawfully evicted therefrom. It is, moreover, claimed by the Plaintiffs that they have been in occupation of the disputed lands for a very long time and it appears that they were so at the time of the institution of these proceedings on 26th November, 1929.

Having regard to the facts and conclusions mentioned above, the Court is unanimously of the opinion that it is just and

equitable to grant the Plaintiffs' application and they should be put back in the same position in which they were at the time of the institution of these proceedings pending delivery of final judgment in this action.

We therefore order accordingly.

Given the 3rd of October, 1930.

EVICTION.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 95/23

BEFORE:

The Chief Justice, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Haim Nikritin — APPELLANT.

vs

Jacoub Haim Margovsky — RESPONDENT.

Action for return of money paid in excess of rent — Eviction for non-payment of rent—Counterclaim in Magistrate's Court as privilege not obligation — Application of Article 113, Civil Procedure Code limited to case where both Courts are of full competency.

Appeal from a judgment of the District Court of Jerusalem, dated the 12th day of January, 1923, in Action No. 264.

JUDGMENT.

The action in which the judgment is appealed against consists of two parts:—

1. An action for return of money paid in excess of rent.

2. An action for return of certain promissory notes.

The Plaintiff in this action was Defendant in the Magistrate's Court in an action for eviction for non-payment of rent in respect of the same premises as those in question (1) and this part of the present action might have been brought by way of counter-claim in the Magistrate's Court. That however was a privilege of the Defendant and he was not bound to avail himself of it especially in a case like the present one which is not very suitable for trial in the Magistrate's Court. The District Court seems to have thought however that because the present action could have been brought by way of defence or counter-claim in the Magistrates' Courts, it ought to be sent back to that Court for that purpose. Some

justification for that view seems at first sight to be given by Article 113 of the Civil Procedure Code but in our opinion that Article (113) applies only when both Courts are of full competency. In this case the Plaintiff although he may sue in the Magistrate's Court by way of counter-claim cannot be sent there agaisnt his will and it is not intended to empower one Court to send a case to be tried by another Court of an inferior jurisdiction.

The judgment whereby the claim for repayment of excessive rent was sent to the Magistrate's Court to be tried, is set aside and the same sent back for trial to the District Court.

With regard to the second part of the judgment we allow the appeal so far as relates to those promissory notes which have been paid by the Appellant.

Delivered the 7th day of May, 1923.

In the High Court of Justice.

H. C. No. 62/26.

BEFORE:

The Chief Justice and the Senior British Judge.

IN THE APPLICATION OF:

Leah Devorashwili — PETITIONER.

vs

The Chief Execution Officer, in the District Court of Jerusalem, Haim Elisha Tenenbaum — RESPONDENTS.

Stay of execution of judgment for eviction—Land Court and Court of Appeal on appeal therefrom held not to have jurisdiction to give order for possession — Inoperative judgment not executed.

Application for an order to issue against the Chief Execution Officer in the District Court of Jerusalem setting aside his order of July, 13th, 1926, given in execution of a judgment of the Court of Appeal dated 22nd March, 1926, in the case of Tenenbaum v. Devorashwili with regard to eviction and requiring him to stop execution on the ground that the said judgment does not contain an operative part for eviction.

ORDER.

The Court upon hearing Mr. Eliash for the Petitioner and Mr. Gratch for Haim Elisha Tenenbaum, the Chief Execution Officer not appearing.

It is ordered that the order made on the 13th July, 1926, by the Chief Execution Officer of Jerusalem in execution of a judgment of the Court of Appeal dated 22nd March, 1926, in the case of Tenenbaum v. Devorashwili (on appeal from the Land Court) be set aside and execution stayed.

It is the intention of the judgment of the Court of Appeal that the legal position of the parties is not affected by the alleged sale, not that possession should be given to Tenenbaum and execution to that effect carried out by the Execution Officer;

The Land Court would have had no jurisdiction to make such an Order, and on appeal from the Land Court the Court of Appeal had no jurisdiction to make such an order.

The Petitioner is entitled to costs including £E. 3 advocate's fees.

Delivered in presence the 2nd day of August, 1926.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 28/27.

BEFORE:

The Senior British Judge, Jarallah J. and Frumkin, J.

IN THE CASE OF:

Sit Leila Bint Mitri Jidi for Herself
and for her minor Daughther Nur — APPELLANT.

vs

Sheikh Mahmud El-Aswad,
Sheikh Mohamed Ali El-Aswad,
Sheikh Ali Ahmad Abu Ayash,
Rashid Ailayan,
El-Sheikh Musa Hamdan — RESPONDENTS.

Question of delivery of possession held not to be within jurisdiction of Land Court—New evidence produced to Court of Appeal which was not before Land Court.

JUDGMENT.

In the absence of a plan it is difficult to ascertain precisely what was put before the Land Court.

It is however clear that two facts are before us which were not before them:

(a) That the Western boundary of the Respondent Aswad's

land in their Kushan is Mohamed Zaha, and not Custa Bozo as it should be to conform to the Land Court's judgment.

(b) That the Southern boundary of Ghanem Shaker's land is Hussain Hamdan and partner only, and does not mention either the Aswads or the mesha' of the village as it should do to conform to the judgment of the Land Court.

These facts seem to us of sufficient importance to need explanation; and so far as the first two Respondents are concerned, therefore, we set aside the judgment of the Land Court and remit the case for rehearing and a fresh judgment.

As regards the Respondent Abu Ayash, we hold that the Land Court was wrong in ordering delivery of possession to the Appellants on repayment—as the question of delivery of possession is not one for the Land Court. We further hold that the Respondent Abu Ayash is not entitled to interest on the purchase money of the land bought by him from the date of purchase, as he was entitled to enjoyment of the land.

The judgment of the Court with regard to the Respondent Abu Ayash will therefore be, that upon repayment to him by the Appellants of the sum of £E. 50, the Appellants are entitled—subject to payment of the prescribed fees—to be registered as owners of that portion of the land concerned as heirs of the transferee from Ali Mahmud Alayan and Hussain Hamdan Maadi.

As regards the Respondents Aswad, costs are to follow the event; as between the Appellants and the Respondent Abu Ayash no order is made as to costs.

Delivered the 27th day of July, 1927.

In the High Court of Justice.

H. C. No. 10/31.

BEFORE:

Baker, J., Khaldi, J. and Frumkin, J.

IN THE APPLICATION OF:

Elimelech Tiktinsky — PETITIONER.

vs

The Chief Execution Officer, Jerusalem,
Kolel Habad, Jerusalem — RESPONDENTS.

Defence of prescription raised in action for eviction — Jurisdiction of Magistrate — Execution of Land Court judgment for eviction disallowed—Eviction to be ordered only on judgment of Magistrate.

Application for an Order to issue to the Chief Execution Officer in the District Court of Jerusalem directing him to show cause why his order dated the 11th August, 1930, in Execution File No. 3305/30, should not be set aside.

JUDGMENT.

The Second Respondent, the Administration of Kolel Habad Waqf, originally brought an action for eviction against the Petitioner in the Jerusalem Magistrate's Court. Petitioner raised the defence of prescription which the Magistrate decided was not within his jurisdiction and was a matter for the Land Court to determine. Respondents then brought an action in the Land Court, the said Court deciding that the tenements, the subject matter of the Application, did in fact belong to the Second Respondent and that they were entitled to recover the same*. The judgment of the Land Court was presented to the Execution Officer and an application for eviction of Petitioner applied for. This application the Execution Officer granted. Petitioner now applied for the order to be set aside.

After hearing Mr. Eisenberg for Petitioner and Mr. Levanon for the Second Respondent, we are satisfied that the Chief Execution Officer was wrong in granting an order for eviction on the said judgment and that eviction can only be ordered on a judgment of a Magistrate to whom Respondents should apply.

The order is accordingly made absolute with costs and £P.2 advocate's fees.

Delivered the 22nd day of October, 1931.

In the High Court of Justice.

H.C. No. 8/32.

BEFORE:

The Acting Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:

Sheikh Abd El Qader Abou Rabah APPELLANT.

VS

The Chief Execution Officer, Jaffa,
Nissan Turkanoff RESPONDENTS.

Execution of judgment for eviction—Question of eviction exclusively within jurisdiction of Magistrate.

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* The judgment was confirmed on appeal, see L. A. 48/30, post.

Application for an order to issue to the Chief Execution Officer to show cause why he should not execute the judgment of the Magistrate of Jaffa for eviction dated 16th June, 1931, Sheikh Abd El Qader Abou Rabah vs. Nissan Turkanoff.

JUDGMENT.

The order is made absolute.

A judgment of the Jaffa Magistrate for eviction was presented to the President of the Jaffa District Court as Chief Execution Officer, Jaffa, for execution. The Chief Execution Officer refused execution ordering the judgment creditor to apply to the Court.

The question of eviction is one exclusively within the jurisdiction of a Magistrate, and there cannot be any necessity to apply to any additional Court.

The order must be made absolute.

Delivered the 19th day of May, 1932.

In the High Court of Justice.

H.C. No. 84/32.

BEFORE:

Baker, J. and Khayat, J.

IN THE APPLICATION OF:

Wadi' Zarifeh — PETITIONER.

vs

The Chief Execution Officer, Jaffa,
Haj Hassan 'Isawi — RESPONDENTS.

Jurisdiction of Chief Execution Officer to order eviction—Reference by Chief Execution Officer to competent Court—Eviction of lessee.

Application for an Order to issue to the first Respondent directing him to show cause why his order dated the 19th November, 1932, should not be set aside.

JUDGMENT.

After hearing the parties, we are satisfied that the Chief Execution Officer had no jurisdiction to order eviction in view of the fact that there was a valid lease in respect of 3 out of 24 shares of the property subsisting at the time the order for eviction was granted. The proper course for the Chief Execution Officer

to have followed was to refer Respondent to a competent Court for any legal remedy the second Respondent might there seek.

The Order Nisi is made absolute with costs and advocate's fees assessed at £P. 2.

Delivered the 4th day of March, 1933.

In the High Court of Justice.

H. C. No. 56/33.

BEFORE:

The Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Abu Lifeh and Others — PETITIONERS.

vs

C. E. O. Jaffa and Litwinsky Brothers — RESPONDENTS.

Application to set aside eviction order made by Chief Execution Officer—Sale of attached property through the Execution Office—Refusal of High Court to restore possession of land—Jurisdictin of High Court re eviction.

ORDER.

The Order of the Chief Execution Officer had already been carried into effect when this Petition was filed.

It is not within the competence of this Court to make an order for restoring to the Petitioners possession of the land from which they have been evicted by virtue of that Order. The petition is dismissed.

In the Supreme Court sitting as a Court of Appeal.

L. A. 58/33.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Salim Risq Hanna — APPELLANT.

vs

Bulos Hanna Rizq — RESPONDENT.

Eviction from land—Proof of recent possession—Document of title within the meaning of Art. 24, Magistrates' Law, 1331—Werko Register extract as sanad of possession.

Appeal on a point of law from a judgment of the Land Court of Jerusalem reversing the decision of the Magistrate ordering eviction.

JUDGMENT OF THE LAND COURT OF JERUSALEM.

Upon examination it appears that the judgment appealed from is based upon the assumption that the Appellant's (present Respondent) possession is recent, according to his admission that he took possession five years ago. That admission does not however corroborate Respondent's (present Appellant) claim, but is on the contrary a denial of that claim and a contention that Appellant was in joint possession with Respondent's ancestor. It was therefore necessary to call upon Respondent to prove that either he or his ancestor had been of old in independent possession of the said plots. Furthermore the Werko extracts upon which the Respondent relied are not documents of title within the meaning of Article 24 of the Magistrates' Law.

The Court therefore quashes the judgment and remits the file to the Magistrate to call upon the Respondent to prove his case in the usual legal manner, and to give judgment accordingly.

Delivered the 2nd day of November, 1933.

JUDGMENT OF THE COURT OF APPEAL.

Following the judgment of this Court in Land Appeal No. 29/29, Khadija bint Haj Ahmad Salim vs. Ismail Huneidan Salim, we hold that an extract from the Werko Register is a sanad in possession within meaning of Article 24 of the Magistrates' Law, 1331.

The appeal is therefore allowed and the case remitted to the Land Court for decision.

The costs of this appeal will follow the event.

Delivered the 18th day of October, 1934.

EVICTION—

See also Execution.

EVIDENCE.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 53/22.

BEFORE:

Corrie, J., Khaldi, J. and Jarallah, J.

Death of witness to document — Oral evidence heard to establish bill—Proof of authenticity of bill.

JUDGMENT.

It was proved that Issa Sa'ati one of the witnesses who were heard by the Land Court, was not yet born on the date of arranging the bill claimed, when considering his age, and that the witness who was called in this name and who signed on the bill the Appellant alleges that he died already and only one of the witnesses who signed on the bill was heard and the rest were dead, therefore the Court finds that the Appellant has the right to produce other proofs for proving the verity of her bill and it was decided to set aside the judgment of the Land Court and to return the documents to it in order to hear the witnesses who were named by the Appellant and any other witnesses who can give evidence concerning the verity of this case.

Delivered the 7th day of November, 1922.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 38/23*.

IN THE CASE OF:

Faiz Abdi Nicola — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Allegation that money deposited in trust was misused — Proof of obligation customarily reduced to writing — Proof of debt in writing — Abuse of deposit punishable under Article 236, Ottoman Penal Code—Article 80, Civil Procedure Code.

NOTE BY THE CHIEF JUSTICE.

The Court holds that the requirements of Article 80 of the Civil Procedure Code govern the proof of obligations such as that

* Discussed in Zheibrah vs A.G., M.A. No. 2/32, post.

of deposit the abuse of which is punishable under Section 236 of the Ottoman Penal Code. It will be therefore necessary to prove this debt by some document in writing such as a receipt.

The District Court should receive evidence to show what is the origin and nature of this alleged deposit and whether it is in fact a deposit recoverable in law and if so whether it is the kind for which it is customary to give an acknowledgment in writing.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 137/23*.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Afifeh, Rachel and Milia, daughters of Elias Abu Rahmi — APPELLANTS.

vs

Na'im and Halim, sons of Jirius Abyad of Haifa — RESPONDENTS.

Allegation of fictitious registration in Land Registry — Written evidence required to set aside registered title — Presumption of ownership carried by registered title — Evidence of witnesses, possession, admissions of other parties not sufficient to set aside registered title.

JUDGMENT.

This is a question whether there was evidence before the Land Court which could justify it in finding that the registration in the name of Shukri was fictitious and should be set aside in favour of the Respondents. There is no written evidence to contradict the registered title which carries a presumption of ownership. The evidence of witnesses, the possession of the Respondents, the admissions of other parties interested however convincing are not sufficient to override the general rule that has been established in this Court that a registered title will not be set aside except by some evidence in writing sufficient to support an adverse title or to corroborate evidence in support of such adverse title.

Judgment as against the Appellant will be set aside with costs and £E. 3 advocate's fees.

Delivered the 23rd day of January, 1924.

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* Discussed: L. A. 135/26.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 144/23.

BEFORE:

Corrie, J., Khaldi, J. and Khayat, J.

Written evidence of ownership not produced to substantiate claim—Allegation that ancestor had right to build on roof of another's house—Right to tender oath on failure to prove claim by evidence.

JUDGMENT.

The Court finds that the Land Court should not have set aside the claim of the Appellant for the mere reason that she could not produce written evidence, but it should have had to investigate from the Appellant the reason of the proprietorship. She alleges that her father has obtained a right to build on the roof of the Respondent's house, if she could produce evidence proving the existence of ordinary documents granting her this right and that her father in accordance with the above mentioned document has erected and possessed the building constructed on the roof of Respondent's house. If she would fail to prove that, she had the right to request from the Respondent Nazireh to take the oath.

It was therefore decided to set aside the judgment and return the documents to the Land Court for the necessary action.

Delivered the 25th day of March, 1924.

In the Supreme Court sitting as a Court of Appeal

L. A. No. 39/24.

BEFORE:

Corrie, J., Khaldi, J. and Jarallah, J.

Werko certificates produced to prove claim of ownership to land—Werko certificates alone held insufficient to establish claim of ownership—Right to tender oath where written evidence insufficient—Claim of inherited lands disputed.

JUDGMENT.

It was proved that the Land Court issued a judgment in favour of the Respondents, for what they alleged inheritance, in the house built on the land of the Appellant relating the house to their grandfather i. e. the husband of the said Hanneh, according

to the Werko deed alone because it did not consider the evidence given by the two parties.

The Court finds that the Werko deed alone was not sufficient for issuing a judgment and finds that the claimants failed to produce evidence to confirm their claim. Whereas they failed to prove their claim therefore they have the right to ask for an oath and whereas the Respondents asked that the Appellant Hanneh and her son shall give an oath and the Appellant agreed to swear, therefore the Court decides to compose the oath which should be offered to the Appellant Hanneh only in the following form:-

"I swear by God that the first floor of the house was not built from the monies of my husband Elias and not with my permission and the second floor also was not built from the monies of my son Jiryes and not with my permission".

Therefore it was decided to set aside the preliminary judgment and to return the documents to the Land Court for doing the necessary in accordance with the above mentioned and consequently to give a judgment.

Delivered the 24th day of September, 1924.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 54/24.

BEFORE:

Seton, J., Khaldi, J. and Jarallah, J.

Sufficiency of proof to establish ownership to land as heirs—Evidence against official deeds not received.

JUDGMENT.

It was shown that the sole point which has to be considered in this case, outside of considering that the legal time has elapsed, is whether the claimed lands really belong to the testator of the claimants or not and if there is sufficient proof to this effect or not. This Court finds that the Court below cannot be blamed for not considering the evidence against the official deeds, therefore it was decided to dismiss the appeal and to confirm the judgment.

Delivered the 23rd day of October, 1924.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 58/24.

BEFORE:

Seton, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Abdul Qader Hussein Judeh and his brother Ibrahim	APPELLANTS.
VS	
Yusef Mohammed Abu Hussein and his sister Zarifeh	RESPONDENTS.
Mohamed, Mustapha and Mohd. Ali, sons of Rashid Mohd. 'Awad	THIRD PARTIES.

Mortgage of share of common lands of village—Written evidence of ownership not produced to substantiate claim—Deed of sale alleged stolen—Oral evidence admitted to establish lost document—Land ordered registered in name of successful litigant.

JUDGMENT.

Mohammad Abu Hussein was the owner of one share out of 16 in the common lands of Shalta village and according to the allegation of the Appellants half this share was mortgaged to them by the said Mohammad during his lifetime and they entered into possession of it. Upon the death of Mohammad he was succeeded by the Respondents Yusef and Zarifeh and another daughter named Hussun, each of whom thus became entitled to one third of the one share.

The Appellants allege that in the year 1335 they agreed to pay a further sum of money and to release the mortgage on the half share in consideration of the Respondents Yusef and Zarifeh transferring to them by way of sale one half of their respective one third shares (which would give the Appellants one third of the whole). This was accordingly done and the Appellants received from the vendors Yusef and Zarifeh a document of sale dated 15th Jamad El-Awal, 1335, and thereupon surrendered possession of the difference between the one half and one third shares.

By a power of attorney for sale dated 6th Jamad El-Awal, 1335, Yusef sold half his one third share and Hussun the whole of her third share to the father of the third parties Rashid Mohammed and by another power of attorney for sale dated 22nd Zil Hujjah, 1335, Yusef and Zarifeh sold or purported to sell

the said Rashid Mohammed the whole one share out of 16 which had belonged to their father.

By virtue of these two powers of attorney Rashid Mohammed in 1921 obtained registration in the Tabou on the whole one share out of 16 in the names of his sons Mohammed, Mustafa and Mohammed Ali the third parties to this action.

The Appellants by this action seek to establish their ownership of one third of the whole share by virtue of the deed of sale of 15th Jamad Awal, 1335, the original of which they allege was stolen from them in the year 1920 when their house was robbed. In proof of this the penal proceedings as to the robbery have been produced in which it is recorded that the Appellants did at the time of the theft state that amongst the things stolen was a document relating to a sale of land belonging to Yusef Abu Hussein to their father.

In the Court below the Respondent Yusef gave evidence in favour of the Appellants but except for this neither Respondent took any part in the proceedings. The third parties however obtained permission to defend the action as being the persons in whose names the land in question is now registered.

The Land Court took the view that the document lost in the robbery could not have been the document of sale upon which the present action is founded because the former was a sale to the father of the Appellants while the latter is a sale to the Appellants themselves. It therefore found that the sale to the Appellants had not been proved and dismissed their claim.

The Appellants appeal and their submissions may be stated as follows:—

1. That the document lost in the robbery was in fact the document of 15th Jamad El-Awal, 1335, and that its inaccurate description in the penal proceedings may have been due to a clerical error on the part of the clerk or a mistake on the part of the Appellants themselves who possibly might have described the document as a sale to their father confusing it with the previous mortgage which had been in their father's name.

2. That there was abundant proof of the existence of the document in the evidence of Yusef, one of the vendors, the Imam who wrote the document and the witnesses who attested it.

3. That the admission of the Respondents and the third parties that the Appellants have been in possession of the one third share in question until the present time in spite of the third parties' allegation of having purchased in more than 8 years ago further corroborates their claim.

In our opinion the explanation which the Appellants give as to the discrepancy in the description of the document is not unreasonable and we do not think in view of the strong evidence of the existence of such a document, that the discrepancy is a sufficient reason for dismissing the Appellants' claim. Further the admission by the third parties in this Court that they took possession of the two thirds in 1335 and their inability to explain why they did not take possession of the other third considerably strengthens the Appellants claim.

We hold that the Appellants have made out their case and we therefore set aside the judgment of the Court below and order that one third of the one share out of 16 in the common lands of Shalta village be transferred in the registers of the Tabou from the names of the third parties into the names of the Appellants. The third parties must pay the costs of the action here and in the Court below.

Delivered the 10th day of November, 1924.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 64/24.

BEFORE:

The Chief Justice, Corrie, J., Jarallah, J. and Khaldi, J.

IN THE CASE of:

Yusef Abdul Raseel
Abdul Karim Ali Dhaidel — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Finding of Trial Court contrary to evidence reversed by Court of Appeal — Case remitted for further evidence to be heard — Article 174, Ottoman Penal Code.

Appeal from the judgment of the District Court of Jerusalem, dated the 22nd day of April, 1924, whereby accused were found guilty under Article 174, 2nd paragraph, and sentenced to death.

JUDGMENT.

As regards the accused Abdul Karim, it appears:

(1) That the finding of the District Court that the two accused were seen together armed by Abbas Yahia Al Omar at his house before and again after the murder, is not in accordance with the evidence; as Abbas stated in Court that the days on

which the accused came to his house were Wednesday and the following Friday while the day on which the crime was committed was a Monday.

(2) That there was not evidence before the District Court to support the finding that Abdul Karim when arrested was wearing clothing similar to that described by the driver Yakoub Harna Bakhar as worn by the companion of Yusef.

(3) That the District Court has not dealt with the fact that the physical appearance of Abdul Karim does not correspond with the driver Yakoub's description of the assailant given on the day after the crime as being short and stout and having a grey moustache.

(4) That the Court has not heard the evidence of the persons referred to by Mohamed Eff. Rais as to an alleged statement made by the accused.

The judgment of the District Court as regards Abdul Karim is therefore set aside and the case remitted for retrial, and further evidence to be taken on certain points as follows:

(1) To enquire from the witness Jakoub Harna Bakhar whether on the sight of the prisoner Abdul Karim he is of opinion that he comes within the description of the fair man he saw at the time of the murder.

(2) To enquire and hear evidence of the statement said to have been made by Abdul Karim and referred to in the evidence of Mohamed Rais given before the District Court and such other evidence as may seem desirable to be heard.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 100/24.

BEFORE:

The Senior British Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Nuzha bint Mustapha el-Kandus (for herself and as guardian of her minor children, and on behalf of the other heirs of Ramez Abdu) — APPELLANT.

VS

Mustapha Ramez Abdu — RESPONDENT.

New evidence produced in Court of Appeal — Document material to the decision of the case not before District Court—Authenticity of document contested in Court of Appeal.

JUDGMENT.

Whereas a document has been produced to this Court by the Appellant which was not before the District Court and which appears to be material to the decision of the case;

And whereas the authenticity of the said document has been contested by the Respondent, and this Court is of opinion that the question whether the document is authentic or not is one that should be determined;

The Court sets aside the judgment of the District Court and returns the file to the District Court to determine whether such document is or is not forged, to consider the effect of the said document upon the case and to give judgment accordingly.

Costs will follow the event.

Given the 29th day of June, 1927.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 109/24.

BEFORE:

Corrie, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Faram Saleh Haddad — APPELLANT.

vs

Haj Abdel Wahid Sammar — RESPONDENT.

Application to establish that transaction effected in 1332 and purporting to be a sale was in fact a mortgage — Documentary evidence not produced— Refusal to tender oath— Verbal testimony not allowed against deed — House and appurtenances included in transfer—Whether outhouses included.

JUDGMENT.

The Appellant has failed to produce any documentary evidence to prove his contention that the transaction of the 23rd April, 1332, was made by way of mortgage, and has refused to administer to the Respondent an oath to the effect that such was not the case. He is not entitled to call witnesses to prove his allegation.

So far therefore as regards the part of the property in dispute specified in the registered transfer, the Appellant must fail.

The only question that remains is as to the unregistered rooms erected on the southern end of the land transferred.

The transfer includes the house and its appurtenances; and hence if, as alleged by the Respondent, these rooms were at the time of the transfer simply outhouses used in connection with the house, they pass under the transfer to the Respondent.

If, on the other hand, as alleged by the Appellant, these were then rooms occupied as dwellings apart from the house transferred; they would not pass to the Respondent.

The judgment is therefore set aside and the case sent back to the Land Court for evidence to be heard and judgment given on this case.

The Appellant, having failed in his appeal as regards the registered property, will pay half the costs of this appeal. The other half will depend upon the judgment as regards the unregistered property.

Delivered the 31st day of July, 1925.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 82/25.

BEFORE:

Corrie, J., Khaldi, J. and Abd-el-Hadi, J.

IN THE CASE OF:

Aziz Irani — APPELLANT.

vs

Joshua Khankin — RESPONDENT.

Order extending time for appeal held to be an interlocutory order—Rules of Court, Civil Appeals, 1st June, 1921—Interlocutory order made by single Judge—Sec. 4, Courts Ordinance, 1924—Written evidence required to modify contract—Admissibility of oral evidence to establish agency.

JUDGMENT.

The Court holds that an order made under Rules of Court, Civil Appeals issued on the 1st June, 1921, granting an extension of time for appeal, is an interlocutory order within the meaning of Section 4 of the Courts Ordinance, 1924, which can be made by a single judge. The fees of appeal were tendered within the extended time granted, and hence the Court holds that the appeal is made within time.

The Court holds that the issue is not whether a contract was or was not modified, which can only be established by

written evidence. The issues remitted to the District Court viz: whether the Respondent entered into the contract as an agent of the Company or not, or whether he authorized the transfer to the Company or not, are of a nature with respect to which oral evidence is admissible.

The judgment of the District Court is set aside, and the case remitted.

Costs to follow the event.

Delivered in presence the 2nd day of February, 1925.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

P.C. No. 97/25.

BEFORE:

Viscount Haldane, Lord Atkinson and Lord Darling

IN THE CASE OF:

Andrew Mantoura & Sons — APPELLANTS.

vs

Menachem David — RESPONDENT.

Consignment of goods found missing from ship—Insufficiency of evidence for judicial decision—Entries in books customarily used by merchants as evidence—Mejelle, Art. 1608—Value of certificate of Consul certifying to having examined ledger of shipping company—Account books as evidence—Secondary evidence of contents of account books not admitted—Bill of lading—Liability of public carrier—Printed conditions on back of bill of lading—Waiver of rights.

JUDGMENT DELIVERED BY LORD ATKINSON.

This is an appeal from a judgment of the Court of Appeal of Palestine dated the 15th April, 1924, dismissing an appeal of the Appellants from a judgment of the District Court of Jaffa dated the 1st November, 1923, given in favour of the present Respondent for P.T. 57, 170 and costs.

The action out of which this appeal has arisen was, on the 21st May, 1921, instituted by the Respondent to recover the value of five boxes or cases of cotton goods to be carried to the Port of Jaffa and there delivered to the consignee, the Respondent in the present appeal. These boxes were never delivered to the Respondent at all, either at Jaffa or elsewhere. These five boxes formed portion of a larger number of the same description intended to have been

all shipped at the same time in the same ship at the port of Venice, to be all carried of Jaffa. Any difficulty in dealing with it which exists in the case arises mainly from this, that while the evidence given in the case is on certain important points, according to the rules and principles of law, sufficient to cause one to conjecture, surmise or apprehend, that certain events occurred and certain arrangements or transactions were carried out which, if they had in fact occurred or been in fact carried out, would have entitled the Respondent to recover the value of these goods, no evidence, however, has been given legally admissible according to law, sufficiently clear, I definite, relevant and convincing as to form a just and adequate basis for judicial decision in a court of law of contested points.

For instance, there is no direct evidence whatever that any one of the five boxes of the Respondent's were, in fact, loaded on the s.s. "Baron Call" at Venice. The evidence bearing on that point is this. Article 1608 of the Mejelle or Ottoman Code of Civil Law provides that entries in books customarily used by merchants are equivalent to an admission in writing. Well, in this case no books of any merchant were produced, but a certificate was by the British Vice-Consul at Milan given under his hand certifying that he had examined the ledger of Messrs. Asser, Gabriele & Battino (described as now in liquidation), who were, it is to be presumed, the vendors of these goods, and that he found entries in their books to show that the vendors had, on the 11th and 16th March, 1920, delivered to a firm of forwarding agents—M. Luciano Franzosini—for transmission to Venice, and from the latter place to Jaffa, to Mr. David S. David's address, the goods mentioned, namely, five cases, the numbers and weights of which were given, four of the cases being lettered R.H., one lettered D.S.D. It may well be that the entries in the ledger of the vendors would be evidence if the book were produced in Court, but it by no means follows that the certificate of the Consul setting out the items he found in the ledger of this firm is admissible as evidence of the contents of the ledger. But even if the certificate be assumed to be admissible evidence for that purpose, it amounts to little.

No agent of the forwarding agents or persons employed by them was examined at any of the trials to prove that the Respondent's goods were, in fact, transmitted to Venice, or, in fact, loaded on the s.s. "Baron Call" at all. The weights and dimensions of these boxes were such that they might be readily carried away.

There is no evidence whatever as to how or where these boxes, if they were loaded at all, were stowed, or for what purpose the ship visited the four or five ports it is admitted she did visit en route from Venice to Jaffa, whether it was for discharging cargo or receiving it, or what, if any, were the opportunities afforded for theft.

There are two bills of lading given in evidence, numbered respectively 4 and 5. The first sets out upon the face of it that four cases (Nos. R.H. 3122/25) were shipped by Luciano Franzosini, Venice branch (this is the firm forwarding agents), on the 6th April, 1920, on the s.s. "Baron Call". And the bill of lading No. 5 sets out that two cases (not one) marked 315/316 were similarly shipped on the same day. These bills had a clause upon their face, which was translated into English as follows: "Weight and measurement of contents are unknown". Each bill of lading had an identical clause, which has been variously translated, but of which their Lordship may adopt the translation set out on the bills of lading. That translation runs thus: "The company shall never be responsible for captains or sailors strike, and the captain also shall not be held responsible for sailors strike. Likewise the company shall not be liable for robberies and other damages of goods whilst these are in the stores, depots or being transported in trucks kept on seashore awaiting shipping or when they are being loaded or unloaded". It is obvious that it rests upon the shipowners, when sued for the value of non-delivered goods, if they desire to escape liability, to bring themselves within the letter of this clause.

They have not done so in this case. All they have done is to show that facilities for theft existed and that it might be one of the ways of accounting for the non-delivery of the cases. In their Lordships' view the shipowners cannot get rid of this liability as carriers by relying on a half-proven clause such as this.

In their Lordships' view the proof of the receipt on board the s.s. "Baron Call" at Venice of the five cases of goods sued for is not so clear and satisfactory as could be desired; but they now turn to Clause 32 printed on the back of the bills of lading. It is, they think, clear that the shippers of goods must be bound by this clause as a purchaser of a railway ticket is bound by the conditions printed on the back of it, if he has had a reasonable opportunity of reading them, and especially if his attention has been called to them. It is part of a contract made with the passenger which qualifies in each of these cases the contract of carriage.

The translation, which may be treated as reliable, of the important part of Article 32 runs as follows:—

"The company shall be liable within two days (from date of shipping) for all consignments to the Adriatic ports, for eight days for those (consignments) to the Levant Ports (the Grecian, Turkish and Egyptian Ports) as well as the Ports of Black Sea and Danube and for a full month for those across Suez Canal or Gibraltar.

"Any claim made regarding shortage, loss or damage of goods on their delivery, shall be acceptable, provided that such claim is made in writing and presented to the Company's Agent in the destination port, within the period as fixed above".

The word "acceptable" means, they think, shall be accepted as binding. Jaffa is a Levant Port. The "Baron Call" arrived at Jaffa on the 19th April, 1920. The five cases were then missing, and were nowhere to be found. Yet no claim in writing for loss or shortage was made against the owners, the present Appellants, for some months after that date—indeed, not till or about the 16th September, 1920. That was obviously quite too late, and the shipowners were quite entitled to rely upon the fact that it was late. The present Respondent, the consignee of these goods, contends that the letter of the 19th October, 1920, written by the owner to him, amounted by itself or together with the letter of the 16th September, 1920, to which it was an answer, to a waiver of this condition as to notice of loss within eight days.

Their Lordships are quite unable to take that view.

One does not know what were the contents of the letter of the 16th September, 1920, written by the owner of the non-delivered goods, but the shipowners' right to protect themselves by the non-receipt of the notice within eight days from the date the loss had already accrued. It accorded a good legal defence to the action to recover the value of these goods. Their Lordships cannot find anything in these letters expressive of a desire or intention on the part of the shipowners to deprive themselves of the advantage of that defence. They therefore think that no waiver by the shipowners of the stipulation for the receipt of notice in paragraph 32 was proved, and therefore the Appellants succeed on this appeal, which must be allowed, and the action dismissed with costs here and below, and they will humbly advise His Majesty accordingly.

Delivered the 22nd day of June, 1926.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 65/26.

BEFORE:

Corrie, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Shehade Mahmud Shaaban — APPELLANT.

VS

The Attorney-General — RESPONDENT.

Evidence raising a strong presumption against innocence of accused held insufficient for conviction — New evidence not heard by Trial Court—Evidence of policemen regarded with suspicion by the Courts but nevertheless admissible — Case remitted by Court of Appeal for further evidence to be heard.

JUDGMENT.

The Court is not satisfied that the evidence heard by the District Court is sufficient to support a conviction, though it raises a strong presumption against the innocence of the accused.

It appears that other evidence for the prosecution was available but was not heard by the Court.

This further evidence was that of two Policemen who were alleged, while concealed in a cupboard, to have overheard statements made by the accused to his wife Fatum.

Evidence of this character is naturally regarded with a certain degree of suspicion by the Courts and it is not a matter for surprise that the District Court should have been unwilling to hear such evidence. Nevertheless, the evidence is admissible, and we hold that, under the circumstances, the Court should hear it.

It will be open to the accused to tender evidence to rebut such further evidence, if he desires to do so.

The judgment of the District Court is set aside and the case remitted for such further evidence to be heard and judgment given.

Delivered the 5th day of October, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 68/26.

BEFORE:

Seton, J., Khayat, J. and Abdel Hadi, J.

IN THE CASE OF:

Hassan El-Haj Mohammad Yacoub APPELLANT.

VS

Mohammad Abdallah Salhi RESPONDENT.

Land Court held to have enquired insufficiently into facts of case to give judgment—Unregistered deed of purchase alleged to have been lost— Purchase and possession of land proved by parol evidence — Werko entry as evidence of possession.

JUDGMENT.

We do not think that the Land Court had enquired sufficiently into the facts of this case to enable it to give judgment on its merits as it did on 12th January, 1926, when the Plaintiff failed to attend the trial.

The Plaintiff (now the Appellant) says that being the registered owner of half the land in question he bought the other half from the Respondent by an unregistered deed which is now lost. He wants to call witnesses to prove the purchase and his possession of the whole land since a long time. In support of this allegation he produced a Werko entry made out in the name of "Ismail Mohammad Yacoub and his brothers." The area of the land in dispute is 1 1/2 dunums, while the Werko entry relates to land of an area of 13 dunums, 300 dras. The Appellant states that the 1 1/2 dunums is comprised in the larger area of 13 dunums, 300 dras.

We think that he should be given an opportunity of proving his contention, and for this reason we set aside the judgment of the Land Court and remit the case.

Costs to be costs in the cause.

Delivered the 13th day of July, 1926.

In the High Court of Justice.

H. C. No. 77/27.

BEFORE:

The Chief Justice and Frumkin, J.

IN THE APPLICATION OF:

(EX PARTE)

Mordekhai Weingarten — PETITIONER.

VS

The Chief Execution Officer, Jerusalem,
Israel Label
Shlomo Roth — RESPONDENTS.

Refusal of Chief Execution Officer to hear evidence — Evidence heard by High Court — Participation of several judgment creditors in attachment.

Application for an Order to issue to the Chief Execution Officer of Jerusalem directing him to rescind his Order of 30th September, 1927, refusing to allow Petitioner to participate in the proceeds of the attachment effected on the property of the judgment debtor (Shlomo Roth) and to allow Petitioner to participate therein.

JUDGMENT.

The Court after having heard the relevant evidence before it, is satisfied that the award of 2nd Kislev, 5687 (8th November, 1926) is concerned with the same subject matter as that of 6th Nissan, 5685 (31st March, 1925).

The Court is of opinion that the evidence which was tendered before the Chief Execution Officer to this intent should have been heard by him, but sees no point in remitting the case for him to re-hear evidence which it has heard itself.

The Order of 16th February, 1928, is therefore made absolute, and the Court orders:

That the Order of the Chief Execution Officer dated 30th September, 1927, refusing to allow Petitioner to participate in the proceeds of the attachment effected on the property of his judgment debtor (Shlomo Roth), be set aside, and that the Petitioner be allowed to participate therein.

The costs of this application together with advocate's fees are to be paid by the Respondent, Israel Label.

Delivered in presence the 2nd day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 111/27.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Sliman 'Isa Ahmad — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Confession not free and voluntary held to be inadmissible in evidence—Evidence obtained in consequence of inadmissible confession also inadmissible — Section 8, Law of Evidence Amendment Ordinance, 1924.

JUDGMENT.

The Court is of opinion that the confession was not free and voluntary and hence is inadmissible under Section 8 of the Law of Evidence Amendment Ordinance, 1924, and it cannot admit evidence obtained in consequence of this inadmissible confession since it is not confirmed by the finding of the property as in the case referred to on pages 393 and 394 of Archbold, 26th Edition.

The conviction is therefore quashed.

Delivered the 6th day of February, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 49/28.

BEFORE:

Baker, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Ahmed Muhammed El-Habashi — APPELLANT.

vs

Tewfik El-Haj Omar — RESPONDENT.

Admissibility of oral evidence to prove authority of one person to sign named of another—Proof of agency—Proof of signature affixed by illiterate person to document.

JUDGMENT.

The question before the Court has on previous occasions been decided by the Court of Appeal, the Court having decided

that evidence may be heard as to the authority of one person to sign the name of another to a sanad.

Therefore, the judgment of the District Court of Nablus must be affirmed and the appeal dismissed with costs.

Delivered the 23rd day of January, 1928.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 89/28.

BEFORE:

The Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Ibrahim Hassan Hussein El-Abed
Deeb Mohamed Saleeba — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Committal by Attorney-General upon charge arising out of evidence taken at the trial of another person held invalid—Secs. 6, 7, Law of Evidence Amendment Ordinance, 1924—Committal under Sec. 26 (2) Trial Upon Information Ordinance, 1924—Conviction quashed for improper procedure—Sec. 3, Young Offenders Ordinance, 1922.

JUDGMENT.

The Court is of opinion that the evidence of Subhieh against Deeb is not corroborated by any other material evidence and does not come under Sections 6 or 7 of the Law of Evidence Amendment Ordinance, 1924, and moreover holds that the committal by the Attorney-General was upon a charge arising out of evidence taken at the trial upon information against Ibrahim and not at proceedings for his committal under Section 26 (2) of the Trial Upon Information Ordinance. For these reasons the conviction against Deeb is quashed.

The Court is of opinion that apart from the allegation that Deeb was an accomplice of Ibrahim, there is no evidence against the latter of premeditation. In the circumstances, it convicts Ibrahim of attempted unpremeditated murder under Article 174 of the Ottoman Penal Code, Section 3 (1) (a) and 9 (b) of the Criminal Law Amendment Ordinance, No. 2 of 1927, and Section 3 of the Young Offenders Ordinance, 1922, and sentences him to five years' imprisonment with labour.

Delivered the 4th day of October, 1928.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 138/28.

BEFORE:

The Senior British Judge, Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Mohamed Abdel Kader El-Dasuhi — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Evidence of witness given at preliminary investigation—Admissibility in evidence of deposition of absent witness—Evidence inadmissible by law not rendered admissible by consent of parties to action—Sec. 34, Trial Upon Information Ordinance, 1924.

Appeal from the judgment of the District Court of Jaffa dated 22nd October, 1928, whereby the Appellant was convicted under Article 174 of the Penal Code and Section 9 (2) of the Criminal Law Amendment Ordinance, No. 2 of 1927, and Article 177 of the Penal Code and sentenced to 8 years' penal servitude.

JUDGMENT.

The classes of persons whose depositions may be read at the trial as evidence in their absence are enumerated in Section 34 of the Trial Upon Information Ordinance, 1924. Dr. Dajani did not fall within any of these classes, and his deposition could not be rendered admissible as evidence by consent of the defence.

Moreover, the finding of the Court that the doctor estimates the permanent injury to the victim as 75% is at variance with Dr. Dajani's deposition which was to the effect that the permanent injury was 25%.

The judgment of the District Court is set aside and the case remitted for the medical evidence to be heard and judgment given.

Delivered the 24th day of January, 1929.

In the District Court of Haifa sitting as a Court of Appeal.

M. A. D. C. Ha. No. 28/29.

BEFORE:

The President, Hasna, J. and Said, J.

IN THE CASE OF:

Fahed Mohamed Hamdan
of Balad Es Sheikh — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Sufficiency of evidence for conviction — Evidence heard on retrial by Appeal Court — Court entitled to hear best evidence — Plaster impressions held to be best evidence of footprints.

Appeal from the judgment of the Magistrate's Court of Haifa, dated the 12th day of April, 1929.

JUDGMENT.

When this Court perused the evidence given before the Magistrate, this Court came to the conclusion that this evidence was unsatisfactory. The Court has now heard the evidence itself upon retrial and the Court has no reason whatever to change its original opinion of the evidence. In the opinion of the Court the accused should not have been convicted upon this evidence and the Court quashes the conviction and sentence of the Magistrate dated 12th April, 1929, and finds the accused Not Guilty.

The Court considers that the way in which an accused's feet are compared with foot prints on wet ground is most unsatisfactory. The Court is entitled to have the best evidence before it and the best evidence in such cases is plaster impressions of the foot prints which the Court can itself compare with other plaster impressions of the accused's soles.

Given the 18th day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 76/29.

BEFORE:

The Senior Puisne Judge, Frumkin, J. and Khayat, J.

IN THE CASE OF:

Moshe Turek — APPELLANT.

vs

Aziza Ezra David,
Ezra Shlomo David — RESPONDENTS.

Evidence of parties—Right of either party to the action to summon the other party to give evidence.

Appeal from the judgment of the District Court of Jaffa, dated the 25th day of April, 1929.

JUDGMENT.

The Appellant was entitled to give evidence on his own behalf and to have Respondents summoned to give evidence. Until such evidence had been heard, the District Court was not in a position to hold that the Appellant had failed to prove his case.

The judgment of the District Court is therefore set aside and the case remitted for such evidence to be heard and a fresh judgment given.

Costs will follow the event.

Delivered the 31st day of October, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 89/29.

BEFORE:

The Senior Puisne Judge, Baker, J. and Frumkin, J.

IN THE CASE OF:

Shakib El-Haj — APPELLANT.

vs

Moshe Isaak Matalon — RESPONDENT.

Necessity of Notarial Notice to prove delivery of documents—Admission of evidence under Art. 80, Civil Procedure Code—Breach of contract for the sale of land—Extension of time for completion offered by Notarial Notice—Effect of refusal to accept extension of period for completion.

JUDGMENT.

The District Court has refused to allow the Appellant to call evidence to prove his allegation that certain documents were delivered by him to the Respondent, holding that this allegation must be proved by service of a Notarial Notice.

It is clear, however, that the Appellant was entitled to prove his allegation by any evidence admissible in accordance with Article 80 of the Code of Civil Procedure as amended.

This Court, however, holds that the fact of such delivery, if established, would not affect the rights of the parties.

The Appellant admits that the period fixed for completion of the purchase of 250 dunams expired on the 17th August, 1928. The Notarial Notice served by the Respondent upon the Appellant on the 15th September, 1928, offered an extension of the period for completion up to seven days from that date.

This offer was refused by the Appellant who endorsed the Notarial Notice as follows:

> "You will find us prepared to complete within a month from this date, and not a week as you request".

In the face of this refusal, it is useless for the Appellant to attempt to prove that he in fact complied with the requirements of the Notice.

The second point raised in this appeal is as to the area which has actually been transferred to the Respondent.

The area as claimed and accepted by the District Court is 719 dunams. The Appellant alleged that in fact about 800 dunams were transferred. The Respondent is prepared to accept 800 dunams as the correct area.

The amount adjudged as payable by the Appellant must accordingly be reduced by the equivalent in Palestine currency of £E. 291.60, the price of 81 dunams.

Subject to this variation the judgment of the District Court is affirmed with costs.

Delivered the 17th day of April, 1931.

In the Supreme Court sitting as a Court of Appeal.

CR. A. No. 132/29.

BEFORE:

Tute, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Mohammed Junes Abdul Al — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Identification of accused person—Foot-tracks as evidence—Sufficiency of evidence for conviction.

Appeal from the judgment of the District Court of Jaffa dated the 13th day of August, 1929, whereby the Appellant was sentenced to ten years' imprisonment under Article 174 of the Penal Code and Article 9 (b) of the Criminal Law Amendment Ordinance.

JUDGMENT.

The complainant says that he was sleeping outside a motor shed in an orchard when the accused came and shot him through the body. He recognised and pursued him for some distance notwithstanding his wound. He then returned, and named the accused to his partner who was sleeping in the shed. Others came on the scene among them two relatives of the complainant,—P.W. (4) and P.W. (5). P.W. 4 sent information to the police but did not name the accused in it. He was named in a report which was sent a little later—apparently by someone else.

When they came to the scene the police found tracks on the line of accused's flight which have been identified with the tracks of the accused.

P.W. 5 says that he saw the accused with a rifle in the locality on a night preceding the crime.

On this evidence the Lower Court has convicted. The Doctor's evidence shows that the bullet passed through the muscles of the heart and was so dangerous that the eventual recovery which followed was not expected.

It is difficult to believe that a man so wounded would be able to pursue his assailant and then find his way back unassisted to the place where he had been shot. The point has not been dealt with by the medical evidence.

Complainant's allegation that he named accused at once to his partner is denied by the latter. P.W. 4's allegation that

complainant named him as soon as he ran up is not consistent with the information sent to the police by that witness which does not disclose the name of the accused.

The evidence appears to be consistent with the supposition that the accused ran up with others on hearing the shot and the subsequent outcry, and that in going away he left the tracks which were later treated as evidence of his guilt. The enmity of the parties may either have been the motive for the crime or else the reason for a false charge.

The Lower Court has not written a detailed judgment and it is therefore impossible to say what opinion it formed on those parts of the evidence which are naturally contradictory.

We consider that the conviction is not supported by sufficient uncontradicted evidence and acquit the accused.

Delivered the 26th day of November, 1929.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 48/30.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Frumkin, J.

IN THE CASE OF:

Elimelekh Tiktinsky — APPELLANT.

vs

Kolel Habad Waqf — RESPONDENT.

Question of fact held not to give rise to appeal to Court of Appeal— Fresh defence involving facts not alleged in Trial Court not heard in Court of Appeal — Declaration of title to immovable property made by Court of Appeal on appeal from Land Court.

Appeal from the judgment of the Land Court of Jerusalem, dated the 28th July, 1930.

JUDGMENT.

The Land Court has held that the room in dispute forms part of the Waqf property administered by the Kolel Habad. This is a question of fact which does not give rise to an appeal to this Court.

The Appellant has, as an alternative, claimed that the room in question was made over to the Kolel subject to his right to occupy the room for life.

This is an entirely fresh defence involving facts which were never alleged before the Land Court, and this Court cannot go into them.

The appeal is dismissed.

The Respondent Society is entitled to a declaration of title to the room in claim free from any right therein of the Appellant.

The Appellant will pay the costs of this appeal including £P. 2 advocate's fees.

Delivered the 22nd day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

L. A. No. 58/30.

BEFORE:

Baker, J., Frumkin, J. and Khaldi, J.

IN THE CASE OF:

A. Friedman — APPELLANT.

vs

M. Miller — RESPONDENT.

Mortgage alleged to have been signed by mortgagor under threats and coercion—Cancellation of mortgage by Land Court—Section 3, Prevention of Intimidation Ordinance, 1927—Admissibility of record of conviction as evidence of the same fact coming into controversy in a civil suit — Binding effect of criminal conviction on Civil Court—Nature of compulsion for rescission of contract.

Appeal from the judgment of the Land Court of Jaffa, dated 27th November, 1931.

JUDGMENT.

This is an appeal from the judgment of the Jaffa Land Court whereby the said Court cancelled a mortgage executed by Respondent in favour of Appellant whereby Respondent secured her house for the sum of £.620. in Appellant's favour.

On or about November, 1927, Respondent instituted criminal proceedings against Appellant alleging that she had been intimidated by Appellant into signing the mortgage, the subject matter of this appeal, and on the 28th November, 1927, the Magistrate of Tel-Aviv, after hearing the complaint and evidence in the case found Appellant guilty of such intimidation under Section 3 of the Prevention of Intimidation Ordinance, 1927, and imposed upon him a fine of £P.5.

Against this judgment Appellant applied for leave to appeal to the President of the Jaffa District Court on the grounds that the Intimidation Ordin., 1927, was only applicable to industrial disputes.

This application the said President refused on the 8th January, 1928, on the grounds stated in his refusal.

In April, 1929, the Respondent applied to the Jaffa Land Court for the cancellation of the mortgage, the subject matter of this appeal, on the grounds that no consideration had passed between Respondent and Appellant and that Respondent was induced to execute the mortgage by intimidation and threats. In support of her application she cited the before-mentioned judgment of the Magistrate whereby Appellant was convicted in respect of such intimidation.

The Jaffa Land Court heard no evidence and after hearing counsel for both parties decided "that they were bound by the judgment of the Magistrate's Court and that they were not competent to go beyond it being bound by its contents insofar as it contains statements of facts; that the Magistrate's Court judgment disclosed that the mortgage was obtained by threats and that it showed beyond question that Respondent's consent was not a free and voluntary one, but was coerced and therefore not a genuine one and accordingly the Court decided to grant the application for recission of the mortgage."

Counsel for Appellant has argued that the Magistrate's judgment cannot be considered conclusive, that there is no Ottoman law which prescribes such a doctrine or prescribes what weight, if any, shall be given to a criminal decision of a Magistrate in a civil case and therefore one must go to the English Common Law (Article 46 of the Palestine Order-in-Council, 1922).

He says that the English law is clear and quotes Roscoe on Nisi Prius Evidence, p. 207, 18th Edition, where it states: "It is now settled that a record of conviction is inadmissable as evidence of the same fact coming into controversy in a civil suit. Gibson v. McCarty, Lee temp. Hard. 311." Further he argues that the threats or coercion must be of such nature as to render a mortgage null and void under the civil law and that they must come within the provisions of the Mejelle.

Counsel for Respondent has argued that the Land Court was bound by the Magistrate's judgment, that the Ottoman law is not deficient in prescribing that a civil court is bound by a judgment of a criminal court, and cites Article 3 of the Penal Code of Procedure and learned French authors on the subject.

The Magistrate held that the mortgage, the subject of appeal was obtained by threats. The Land Court, however, did not consider whether the threats were of such a nature which under the civil law would render the mortgage void.

Accordingly the judgment of the Land Court is set aside and the case remitted for the said Court to decide whether the compulsion used, if any, was such as to render the mortgage void in accordance with the relevant Sections of the Mejelle dealing with the rescission of contracts on the ground of compulsion.

Costs, costs in the case.

Delivered the 27th day of November, 1931.

In the District Court of Jerusalem sitting as a Court of Appeal.

C. A. D. C. Jm. No. 60/30.

BEFORE:

De Freitas, J., Valero, J. and Baradey, J.

IN THE CASE OF:

Sader Ed Din Dajani — APPELLANT.

vs

Samuel Horenstein — RESPONDENT.

Refusal of party to appear as witness at request of other party — Such refusal held to be admission of claims.

Appeal from the judgment of the Magistrate's Court of Jerusalem, dated the 23th day of January, 1930.

JUDGMENT.

Whereas it appears that Respondent refused to appear as witness on the request of the Appellant, this Court holds that he admits all arguments of the Appellant, viz: that the document signed by the Appellant was given to Respondent as security for the giro given by Respondent in favour of Appellant.

We hold, therefore, that Respondent is not entitled to claim any amount before proving that he paid any sum in accordance with his giro.

We set aside the Magistrate's decision.

Judgment final.

Costs to be paid by Respondent.

Advocate's fees £P.2.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 75/30.

BEFORE:

The Chief Justice, Khaldi, J. and Abdel Hadi, J.

IN THE CASE OF:

Khalil Abu Khaled — APPELLANT.

vs

Haj Ibrahim Abu Irmelah — RESPONDENT.

Civil procedure—Order of calling of witnesses—Plaintiff to call his witnesses first.

Appeal from the judgment of the District Court of Jerusalem dated the 14th day of May, 1930.

JUDGMENT.

There appears to have been a misapprehension of procedure in this case.

Para. 3 of the judgment states that Counsel for Plaintiff and Defendant both asked that the other party be heard as a witness and thereupon the Plaintiff was called for the Defendant, sworn, and Counsel for Defendant having dispensed with him, Counsel for Plaintiff wished to re-examine him.

The proper procedure was for the Plaintiff to call his witnesses first and only if he failed to produce evidence to support his case could the Court have said that it rested on no evidence and dismissed it; if he produced evidence the witness of Defendant should then have been called.

The case is remitted to the District Court for retrial according to the proper procedure.

No order as to costs.

Delivered the 24th day of September, 1931.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 78/30.

BEFORE:

The Senior Puisne Judge, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Ahmed Kassem Awad El-Taha — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Evidence of absent witness—Admission in evidence of deposition made at preliminary enquiry in presence of accused—Sec. 34, Trial Upon Information Ordinance, 1924—Necessity for calling clerk present at preliminary enquiry to prove deposition—Inability to produce witness to be proved.

JUDGMENT.

The appeal is dismissed with costs.

With regard to the admission in evidence of the deposition of Hilweh bint Ahmad, the Court desires to point out that it was unnecessary to prove this deposition by the evidence of someone present when it was made. Section 34 of the Trial Upon Information Ordinance, 1924, provides that in a case to which it applies a deposition —

> "may, with leave of the Court, be read at the trial as evidence in the case on production of the deposition signed by the Magistrate and on proof that the witness cannot be produced at the trial for one of the causes above mentioned and on proof, also, that the accused was present when the deposition was taken, except in the cases provided for in Section 25, and that he had an opportunity of cross-examining the witness".

It is the practice to admit such a deposition in evidence, if it is certified by the Magistrate to have been made in the presence of accused and that the accused had an opportunity to cross-examine.

The deposition in this case was so certified, and we hold that such certificate is sufficient evidence for the purpose of Section 34 without calling a clerk to prove the facts required.

It should, however, be pointed out that the section requires proof, not only that the witness is absent from Palestine, but that he cannot be produced on account of this absence; which does not necessarily follow from the fact that he is absent.

Delivered the 12th day of November, 1930.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 101/30.

BEFORE:

The Acting Chief Justice, Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Zahra bint Abdel Majid Abdel Latif
Mahmoud Ali Rashid — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Sufficiency of medical and police witnesses for conviction—Depositions made at preliminary enquiry and facts therein denied at trial held inadmissible—Art. 174, Ottoman Penal Code.

Appeal from the judgment of the District Court of Haifa dated the 5th day of November, 1930, whereby the Appellants were each sentenced to three years' imprisonment, under Article 174 of the Ottoman Penal Code.

JUDGMENT.

In this case the witnesses for the prosecution, other than the medical and police witnesses, have given no evidence before the Court of Trial upon which a conviction could be based.

The witnesses did, it is true, when appearing before the Magistrate, make depositions incriminating the accused, and these depositions were proved and read to the Court. But there is no authority for admitting in evidence on behalf of the prosecution a deposition made by a witness who in Court denied the facts stated in his deposition.

Accordingly the judgment must be set aside and the accused acquitted.

Delivered the 26th day of January, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 62/31.

BEFORE:

Baker, J., Frumkin, J. and Jarallah, J.

IN THE CASE OF:

Joseph Sharab — APPELLANT.

VS

Khalil Wafa — RESPONDENT.

Payment of money in satisfaction of debt—Allegation that money paid in satisfaction of prior debt—Oral evidence admitted to ascertain to which account payment of over LP.10 to be credited—Art. 80, Civil Procedure Code.

Appeal from the judgment of District Court of Jaffa, dated the 31st December, 1930.

JUDGMENT.

Appellant sued Respondent for the sum of LP.226.250 alleged to have been paid to Respondent to purchase sheep for him. Appellant produced evidence that the sum had been paid to Respondent and Respondent admitted receipt thereof, but alleged that the money was paid in satisfaction of a prior debt.

The amount in claim exceeds £P.10. but actual payment thereof is not disputed and oral evidence can therefore be admitted as to the facts. The Court was wrong in refusing to hear oral evidence. Accordingly the case must be remitted for the Court to hear such evidence the parties choose to produce, as to what in fact the payment of LP.250 to Appellant actually related to, and to give judgment thereon. Costs to be costs in the case.

Delivered the 20th day of January, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 72/31.

BEFORE:

The Chief Justice, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Ibrahim Elias Nasr — APPELLANT.

vs

Nijmeh Elias Nasr — RESPONDENT.

Admissibility of oral evidence—Written agreement between husband and wife — Oral evidence not admitted to rebut terms of written document—Articles 80, 82, Civil Procedure Code.

JUDGMENT.

In this case the husband and wife reduced their agreement to writing, and we hold that relations such as contemplated in Article 82 of the Civil Procedure Code who inter se have reduced their agreements to writing, cannot be held to come within the exemption which Article 82 gives to such relatives in normal circumstances when they are assumed to conduct their affairs on a basis of mutual confidence, and that in consequence oral evidence is not admissible to rebut the written terms of the written document which can only be rebutted by documentary evidence as prescribed by Article 80.

The appeal is dismissed with costs and £P.2 advocate's fees.

Delivered the 25th day of January, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 124/31.

BEFORE:

The Chief Justice, the Acting Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:

Herman Louis Heinberg — APPELLANT.

vs

Leon Heinberg
Philip Heinberg
Regina Pepin
Zipa Ertel — RESPONDENTS.

Probate of will—New evidence revealed on appeal— Case remitted for retrial — Affidavits of two attesting witnesses to will produced

to prove due execution thereof— Petitioner for probate to be given opportunity to prove due execution of will before application dismissed.

Appeal from the judgment of the District Court of Jerusalem, dated the 24th day of July, 1931.

JUDGMENT.

We hold that on the evidence before it the judgment of the lower Court was correct, but fresh evidence in the shape of affidavits of the two attesting witnesses as to the due execution of the will being now available, we set aside the judgment of the District Court and we remit the case to the District Court to consider such evidence and give judgment accordingly.

We wish to add that in all applications for probate, opportunity should be given to the Petitioner to produce evidence on affidavit or otherwise as to the due execution of the will before such application is dismissed.

Costs of the appeal and of the proceedings in the District Court from which this is an appeal to come out of the costs.

Mr. Levitsky is released from the undertaking to pay £P.5 in lieu of guarantee.

Delivered the 20th day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 2/32.

BEFORE:

The Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Abu Zheibreh — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Promissory note delivered to accused in trust—Breach of trust under Art. 236, Ottoman Penal Code — Proof of payment of money — Admissibility of oral evidence to prove receipt of money—Obligation customarily reduced to writing—Oral evidence admissible to prove facts in civil case also admissible in criminal case to prove same facts.

JUDGMENT.

This is an appeal against a conviction under Article 236 of the Penal Code, the ground of appeal being that the Court of

trial wrongly admitted oral evidence and that the provisions of Article 80 of the Code of Civil Procedure should have been applied.

Article 236 of the Ottoman Penal Code says:

"A person who received movable property including goods, cash, commercial documents on trust or commission, with a view to his using the same in some specific manner whether for his or another's benefit, and conceals, changes, takes possession or makes use of them otherwise, and refuses to deliver them to the person who is entitled, or commits any other act that may be deemed to be a conversion, is punishable with imprisonment from two months to two years, and with a fine equal to 1/4 of the amount of compensation which may be due".

The accused was charged upon the complaint of one Jirius Bishara Zughbi who alleged that a promissory note signed by him in favour of the Appellant was delivered to the Appellant upon condition that he should pay £P.10 to the complainant, that such condition had not been fulfilled, and that in the absence of such fulfillment, the Appellant had no authority to retain or to negotiate the promissory note, but was bound to return it to the complainant and that his refusal to do so constituted an offence under Article 236 of the Penal Code.

The Appellant did not deny the obligation upon him to pay the £P. 10 but alleged that he had done so.

The issue of fact for the Court was whether or not the Appellant had paid the complainant the sum of £P.10.

The District Court after hearing witnesses on both sides, held that the sum of £P.10 had not been paid and accordingly convicted the Appellant.

The Appellant is support of his claim that oral exidence should not have been admitted, relies upon the judgment of this Court in Faiz Abdo Nikola v. The Attorney-General, M.A. No. 38/23.* That was a case in which a complainant alleged that he had paid a sum of money to the accused by way of deposit, and as the accused denied receipt of the money, the complainant proposed to prove payment by oral evidence.

The judgment of this Court was as follows:—

"The Court holds that the requirements of Article 80 of the Civil Procedure Code govern the proof of obligations such as that of deposit the abuse of which is punishable under Section 236 of the Ottoman Penal Code. It will be therefore necessary to prove this debt by some document in writing, such as a receipt.

* Reported ante p. 763.

The District Court should receive evidence to show what is the origin and nature of this alleged deposit and whether it is in fact a deposit recoverable in law, and if so, whether it is the kind for which it is customary to give an acknowledgement in writing".

That is to say: provided that it were proved that the alleged payment was of "the kind for which it is customary to give an acknowledgement in writing", the Court held that it was necessary to prove the debt by some document in writing and that the provisions of Article 80 of the Civil Procedure Code apply.

In the first case the Appellant alleges that the promissory note was delivered to him upon payment by him of the sum of £P.10. The complainant alleges that the delivery was made upon the condition that the sum of LP.10 should be paid at a later date, and that such sum never was so paid.

These are facts which the parties should be entitled to prove by oral evidence in a civil action, and it follows that oral evidence was admissible in the criminal proceedings.

The appeal must therefore be dismissed.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 6/32.

BEFORE:

The Acting Senior Puisne Judge, Khaldi, J. and Khayat, J.

IN THE CASE OF:

Haj Ragheb Es Sokhon — APPELLANT.

VS

Salim Hannun
Abdel Hamid Khreim — RESPONDENTS.

Question of credibility of witnesses is question for Lower Court—Usurious Loans (Evidence) Ordinance, 1922.

Appeal from the judgment of the District Court of Nablus, dated the 22nd day of November, 1931.

JUDGMENT.

The Lower Court heard evidence under the Usurious Loans Ordinance and believed such evidence.

Accordingly, the appeal must be dismissed and the judgment of the Lower Court confirmed with costs and advocate's fees assessed at £P.2.

Delivered the 8th day of June, 1932.

In the District Court of Jerusalem.

CR. C. Jm. No. 7/32.

BEFORE:

Sherwell, J. and Abdel Hadi, J.

IN THE CASE OF:

The Attorney-General

vs

Hanna Bishara ACCUSED.

Criminal procedure — Evidence of witnesses rejected by Court as being unreliable—Onus on prosecution to prove its case—Doubts in minds of the Judges to be placed to benefit of accused.

JUDGMENT.

The evidence for the prosecution here is wholly insufficient and inconvincing to our minds. In particular, the Court finds the evidence of Mr. Suleiman Tannour and that of his brother Dr. Issac Tannour, on all material points to be unreliable.

The onus lies upon the prosecution to prove its case. Having heard the whole of evidence for the prosecution, there exist grave doubts in our minds as to whether any of the allegations put forward here by the prosecution on behalf of the Complainant Mr. Suleiman Tannour have any real foundation. Our doubt is such that we have no hesitation in acquitting now the accused Hanna Bishara of the charge against him here, and therefore we order his discharge forthwith.

Delivered the 30th day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 11/32.

BEFORE:

Corrie, J., Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Hamad Haj Hamdan — APPELLANT.

VS

Abdel Latif Mahmud Haj As'ad,
Abdallah Muhammad Haj As'ad,
Amineh Bint Abdel Qader Musa,
Atfeh Bint Yusef Hassan Daoud,
Zahra Bint Mahmd Haj As'ad — RESPONDENTS.

Inspection of land in dispute ordered by Land Court—Right of Land Court to make findings of fact upon the evidence before the Court without proceeding with the inspection—Order for inspection rescinded by Court—Discretion of the Land Court not interfered with by the Court of Appeal.

JUDGMENT.

The only question of law raised by this appeal is whether the Court, after having ordered inspection of the lands in dispute, was or was not entitled to make findings of fact upon the evidence before the Court without proceeding with the inspection. The question whether an inspection should be held or not was within the Land Court's discretion, and this Court, by a majority, holds that there is no authority for the view that a Court cannot rescind an order for inspection.

In the present case the Land Court having heard evidence was satisfied as to the facts, and we hold that it is not for this Court to direct that the Land Court shall base its finding of fact upon an inspection rather than upon evidence heard by the Court itself, when the Court is satisfied that the evidence before it is sufficient. The appeal of the Appellant Hamdan is dismissed.

With regard to the cross-appeal by the Respondent Zahra, the judgment of the Land Court will be amended by a declaration that the other heirs of Haj As'ad are entitled to be registered in respect of the shares to which they are entitled under the Certificate of Succession to Haj As'ad's Estate.

The Appellant Hamdan will pay the costs of this appeal, including £P.5 advocate's fees and expenses, to the Respondents Amineh, Atfeh and Zahra jointly, and £P1.500 expenses each to Respondents Abdel Latif and Abdallah.

Delivered the 27th day of September, 1932.