COLLECTION OF JUDGMENTS

OF

THE COURTS OF PALESTINE

1934 — 1936

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

UNDER THE EDITORSHIP
OF
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COMPILED AND ARRANGED
IN ALPHABETICAL AND CHRONOLOGICAL ORDER
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WITH
A COMPREHENSIVE AND DETAILED INDEX
BY THE EDITOR

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PREFACE.

In preparing this Collection of Judgments and its predecessor, the Collection of Judgments, 1919—1933, it has been my constant object to facilitate reference by the practitioner to judicial decision and with this end in view a scheme of arrangement has been adopted which groups together under various titles cases dealing with particular branches of law. It has not always been possible to conform to this rule since cases containing identical principles often embodied other important questions of law and these have generally been distributed under different titles. Those cases, however, which have obtained some measure of notoriety in the profession as expounding a principle under a certain title have, for convenience of reference, been placed under that title.

Some difficulty was encountered as regards the exclusion of cases which may be considered as obsolete due to the displacement of legislation since the Occupation. I have felt, however, that these have more than historical value as they are still referred to and may have practical utility as showing the state of the law before it was amended and in many instances revealing the reasons for the amendments.

An outstanding feature of this work is that the judgments have been closely indexed in an index to be published at the end of the work so that each principle of law evolved or referred to in any judgment whether it be the principle on which the issue was determined, or whether it be a principle discussed, or mere obiter

dictum, has been made available in accessible form. The importance of this convenience can readily be appreciated in view of the scarcity of indexed reference to legal authority in Palestine. In a country, also, in which the judicial system is newly erected and where there is no body of accumulated legal interpretation to which the practising lawyer can refer, every interpretation of or judicial comment upon a principle of law by a Court is an asset to the lawyer.

This work and the vast amount of labour which it has involved is dedicated to the legal profession in Palestine in the sincere hope and belief that it will lighten the burden of legal research and increase the facility for making authority available to the practitioner.

Max D. Friedman.

Tel-Aviv,
February, 1937.

PUBLISHER'S NOTE.

This publication is arranged along the same lines as the arrangement used by the publisher in his Collection of Judgments, 1919—1933. There has, however, been added in each report a head-note by the editor setting out the facts and synopsyzing the whole judgment in such a manner as to show the result of the judgment in a few sentences. A number of judgments omitted from the Collection of Judgments, 1919—1933, and not available at the time of the publication of that collection have been included here.

Suggestions for the improvement of the work and notices of error will be welcomed.

L. M. Rotenberg.

February, 1937.

ABBREVIATIONS

USED IN THIS WORK:

A.	— Criminal Assize.
A.A.	— Assize Appeal.
C.A.	— Civil Appeal.
C.A D.C.	— Civil Appeal in the District Court.
C.D.C.	— Civil Case in the District Court.
C.E.O.	— Judgment of Chief Execution Officer.
C. of J.	— Collection of Judgments 1919—1933.
C.L.A.C.A.	— Civil Leave Application in the Court of Appeal.
C.L.A.D.C.	— Civil Leave Application in the District Court.
CR.A.	— Criminal Appeal.
CR.A.D.C.	— Criminal Appeal in the District Court.
CR.C.D.C.	— Criminal Case in the District Court.
CR.L.A.C.A.	— Criminal Leave Application in the Court of Appeal.
H.C.	— High Court.
L.	— Land Case.
L.A.	— Land Appeal.
L.A.L.C.	— Land Appeal in the Land Court.
L.S.	— Land Settlement.
M.A.	— Misdemeanour Appeal.
M.A.L.C.	— Misdemeanour Appeal in the District Court.
M.D.C.	— Misdemeanour Case in the District Court.
O.G.	— Official Gazette (until August, 1932).
P.C.A.	— Appeal to the Judicial Committee of the Privy Council.
P.C.L.A.	— Privy Council Leave Application.
P.G.	— Palestine Gazette (after August, 1932).
P.L.R.	— Palestine Law Reports.
S.T.	— Special Tribunal.
W.C.O.	— Workmen's Compensation Ordinance.

ACCOUNT BOOKS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 130/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Baker, J. and Khayat, J.

IN THE CASE OF:

J. P. Vigolik — APPELLANT.

v.

M. Spitzer — RESPONDENT.

Entry in account books as evidence — Master and servant — Employment of person to supervise construction of building — Recovery of remuneration — Plea of payment of lump sum a defence not a counterclaim — Burden of proof.

The appellant employed the respondent at an agreed remuneration to supervise the construction of a building which the appellant was erecting. The appellant gave to the respondent certain lump sums to be used for purposes in connection with the building, including the remuneration due to the respondent. Before the building was completed the appellant dismissed the respondent on the ground that these sums were incorrectly entered in the account book of the respondent and that the respondent had appropriated to himself an amount greater than his remuneration. The account book showed on one side of the account the lump sums received and on the other side the expenditures alleged by the respondent to have been made by him. The respondent having been declared bankrupt the Syndic sued for the balance of remuneration due.

The Magistrate found for the respondent and on appeal the District Court confirmed the judgment. Leave to appeal was granted on the following points of law:

1. Plaintiff was employed by defendant to supervise the construction of a certain building belonging to the defendant. Plaintiff claimed the balance of the remuneration alleged to be due from defendant.

The defendant pleaded that plaintiff used to receive from him lump sums which he was free to apply to any purpose connected with the building, including the remuneration due to himself, and that the said lump sums received by him in fact covered remuneration claimed. Must this plea by defendant be regarded as a defence or as a counterclaim for moneys received and not accounted for which counterclaim is to be admitted before the Bankruptcy Committee?

2. In view of the defendant's having submitted a book of accounts kept by and in the handwriting of the plaintiff showing on one side of the account the lump sums paid to plaintiff and on the other side of the account the expenditures alleged by the plaintiff to have been made by him, does not the onus shift on the plaintiff to prove the items of expenditure, inasmuch as the said entries of expenditure are statements made by the plaintiff in his own favour?

3. Alternatively, the plaintiff not having been exclusively engaged by the defendant and having been dismissed by the defendant after a part of his work had been performed, is he entitled to claim the whole remuneration stipulated or only part thereof, inasmuch as if the dismissal was wrongful, the plaintiff has got a remedy in damages for breach of contract?

HELD: That such a plea was a defence and not a counterclaim, and that the burden was on the respondent to prove that the expenditure was in respect of purposes other than his remuneration.

Appeal from the judgment of the District Court of Jerusalem (C.A.D.C.Jm. No. 119/34) confirming the judgment of the Magistrate in favour of the plaintiff.

I. Olshan — for the appellant.
A. King — for the respondent.

JUDGMENT.

The answers to the first two questions upon which leave to appeal has been granted are:—

1. The appellant's plea is a defence and not a counter-claim.

2. The burden of proving the items of expenditure entered in the respondent's account book is upon the respondent.

The third point of law does not arise upon the facts as found in the judgment of the Magistrate's Court.

We hold, therefore, that it is not for us to give any ruling, at this stage, upon this point.

The judgment of the District Court is set aside and the case remitted to the Magistrate's Court for completion in accordance with this judgment.

Costs will follow the event.

Delivered the 20th day of December, 1936.

ADMINISTRATION OF ESTATES.

In the District Court of Jaffa.
(Probate Jurisdiction).

C.D.C.Ja. No. 420/28.

BEFORE:

The President (Copland, J.).

In the Matter of the Estate of Baruch Bromberg, deceased.

IN THE CASE OF:

Pearl Bromberg — PLAINTIFF.

v.

The Administrator of the Estate of Baruch Bromberg — DEFENDANT.

and

Sara Bromberg
Israel Bromberg — THIRD PARTIES.

Payment of dowry from estate — Duty of administrator to obtain directions of the Court — Claim for monies due under marriage contract between Jews — Ketuba — Marriage contract amended after execution thereof — Validity of such amendment — Dowry a matter of personal status — Money payable under marriage contract not a gift — Arts. 854, 879, Mejelle.

A contract of marriage made by persons of the Jewish faith contained a stipulation that a sum of £E. 5 was to be paid to the wife as ketuba in the event of separation. Six months prior to the death of the husband he changed the stipulation by an indorsement on the contract providing for a payment of £E. 500 in place of £E. 5. In a claim by the widow for the £E. 500.

HELD: That the indorsement was valid according to Rabbinical law being an addition to and part of the contract. Also, that the stipulation in the contract for payment was in the nature of

dowry and not a gift to which the provisions of Articles 854 and 879 of the Mejelle could be applied.

D. Hatchwell — for one of the third parties.

JUDGMENT.

This is a claim by the widow of the deceased for £E. 5 and £E. 500 as dowry under her marriage contract. The sum mentioned in the contract itself is £E. 5 but by an endorsement executed some 6 months before his death the deceased added a sum of £P. 500 to the amount stated in the contract. The administrator has very properly resisted the claim as it is obviously one on which he must obtain the directions of the Court. The third parties who are children of the deceased have been admitted to this action because if the claim of the widow be allowed their shares in the distribution of the estate will be diminished.

Dowry being a matter of personal status we have taken the opinion of the Chief Rabbinate on the question of the validity of the endorsement on the contract and the reply is that the endorsement is a valid one according to Rabbinical Law and must be read with the contract as one whole, though when it comes to the question of the distribution the endorsement may not rank on the same level as the original contract.

We are of opinion that this endorsement is a part of the marriage contract and that it is in the nature of dowry and is not a gift. The provisions of Article 854 of the Mejelle do not therefore apply. In Sharia Law it would certainly rank as dowry. The provisions of Article 879 also have no application to the present case because they refer only to gifts and we hold that this is not a gift.

It has further been argued that whether this is a gift or dowry it is void in any case because at the time of executing it the deceased was of unsound mind and was under undue influence. Undue influence as such is not recognized in the Mejelle which only deals with force and compulsion and it is not suggested here that such force or duress was used against the deceased by his wife or anyone else. It has been argued that because the deceased married a lady of about 50 who himself was 84 that this is a sign of insanity. It may be an act of extreme foolishness but I can hardly say that it shows an unsound mind. And in any case until

a person has been inhibited from dealing with his property he is fully entitled to do what he wishes. The deceased was never inhibited and we cannot therefore now hold that he was of unsound mind.

We therefore declare that this endorsement is an addition to and a part of the marriage contract and is to be admitted as such by the administrator.

Costs of all parties to come out of the estate. Advocates fees £2 to plaintiff, £2 to the administrator and £1 to Mr. Hatchwell representing one of the third parties.

Delivered the 10th day of October, 1928.

ADMISSIONS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 76/34.

BEFORE:

The Chief Justice (McDonnell, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Zakieh Mulki — APPELLANT.

v.

Bahjat el Issa — RESPONDENT.

Allegation that admission made in notarial power of attorney was false — Right to administer oath as to such falsity — Omission by trial court to award interest — Such omission to be raised in pleadings on appeal — Refusal of Court of Appeal to rectify such omission.

Defendant executed an irrevocable power of attorney before the Notary Public containing an admission that she had received LP. 150 from the plaintiff, and undertaking to repay the said amount in accordance with the terms of a certain agreement. The money not being repaid the plaintiff sued. Plea: that the admission

in the power of attorney was false and that she had in fact received only LP.25.

HELD: That although an oath could not, on the principle established in C.A. No. 306/20[1]) be administered to prove the falsity of an admission in the Land Registry, yet there was no authority for extending this rule to apply to admissions before the Notary Public, in cases in which he, as in this case, merely attested the document, and that therefore an oath in the form prescribed by the Court was to be administered.

HELD FURTHER that where the trial Court omits to award interest to a successful plaintiff, the latter is not entitled on appeal to an amendment of the judgment to include interest unless he has cross-appealed to apply for the interest.

Appeal from a judgment of the District Court of Haifa (C.D.C. Ha. No. 143/32) in favour of the plaintiff in the action.

Abcarius Bey — for appellant.
A. Levin — for respondent.

JUDGMENT.

The judgment in Civil Appeal No. 306/20[1]), Abu Khadra v. Abu Khadra, was concerned with an admission in the Land Registry and we can find no authority for its being extended in its application to admissions before the Notary Public in cases in which he, as in this case, merely attested the document.

The appeal is, therefore, allowed to this extent that appellant can administer to the respondent an oath in the following terms:

> "I swear by almighty God that the admission of Zakieh Mulki, in her Power of Attorney of 18th July, 1931, was not false, and that it is not the fact that she received only LP.25 out of the LP.150 mentioned in the Power of Attorney."

The case is adjourned to Thursday, May 9, for the attendance of the respondent for this purpose[2]).

Delivered the 2nd day of May, 1934.

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[1]) Reported C. of J. 1919—1933, p. 1129, P.L.R. p. 1.
[2]) See next page for final judgment.

JUDGMENT.

The Respondent having taken the oath in the form prescribed the appeal is dismissed with LP.4 advocate's fee and costs. With regard to the application to amend the judgment of the Court below to include interest in it we hold that an omission of this kind is not one which we can correct in the absence of a cross-appeal concerning it.

Delivered the 9th day of May, 1934.

ADVOCATES.

In the District Court of Jaffa.

C.D.C.Ja. No. 238/28.

BEFORE :

The President (Copland, J.), Mani, J. and Khaldi, J.

IN THE CASE OF :

Selig Axelrod — PLAINTIFF.

v.

Solomon Feingold — DEFENDANT.

Opposition to judgment given by default — Illness of advocate as ground for adjournment — Petition for adjournment — Civil procedure.

An action was set down for hearing on a certain date. Prior to that date the defendant's advocate applied for an adjournment on the ground of his illness and produced a supporting medical certificate. The advocate made no further enquiries as to whether the application had been granted or not and on the day set for hearing the Court gave judgment by default.

HELD: That in these circumstances an opposition to the judgment given by default could not be accepted, that it is the

duty of an advocate to inform his client of his inability to appear on his behalf, and that an advocate has no right to assume that his application for adjournment will be granted as a matter of course.

Opposition to a judgment given by default in the absence of the advocate of the defendant.

Ibrahim Eff. Yousef — for defendant.

JUDGMENT.

The only ground advanced in support of this application is that the defendant's advocate Ibrahim Eff. Yousef was ill on the day fixed for the original trial and that the Court for this reason ought to allow the defence to be heard. The original case was first set down for hearing on the 14th June, 1927, and the defendant's advocate was notified of this on the 3rd June, 1927. On the 5th June the advocate forwarded a medical certificate stating that he was suffering from chronic malaria and dysentry and that he would not be fit to attend Court for a period of 5 days, and in the petition accompanying this certificate he asked for adjournment of the hearing. The matter came before the Court on the day fixed, June the 14th, and the Court declined to adjourn the hearing and decided to proceed in default. It is from that decision that the defendant now makes this application.

It must be observed that advocates have no right to assume that their petitions for adjournment will be granted as a matter of course and this Court declines to have its hand forced in this matter. On his own showing the advocate knew 9 days before the time fixed for the hearing that he would be unable to be present and it was therefore his duty to inform his client accordingly. This he did not do but applied for adjournment and took no steps whatsoever to ascertain if his request was granted. In these circumstances I am of opinion that the Court was perfectly correct in refusing to adjourn and this alone would be a sufficient reason for us to refuse to allow this opposition.

But it is of interest to note that on the afternoon of the 14th or 15th of June when this advocate was supposed to be in Tiberias too ill to travel he in fact appeared in the District Court offices and asked one of my learned colleagues "What is this that you have done by deciding to hear this case in default ?"

We have therefore not the slightest hesitation in dismissing this opposition with costs.

I may also add that it is not far from the truth to say that every practice of obstruction has been pursued in the proceedings between these parties.

Delivered the 18th day of June, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 139/34.

BEFORE:

The Senior British Judge (Corrie, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Mamur el Awqaf, Jerusalem — APPELLANT.

v.

Syndic of Barsky's Bankruptcy — RESPONDENT.

Authority of advocate to present appeal — Power of attorney signed by officer of Society — Lapse of power of attorney on officer's retirement.

In 1925 an advocate received a power of attorney from the Mamur el Awqaf on behalf of the Waqf Administration. Acting under the power of attorney the advocate filed a claim and appealed from the decision thereof at a time when the Mamur el Awqaf no longer held office. No objection was taken to the power of attorney in the trial Court.

HELD: that in accordance with the rule in L.A. 57/33 the power of attorney was no longer effective on the retirement of the officer holding the position of Mamur el Awqaf, and the advocate had no authority to present an appeal.

Appeal from a judgment of the District Court of Jerusalem (C.D. C.Jm. No. 326/32) in favour of the defendant in the action

Auni Bey Abdul Hadi — for appellant.
M. Eliash — for respondent.

JUDGMENT.

The appeal had been filed by Auni Bey Abdul Hadi in reliance upon a power of attorney given in 1925 by Badr Eff. Yunis, at that time Mamur el Awqaf, Jerusalem.

Before the appeal was presented, however, Badr Eff. had ceased to hold the office of Mamur el Awqaf, hence, in accordance with the rule laid down in LA 57/33, Department of Moslem Waqfs, Jerusalem v. Padre Custode di Terra Santa, Jerusalem, the power of attorney was no longer effective, and Auni Bey had no authority to present an appeal.

There is therefore no valid appeal before this Court and Auni Bey's application is dismissed with costs.

Delivered the 9th day of January, 1935.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 5/35.

BEFORE:

The Acting Chief Justice (Corrie, J.), Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Michael Neeman — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Petition writer practicing as advocate — Leases, contracts or other documents for submission to the Land Registry are documents of legal nature — Licence to practice as advocate — Secs. 2, 24, Advocates Ordinance, 1922.

A licenced land broker and petition writer was charged with, and admitted, having practised the profession of advocate without a licence, in that he had prepared for remuneration, contracts, mortgages, leases and other documents for Land Registries.

HELD: That the preparation of such documents was work of a legal nature and that the petition writer was therefore practising the profession of advocate without a licence contrary to Sec. 24 of the Advocates Ordinance, 1922.

Appeal from a judgment of the District Court of Jaffa (M.D.C.Ja. No. 102/35) convicting the accused.

M. E. Moghannem — for appellant.

A. Bardaky — for respondent.

JUDGMENT OF THE DISTRICT COURT.

This is a curious case, the first of its kind that has come before this Court since the establishment of the Courts in Palestine after the British Occupation.

The defendant is charged with having practised the profession of advocate without a licence, in that he had prepared and written against remuneration, contracts, mortgages, leases and other documents for Land Registries and other Departments, thus contravening the provisions of the Advocates Ordinance, 1922.

The facts of the case are not disputed in any way. The defendant has gone into the witness box and admitted that he has done all these things. He says, however, that he has never held himself out to be an advocate but he was a petition writer and a broker, pure and simple. He says that he has been a petition writer for four or five years and there are dozens of people who are carrying out the same kind of work scattered all over Palestine, who have been doing so for the last 17 years without the slightest objection by Government, following the state of affairs that had been going on during the Turkish Regime. He further says that many advocates send him work of this nature to do. In fact, one of the advocates defending him in this particular case, Abcarius Bey, had given him such work which he had done. And it is an admitted fact that for many years these petition writers had been carrying out this kind of work, and as far as my recollection goes, no objection had been raised by bringing a criminal prosecution.

The only question, therefore, that arises now is whether this work which has been done is of a legal nature and whether the documents that have been written and prepared and presented to the authorities concerned are or are not of a legal nature.

Section 1 of the Advocates Ordinance, 1922, defines the profession of an advocate. Section 1 (b) says that the profession of an advocate consists "in writing or preparing for remuneration any document intended to be presented to a Court, Registry, or other office, or any other document of a legal nature," and I do not think that there can be any doubt that a person who does these things must be held to be practising the profession of an advocate.

Section 24 of the Advocates Ordinance says "whoever holds himself out to be an advocate or practises as such . .". A distinction is made between "holding out" and "practising".

It is not suggested for one moment that the defendant had held himself out to be an advocate. And the only question for us to decide is whether he had practised as such. I do not think that there can be any doubt that a contract, mortgage, lease, or statement of claim, are documents of a legal nature, and that being so, we have irresistibly come to the conclusion that the defendant has been illegally practising as an advocate, contrary to Section 24 of the Advocates Ordinance, 1922. Speaking for myself, I have come to this result with great regret, because I realise that this decision will cause a revolutionary change of what has been considered to be a legal practice not only during the last 17 years but also during the Turkish days. But according to the present law of the country, I regret that I am unable to come to any other conclusion.

In the circumstances, we find the defendant guilty on the charge as laid down in the Information.

This is, of course, a test case, and the question of penalty is of little importance. The sentence we are passing now should not be considered as a precedent and though the penalty in this case is only nominal, we shall deal more severely in future cases, because this is the law of the country unless and until our decision is reversed.

I issue this warning to all persons concerned who are doing the same work as the defendant and would remind them that the maximum penalty is LP. 500.

The sentence of the Court in your case, Michael Neeman, is that you will be bound over in your own recognizance in the sum of LP.5 for a period of one year, that you will come up for sentence for the present offence at any time within the said period

if called upon to do so, and you will pay the costs of this prosecution.

In the meantime you must cease to exercise your present remunerative work.

JUDGMENT OF THE COURT OF APPEAL.

It is clear that Sections 2 and 24 of the Advocates Ordinance, 1922, prohibit a person who is not a licensed advocate from preparing leases, contracts, or other documents for submission to the Land Registry.

All that may be done by such person is the actual filing in the Land Registry.

The appeal is dismissed with costs.

Delivered the 19th day of June, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 13/35.

BEFORE:

The Chief Justice (McDonnell, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Mordechai Levanon — APPELLANT.

v.

Ishac Muradian

Abraham Epstein — RESPONDENTS.

Remuneration of advocate — Sec. 19, Advocates Ordinance, 1922, applicable only to contentious business — Written undertaking to pay fee of advocate — Fair and reasonable remuneration.

An advocate was instructed to draft a contract for the sale of land for an agreed remuneration part of which was paid and for the balance of which an undertaking in the following form was given:

"We, the undersigned, hereby undertake to pay to advocate Mr. M. Levanon, or to his order, the sum of £P. 150, which is the third instalment in respect of his remuneration for legal services rendered to us up till this day.

Payment will be on the 5th day of November, 1931, or on the date upon which the land of Al-Sadra in the vicinity of Rehovoth will be wholly or partly registered in the name of Mr. Ishac Muradian or in the name of Mr. Nisan Ahronovitz, of Tel Aviv, or in the name of any other person by virtue of an order or transfer by them or one of them. Whichever date be the earlier, shall be the date of this bill.

Payment in Jerusalem.

Jerusalem, 5th February, 1930.

(Sgd.) Ishac Muradian
Abraham Epstein
Witness (Sgd.) N. Ahronovitz"

In an action for recovery under the undertaking it was pleaded that the fee was excessive, and that the Court, in exercise of the discretion conferred upon it by Section 19 of the Advocates Ordinance, 1922, should reduce it.

HELD: Section 19 of the Advocates Ordinance, 1922, was concerned only with the remuneration of advocates in respect of contentious business and did not apply to the undertaking sued upon.

Appeal from a judgment of the District Court of Jerusalem (C.DC. Jm. No. 50/34, dismissing the claim of the plaintiff in the action.

S. Horowitz — for the appellant.
Respondent in person.

JUDGMENT.

Sec. 19 of the Advocates Ordinance, 1922, clearly is concerned only with the remuneration of advocates in respect of contentious business, and in consequence does not apply to the undertaking of the 5th February, 1930, sued upon in the present case.

For this reason, we set aside the judgment of the District Court and give judgment against both respondents, jointly and severally, for the amount claimed, viz: £P. 150 with legal

interest from the date of action, being 6th March, 1934, until payment with costs to include £P. 2 advocate's fees.

Delivered the 8th day of April, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 176/35.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Khayat, J.

IN THE CASE OF:

Subhi Ayoubi — APPELLANT.

v.

Ahmed el Habab — RESPONDENT.

Advocate and client — Parol agreement made for remuneration for conducting Court action — Validity of promissory note given under such agreement — Section 19, Advocates Ordinance, 1922.

An advocate made a parol agreement with his client to conduct a case before the Land Court for an agreed fee and took a promissory note for the amount of the fee signed by a third person in his favour as security for payment. The note not having been paid at maturity the advocate brought an action on it before the Magistrate and obtained judgment in his favour. On appeal to the District Court the judgment was reversed on the ground that the parol agreement was unenforceable under Sec. 19 of the Advocates Ordinance, 1922. Upon leave to appeal to the Court of Appeal being granted:

HELD: (a) That the agreement was not enforceable since it had not been reduced to writing, and the promissory note, given under an unenforceable agreement was also unenforceable. (b) That it is immaterial that the note was not made by the client but by a third party.

Appeal from a judgment of the District Court of Jaffa sitting in its appellate capacity (C.A.D.C.Ja. No. 237/35) reversing the judgment of the Magistrate's Court at Jaffa in favour of the plaintiff in the action.

Appellant — in person.

Amin Akel — for respondent.

JUDGMENT.

The promissory note which gave rise to this action is expressed to be made for the following consideration:

"Value: remuneration in respect of action for the cancellation of the sale of Sakhja shares in the Ramlieh lands instituted by Mr. Musa Matalon in the Land Court of Jaffa.

Remuneration agreed upon beforehand.

Written in Jaffa."

Now under Section 19 of the Advocates Ordinance, 1922, an agreement between advocate and client for payment of fees in respect of any proceeding before a Court is unenforceable unless it is reduced to writing and an order for its enforcement is made by the Court before which the proceeding took place.

Hence the agreement between the appellant and Musa Matalon, which the appellant admits, was never reduced to writing and is unenforceable.

It follows that the appellant cannot enforce a promissory note which was given and is expressed to be given in respect of an unenforceable agreement, and it is immaterial that the note was not made by the client but by a third party.

The appeal is dismissed with costs including £P. 1 advocate's fee.

Delivered the 20th day of November, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 177/35.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Khayat, J.

IN THE CASE OF:

Subhi Ayoubi — APPELLANT.

v.

Ahmed el Habbab — RESPONDENT.

Advocate and client — Written agreement made for remuneration for conducting Court action — No order by Court for enforcement of such agreement — Validity of note given under such agreement — Section 19, Advocates Ordinance, 1922.

An advocate made a written agreement with a client to conduct a case before the Land Court for an agreed fee and took a promissory note for the amount of the fee signed by a third person in his favour as security for payment. The note not having been paid at maturity the advocate brought an action on it and obtained judgment in his favour. On appeal to the District Court the judgment was reversed on the ground that since no order had been made by the Court for the enforcement of the agreement the agreement was unenforceable under Section 19 of the Advocates Ordinance, 1922. Upon leave to appeal to the Court of Appeal being granted:

HELD: That the agreement was not enforceable since no order had been made by the Court for its enforcement in accordance with the requirements of Section 19 of the Advocates Ordinance, 1922.

Appeal from a judgment of the District Court of Jaffa sitting in its appellate capacity, reversing the judgment of the Magistrate's Court at Jaffa in favour of the plaintiff in the action.

Appellant in person.
Amin Akel — for respondent.

JUDGMENT.

The facts in this case only differ from those in C.A. 176/35*) between the same parties in that in the present case the agreement between advocate and client was reduced to writing.

No order for the enforcement of the agreement, however, has been made as required by Section 19 of the Advocates Ordinance, 1922.

Following, therefore, the judgment in the case cited, the appeal is dismissed with costs, including £P. 1 advocate's fees.

Delivered the 20th day of November, 1935.

In the Land Court of Jaffa sitting as a Court of Appeal.

L.A.L.C. Ja. No. 230/35.

BEFORE:

The Acting President (Edwards, J.) and Mani, J.

IN THE CASE OF:

David Zelivansky — APPELLANT.

v.

Joseph Shalem

Zwi Aurbach

Shalem Brothers — RESPONDENTS.

Stamp duty on power of attorney to advocate — Procedure where power of attorney found to be insufficiently stamped — Items 31 (1), 31 (4), Schedule to the Stamp Duty Ordinance, 1927.

In an action for eviction before a Magistrate the power of attorney to the advocate contained a power "to submit to arbitration and appoint arbitrators". The power of attorney was stamped with duty of 150 mils. The defendants raised the preliminary objection that the power of attorney was insufficiently stamped because it contained a power to submit to arbitration

*) Ante p. 24.

and appoint arbitrators, and should therefore have been stamped under Item 31 (4) of the Schedule to the Stamp Duty Ordinance, 1927.

HELD: (a) That the power of attorney was insufficiently stamped; (b) that in such event the claim was not to be dismissed, the proper procedure being for an adequate fine to be imposed and the power of attorney accepted.

Appeal from a judgment of the Magistrate's Court at Tel-Aviv dismissing the action of the plaintiff.

P. Goldberg — for appellant.
A. Wilner — for respondents.

JUDGMENT.

In our opinion the Magistrate was wrong in dismissing appellant's action on the ground that the power of attorney held by appellant's advocate was insufficiently stamped. In such a case a fine is to be imposed and the power of attorney accepted.

As to the question of the stamp duty we are of opinion that the power of attorney in question was insufficiently stamped not because it contained the word Land Court, for the intention of the parties is quite clear that the reference is to the Land Court in its appellate capacity, but because it authorizes the advocate to refer the matter to arbitration.

The judgment of the Court below is therefore set aside and the case remitted for hearing after the payment of an adequate fine.

Dated the 3rd day of July, 1935.

In the High Court of Justice.

H.C. No. 13/36.

BEFORE:

The Chief Justice (McDonnell, J.) and Baker, J.

IN THE APPLICATION OF:

Jacob Kost — PETITIONER.

v.

The Chairman and Members of the Legal Board — RESPONDENTS.

Failure of advocate at foreign advocates' examination — Improper exercise of discretion of Legal Board alleged — Application to be re-examined refused — Draft Bill not "law" — Discretion of Court to withhold order where petitioner guilty of delay — Section 26, Advocates Ordinance, 1922 — Rule 2 (2) Advocates Rules, 1926.

The petitioner was qualified abroad as an advocate and as a prospective candidate for the Foreign Advocates' Examination held in April, 1935, obtained a syllabus of the examination, published in November, 1934, which set out that the candidate would be examined in Penal Law which included the Criminal Code Bill, 1933. The petitioner obtained a sufficient general average at the examination, but did not obtain the required minimum in Penal Law. His application to the Legal Board to be re-examined in Penal Law alone having been refused he petitioned the High Court for an order nisi to issue to the chairman and members of the Legal Board to show cause why they should not be required (inter alia) to re-examine him in Penal Law in conformity with Rule 2 (2) of the Rules of 1926 made under the Advocates Ordinance, 1922. Petitioner alleged (inter alia) that the Legal Board had exercised its discretion in an arbitrary and improper manner. An order nisi having been obtained;

HELD discharging the order nisi: (a) That there was nothing to show an absence of the exercise of a proper discretion by the Board involving any breach of duty which imposed upon them a legal obligation which they had to perform as regards the petitioner.

(b) That a syllabus containing a draft Bill is not in conformity with Rule 2 (2) of the Rules of 1926 made under the Advocates Ordinance, 1922, since such Rule requires that a person shall not be deemed to be qualified to practice unless he has passed "an examination in the law and procedure of Palestine", and a draft Bill is clearly not "law", but

(c) That since the petitioner had six months' notice of the inclusion of the draft Bill in the syllabus before the examination and had taken no objection to its inclusion he had been guilty of such a delay as induced the Court in the exercise of its discretion to withhold the grant of an order absolute.

Application to the High Court for an order against the Legal Board as a public body. The facts and arguments appear more fully from the Order Nisi and the Final Order, both of which follow.

Bernard Joseph — for petitioner.
H. Kantrovitch, J.G.A. — for respondents.

ORDER NISI.

The petitioner asks for an order nisi to issue against the Legal Board to show cause:

(a) why they should not review the results of the Foreign Advocates Examination of the year 1935, to determine whether the petitioner passed the examination on the basis of the standard and requirements in force before the examination held in 1935;

(b) why they should not be required to declare the petitioner to have passed the said examination; and alternatively

(c) to show cause why they should not re-examine the petitioner in Penal Law in conformity with the Regulations in force, and take into account the result of such examination in determining whether petitioner passed the Foreign Advocates Examination or not.

As to (a) and (b) we are not satisfied that there is anything to show an absence of the exercise of a proper discretion by the Board, involving any breach of a duty, which imposed upon them a legal obligation which they had to perform as regards the petitioner.

The standard required for passing the examination is not laid down by any statutory authority and there is nothing before us to show that in varying such standard, if in fact there was such variation as the petitioner asks us to infer, the Board exercised its discretion in any improper manner.

In The Queen v. Hertford College (1878) 3 Q.B.D. at p. 701, Lord Coleridge C. J. in delivering the judgment of the Court of Appeal in the case of an application for a Mandamus directed to the electors to fellowships at the College in question said the following:—

> "A court of law can deal only with the acts not the motives of the actors, and if the electors' acts were legal, as where a discretion is left to them, and they act within it, mandamus is inapplicable."

With regard however to the third prayer in the petition which is headed (c), the situation is as follows:—

Under Section 4 (1) of the Advocates Ordinance, 1922, the Legal Board is "charged with the duty of examining applicants for licenses". The only statutory rule relating to the Foreign Advocates Examination is Section 2 (2) of the Rules under the Advocates Ordinance which came into force on the 1st August, 1926.

These Rules, though they do not say so, were clearly made under Section 26 of the Advocates Ordinance, 1922, which entitled the Chief Justice to make rules, inter alia, on "the subjects to be taken at examination."

Section 2 (2) of the Rules says that "no person shall be deemed to be qualified by examination as to his knowledge of the law administered by the Civil Courts unless he has passed an examination in the law and procedure of Palestine, to the satisfaction of the Board (hereinafter called the Foreign Advocates Examination)".

Petitioner's advocate did not draw our attention to the proviso to Section 26 of the Advocates Ordinance, 1922; which nevertheless is of importance. It runs as follows:—

> "Provided that the Chief Justice may delegate to the Legal Board the exercise of his powers so far as they relate to examinations."

It is in the exercise of these powers, no doubt, that the Board issues syllabuses such as that set out on p. 1086 of the

Gazette of the 1st November, 1934, which contains under the heading "Penal Law" the words "the Criminal Law Bill, 1933".

We grant an order nisi in terms of the third prayer headed (c) in the petitioner's application, in view of these provisions, to the petitioner in order that the Board may show cause whether a syllabus including a draft Bill is in conformity with Section 2 (2) of the Regulations of the 1st August, 1926, which requires the examination to be in the law and procedure of Palestine.

Given the 14th day of February, 1936.

ORDER.

This is a return to a Rule Nisi directed to the Chairman and Members of the Legal Board, to show cause why they should not be required to re-examine the petitioner in Penal Law, in conformity with Section 2 (2) of the Rules of 1926 made under the Advocates Ordinance, 1922, and why they should not take into account the result of such re-examination in determining whether or not the petitioner passed the Foreign Advocates Examination.

The matter arises out of some of the questions set in the Foreign Advocates Examination 1935 in the paper on Penal Law. These questions were based upon the Criminal Law Bill, 1933, which had not, at the date of the examination and has still not been passed into law.

It is quite clear that a draft Bill is not "the law administered by the Civil Courts" or "the law . . . of Palestine" upon which candidates have, by Section 2 of the Rules under the Advocates Ordinance of 1st August, 1926, to be examined.

Now, it was proved to us that the Legal Board published a syllabus of the 1935 examination on p. 1086 of the Gazette of the 1st of November, 1934, and that the syllabus was despatched during October, 1934, to every prospective candidate for the examination of 1935.

The Junior Government Advocate, on behalf of the Board, states that the reason for the inclusion of this Bill was that the Board assumed it would have passed into law by the date of the examination which only came on on the 29th of April, 1935. The petitioner did not, at any time before the examination, draw the attention of the Board to the contravention of Section 2 (2) of the Regulations, but it may be said that he, like the Board itself,

laboured under the impression that the Bill would be passed into law before the examination took place.

When the latter event occurred and the Penal Law paper contained questions based upon the Bill, the petitioner still did not point out to the Board the breach of Section 2 of the Regulations in question, nor did he approach this Court for a mandamus, as he has done now.

On the 11th of February, 1936, after the results of the examination were published showing that he had failed in the Penal Law paper he, for the first time, drew the attention of the Board to the breach of Section 2 of the Regulations in question and asked to be allowed to sit in the 1936 examination in Penal Law only. To this he received a reply dated the 14th February, 1936, that his application could not be acceded to and in the meantime he filed his petition in the present proceedings in the High Court.

Now it cannot be said that the petitioner was taken at a disadvantage by the sudden springing upon him of questions which the Board had no right to set. Six months before the examination the "Criminal Law Bill, 1933" appeared in the syllabus published in the Gazette and circularised to candidates. The whole thing it is clear arose from a mistake on the part of the Board in thinking the Bill would shortly become law. It acted in no sense in an arbitrary manner: and the mistake which it made was not one which was concealed but was given every possible publicity.

The candidates for the examination had six months' notice of the inclusion of the Bill in the syllabus and no objection was taken by the petitioner or by anyone else before the examination until the results were published.

It would have been a very different matter if no syllabus had been published and if a question not conforming to Section 2 (2) of the Rules of 1926 had been included.

In The Queen v. All Saints, Wigan (Churchwardens), (1876) A.C. Vol. I. at p. 620, Lord Chelmsford in the House of Lords, speaking of a writ of mandamus, stated that "The Court may refuse to grant writs not only upon the merits, but upon some delay, or other matters personal to the party applying for it, in this the Court exercises a discretion which cannot be questioned"; and in the same case at p. 622 Lord Hatherley said that "upon

a prerogative writ there may be many matters of discretion which may induce the judges to withhold the grant of it — matters connected with delay or possibly with conduct of the parties".

Taking into account the conduct of the Board and of the petitioner and the time at which this petition was filed, in the exercise of our discretion we discharge the Rule Nisi.

Given the 28th day of February, 1936.

APPEAL.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 177/33.

BEFORE:

The Chief Justice (McDonnell, C. J.), Baker, J. and Khayat, J.

IN THE CASE OF:

Eliahu Haskell Tweig — APPELLANT.

v.

Nicola Hawa — RESPONDENT.

Civil procedure — Procedure where leave to appeal obtained — Failure to serve certified copy of leave to appeal on respondent and to file same in Court — Leave to appeal is vital document on appeal—Section 5 (ii) Magistrates' Courts Jurisdiction Ordinance, 1924.

Leave to appeal from a judgment of the District Court having been obtained, the appellant filed in Court a certified copy of the judgment of the District Court but neither filed nor served a copy of the leave to appeal.

HELD: That there was no appeal properly before the Court, the vital document on appeal being the leave to appeal as it defines the limits of the appeal. As such document was not filed in Court the appeal was dismissed. Held further, that Section 5 (ii) of the

Magistrates' Courts Jurisdiction Ordinance, 1924, which provides that if leave to appeal be granted the ordinary procedure on appeal is to be followed does not dispense with the necessity of filing the leave to appeal.

Appeal by way of leave to appeal from a judgment of the District Court of Jerusalem in favour of the respondent.

A. Levitsky — for appellant.
A. Hanania — for respondent.

JUDGMENT.

In this case in which a judgment of the District Court was given on the 14th of August, 1933, and the Acting President of the District Court gave leave to appeal therefrom on the 5th of October, 1933, the appellant filed in Court and served on respondent a certified copy of the judgment of the District Court but neither filed in Court nor served on the other side a certified copy of the decision of the Acting President of the District Court giving leave to appeal.

Section 5 (ii) of the Magistrates' Courts Jurisdiction Ordinance, 1924, provides that if leave to appeal is granted in cases in which it is necessary, the ordinary procedure on appeal shall be followed and this has been taken by the appellant to be satisfied by the filing and service of the judgment of the District Court; but the vital document is the leave granted by the President as that defines the limits of the appeal, and since this has not been filed in Court we hold that the appeal is not properly before us and we dismiss the application with costs to include £P.2 advocate's fees.

Delivered the 8th day of June, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 123/35.

BEFORE:

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

IN THE CASE OF:

Eliahu M. Hotshe — APPELLANT.

v.

Ephraim Eliahu Cohen et al — RESPONDENTS.

Civil procedure — Leave to appeal — Refusal by President, District Court, to grant leave to appeal — Subsequent reversal by him of his own decision — Court functus officio after delivery of decision — Article 43, Ottoman Magistrates Law, 1913.

A plaintiff whose action was dismissed by a Magistrate appealed to the District Court where the appeal was dismissed in the following words:

"The judgment under appeal was delivered in presence on 7.12.34 by the Magistrate's Court, Jerusalem, whereby the appellant's case was dismissed.

The appeal was accepted in form because it was submitted within legal time and it appears to the Court that Grounds of Appeal were submitted on 17.2.35. Therefore, and in view of the provisions of Article 43 of the Magistrates Law as amended the Court dismisses the appeal with fees, costs and £P. 500 mils advocate's fees."

The plaintiff filed an application for leave to appeal to the Court of Appeal on which the President of the District Court endorsed the word "refused". Subsequently however, the President, on the ex parte application of the plaintiff reconsidered and reversed his previous decision.

HELD: The President of the District Court, having exercised his judicial discretion and refused leave, was functus officio, and having once exercised his discretion, had no power once more to do so and to vary his decision.

Appeal by way of leave to appeal from a judgment of the District Court sitting in its appellate capacity (C. A. D. C. Jm. No. 10/35) dismissing an appeal from a judgment of a Magistrate in favour of the defendant in the action.

A. Levitsky — for appellant.
S. Mizrachi — for respondent.

JUDGMENT.

This is an alleged appeal to this Court by way of special leave.

Application was first made to the President of the District Court which was refused. The President endorsed the word "refused" on the application and the refusal was entered in the Court Register. Subsequently, on the same day, present appellant made an application ex parte to the President requesting him to reconsider his decision. This the President appears to have done and to have reversed his previous decision refusing leave.

We are of opinion that the President of the District Court, having exercised his judicial discretion and refused leave, was functus officio, and, having once exercised his discretion, had no power once more to do so and to vary his decision.

The appeal is therefore dismissed with costs.

Delivered the 8th day of May, 1936.

ARBITRATION.

In the District Court of Jaffa.

C.D.C. Ja. of 1929.

BEFORE:

The President (Copland, J.) and Mani, J.

IN THE CASE OF:

The Committee of the Great Synagogue of Tel-Aviv — PLAINTIFFS.

v.

Arpad Gut — DEFENDANT.

Contract for construction of synagogue — Award of arbitrators — Allegations of misconduct — Arbitrators bound by rules of evidence — Evidence to explain meaning of contract — Evidence of misconduct — Agreement to refer to arbitrator as waiver of right — Estoppel.

By a written agreement, the defendant, a contractor undertook with the plaintiffs, a registered Society to construct a synagogue in accordance with plans and specifications set out in the said agreement. Before the final completion of the synagogue disputes arose between the contractor and the Society over questions of accounts which eventually led to an arbitration and an award of arbitrators. Defendant opposed the application to confirm the award on the grounds, as he alleged, of the following acts of misconduct: (a) that the arbitrators had refused to hear witnesses with regard the meaning of the contract, (b) that defendant's counterclaim for damages was dismissed without reasons being stated, and (c) that the arbitrators ignored the report of the experts appointed by them.

HELD: Confirming the award that in the circumstances of the case none of the objections raised was sufficient for the Court to make a finding of misconduct.

Action to confirm an award of arbitrators.

M. Zeiger — for plaintiffs.
M.L. Gorodissky — for defendant.

JUDGMENT.

This is an application to confirm an award of arbitrators given in a dispute between the parties to this action. The defendant has applied to set aside this award on the ground that the arbitrators have been guilty of misconduct and also have been subject to improper influence though this latter plea has been withdrawn in Court.

Three grounds of misconduct have been alleged. The first is that the arbitrators refused to hear witnesses or the parties to the contract themselves on the nature of the contract. It is a well established rule of law that arbitrators are bound by the ordinary rules of evidence and can only hear witnesses in a case in which a Court could hear them. This arbitration concerned a contract involving the sum of LE. 4673 and though the defendant alleged that the contract is not clear we do not agree with him. The contract sets out in much detail the nature of the work to be done and the quality and amount of material to be used in the construction. Paragraph 1 binds the contractor to execute the works named in the contract. Paragraph 2 lays down that he must not make any alterations in the building which will be in contradiction to the plans of the architects. For the execution of the works named in the contract the contractor was to be paid the sum mentioned above. To my mind it is quite clear that the contractor had to do certain work in a certain manner and to employ in that work certain specified quantities of material. On the completion of this work he was to be paid a certain sum. I cannot adopt the construction placed upon this contract by the defendant that he was entitled to do the work in any manner and use whatever materials he liked when the explicit terms of the contract are the exact contrary. The contract being clear in its meaning, the arbitrators were correct in their refusal to hear the witnesses.

The second ground of misconduct alleged is that the arbitrators refused to give any reason for disallowing the counterclaim of the defendant. This counterclaim was for damages and the arbitrators found that the contractor had not carried out the terms of the contract. No question of damages could therefore arise. I therefore can find no misconduct here.

The third point is that the arbitrators ignored the report of the experts appointed by them. But it appears that there was

Appeal from a judgment of the District Court of Haifa (C.D.C.Ha. No. 235/32) dismissing the application of the plaintiff in the action to set aside an award of arbitrators.

M. Eliash and P. Margolin — for appellant.
M. E. Moghannem and M. A. Tamimi — for respondent.

JUDGMENT.

This is an appeal against the judgment of the District Court of Haifa dated the 9th May, 1933, whereby the Court dismissed an application by the present appellant, Ephraim Aboutboul, to have set aside an award made on the 30th October, 1932, in arbitration proceedings between the appellant and the present respondent, Dr. Gabriel Abyad.

The dispute to which the arbitration related arose out of an undertaking given by the respondent in the following terms:—

> "As from the 16th March, 1925, up to the lapse of fifteen days, I undertake to transfer to Mr. Ephraim Aboutboul the land registered in my name, situated in the Ravel, of an area of 25,000 pics, which was transferred to me by Mr. Petro Abella as a security for the amounts due to Mr. Ephraim Aboutboul, this, in case up to that date, i.e., up to the date of maturity of this promise, he has not received the amount due to him from these two persons, and by agreement with him. The amount due to Mr. Ephraim Aboutboul is from Hassan Eff. Iskeirek and Mr. Abella as stated hereunder.
>
> (Sgd.) Dr. Gabriel Abyad."

Bill on Mr. Abella due 12.3.25.	£E. 440
Bill on Hassan Eff. Iskeirek	£E. 170
	£E. 610

Only six hundred and ten Egyptian Pounds.

Sgd. Dr. Gabriel Abyad."

The appellant claimed that as the bills referred to in that undertaking had not been paid within the period prescribed the respondent was liable upon his undertaking. In support of his claim he produced a letter from Mr. P. Abella stating that he had not paid the amount due from him to the appellant.

The respondent produced another letter from Mr. Abella to the contrary.

The majority of the arbitrators noting that neither side had called Mr. Abella as a witness, and that the appellant had not produced the bills, to which the undertaking related, dismissed his claim for damages.

The third arbitrator, Mr. Kaiserman, dissented, holding, inter alia, that the burden was upon the respondent to prove that the appellant was paid and not upon the appellant to prove that he was no paid.

Upon the appellant's application to the District Court to set aside the award, the judges were equally divided upon the question of the burden of proof and the application was therefore dismissed.

It is against this decision that the appellant is now appealing.

We concur in the view expressed in the judgment of the learned President of the District Court that if the majority of the arbitrators were in error in holding that the burden of proof was on the appellant, that was an error apparent upon the face of the award and would be a ground for setting the award aside.

The English rule was clearly laid down in Landauer v. Asser, (1905), 2. K. B. p. 184, at p. 187 by Lord Alverstone C. J. who said:

> "The only ground on which it is alleged that the award should be set aside is that the arbitrator has gone wrong in point of law, and that the error in law appears upon the face of the award. There is no doubt whatever that if this can be established the award ought to be set aside."

There is nothing in the law of Palestine to render a different rule applicable here.

We have, therefore to determine whether the majority of the arbitrators were or were not mistaken in law.

The appellant's claim rests upon the proof of two facts, namely, that the respondent gave the alleged undertaking, and, that the event upon which the undertaking became enforceable has occurred. The respondent admitted his undertaking. This admission however, did not release the appellant from the obligation of proving that the event upon which the respondent's liability depended, had occurred, namely, that the period of fifteen days from the 16th March, 1925, had elapsed without payment to the appellant of the bills specified in the respondent's undertaking.

We do not take the view expressed in the judgment of Judge Daudi in the District Court, that the appellant could only prove non-payment of the bills by production of the bills themselves. In our view, it was open to him to prove this by other means, and if the letter of Mr. Abella dated 23rd October, 1927, which was submitted by the appellant, had not been contradicted by other evidence, it would have furnished the proof required.

In the circumstances, however, we hold that the majority of the arbitrators were right in their view that the burden of proof was upon the appellant, and that he had failed to discharge it.

The appeal must be dismissed with costs.

Delivered the 17th day of May, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.L.A.C.A. No. 9/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Baker, J. and Frumkin, J.

IN THE CASE OF:

The Palestine Mortgage and Credit Bank Ltd. — APPLICANT.

v.

Lawrence T. Beck and Co. — RESPONDENT.

Arbitration — Refusal by arbitrator to act — Appointment of new arbitrator by District Court — Leave to appeal refused and renewed to Court of Appeal — Secs. 6 (2), 15 (2), Arbitration Ordinances, 1926—1928.

A firm of contractors signed an agreement with a Bank to do certain constructional work. A clause in the agreement providing for the settlement of disputes by an agreed arbitrator having been invoked by the contractors, and such arbitrator having refused to act, the contractors applied to the District Court under Section 6 (2) of the Arbitration Ordinance, 1926, which appointed an arbitrator. The Bank contested the appointment and applied for leave to

appeal from the order of the District Court relying upon Sec. 15 (2) of the Arbitration Ordinances, 1926—1928. The District Court refused leave to appeal and the application was renewed to the Court of Appeal.

Section 15 (2) reads as follows:

> "An application to remove an arbitrator or umpire, to enlarge the time for making an award, or to enforce or set aside an award shall be heard by the Court to which the petition is made. An appeal shall lie from an order of a Magistrate's Court to the District Court of the district in which the Magistrate's Court is situated, and the decision of the District Court shall be final. No appeal shall lie from the order of a District Court, except by leave of the Court or of the Court of Appeal."

HELD: Dismissing the application for leave to appeal that Section 15 (2) of the Arbitration Ordinances, 1926—1928, did not apply to a judgment of a District Court appointing an arbitrator.

Application for leave to appeal from an order of the District Court appointing an arbitrator.

Bernard Joseph — for applicant.
J. Henigman — for respondent.

JUDGMENT.

In accordance with the judgment of this Court in the Latin Patriarch v. Ahmad Jaber, Civil Leave Application No. 39/30[1]), and Cornu v. Ali Ahmad Sheikh Ali, C.A. No. 105/32[2], we hold that Section 15 (2) of the Arbitration Ordinance, 1926, as amended, does not apply to a judgment of a District Court appointing an arbitrator.

The application for leave to appeal is therefore dismissed with costs.

Delivered the 3rd day of May, 1935.

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[1]) C.L.A.C.A. No. 39/30, PLR p. 570.
[2]) C. of J. p. 1172, PLR p. 810.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 13/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Morris Poller — APPELLANT.

v.

G. A. Schutz — RESPONDENT.

Arbitration award confirmed in default — Opposition to such judgment — Judgment "capable of appeal" not appealed against within thirty days — Time for appeal from judgment appealable by leave only — Art. 181 and Art. 22, Addendum, Ottoman Code of Civil Procedure — Sec. 15, Arbitration Ordinance, 1926.

An award of arbitrators was confirmed in the District Court by default in the absence of the appellant. An opposition to the judgment confirming the award was dismissed by a judgment given in the presence of the parties and stated to be "capable of appeal". No appeal was made but some seven months later leave to appeal was obtained and this appeal filed. It was argued on appeal that since Sec. 15 (1) imported the ordinary rules of procedure, the appeal should have been filed within thirty days from the delivery of the judgment of the District Court. Sec. 15 (1) reads as follows:

> "All applications to the Court under this Ordinance shall be made by petition in accordance with the rules of procedure prescribed for civil actions."

HELD: dismissing the appeal on the ground that it was filed out of time, that the provision in Sec. 15 (1) of the Arbitration Ordinance, 1926, importing the rules of procedure prescribed for civil actions require that appeals from applications under the Ordinance should be brought within thirty days.

Appeal from a judgment of the District Court dismissing an opposition to a judgment confirming an award of arbitrators.

A. Levitsky — for appellant.

JUDGMENT.

On the 7th September, 1932, the District Court gave judgment in the absence of the appellant confirming an arbitration award.

On the 22nd February, 1933, the District Court gave judgment dismissing an opposition by the appellant to the judgment of the 7th September, 1932. Judgment was given in the presence of the parties and was stated to be "capable of appeal".

On the 11th September, 1933, the appellant applied to the District Court for leave to appeal. Leave was granted by the District Court on the 16th November, 1933, and notified to the appellant on 1st December, 1933. On 30th December, 1933, the appellant filed this appeal.

Having regard to the judgment of this Court in Shpigel v. Shpigel, C.A. No. 4/28 *), it is immaterial whether the judgment of the District Court was only appealable by leave, or was, as the respondent contends, appealable as of right; for whichever be the case no step was taken by the appellant to bring an appeal before this Court until long after the period of thirty days from delivery of the later judgment of the District Court.

The appeal is therefore out of time and must be dismissed with costs including LP.2.500 advocate's fees and expenses.

Delivered the 11th day of January, 1935.

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*) C. of J. p. 150.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 93/35.

BEFORE:

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

IN THE CASE OF:

Joseph Weiss — APPELLANT.

v.

Israel Shulman — RESPONDENT.

Appeal by way of special leave — Confirmation of arbitration award — Preliminary objection not made in pleadings — Leave to appeal refused by District Court and renewed to Court of Appeal — Enlargement of period for making of award — Estoppel by conduct — Recognition of authority of arbitrator as continuing — Sec. 15 (2), Schedule, para. (c), Arbitration Ordinances, 1926—28.

A dispute having arisen out of an agreement signed by the parties it was submitted to an arbitrator for decision. Confirmation of the decision of the arbitrator was opposed in the District Court on the ground, inter alia, that it was made after three months from the date of the submission and was therefore invalid. The District Court refused the application to confirm on this ground and dismissed a subsequent application for leave to appeal from its decision. Special leave to appeal was granted by the Court of Appeal under Section 15 (2) of the Arbitration Ordinances, 1926—28. The arbitration award was as follows:

AWARD.

On the 15th day of October, 1933, the plaintiff and defendant submitted to me as single arbitrator their disputes arising out of an agreement dated the 26th April, 1933. The pleadings of the parties are contained in the minutes of the arbitration proceedings and also in the written pleadings submitted to me by both parties. The last attendance of both parties took place before me on the 8th March, 1934.

Defendant in his written pleadings dated the 21st January,

1934, and the 8th February, 1934, requested me to state a case to the Court on the following questions of law, viz:

(1) Is it possible to modify or vary a written agreement by a subsequent verbal agreement of the parties?

(2) Could a person who is not a party to a contract and who has no authority in that behalf from the defendant order documents or do any other act which could bind the defendant?

(3) That there is insufficient evidence before the arbitrator to warrant a finding that the defendant committed a breach of the agreement.

(4) That in the absence of an agreed extension in writing by both parties as required by Clause 15 of the agreement, such extension cannot be required by a notarial notice given after the original date had expired.

(5) That, if any breach was committed, it was committed by both parties and therefore no question of damages can arise."

I had to reject the request of the defendant for the following reasons, viz:

Question 1. This is not a question arising out of the arbitration as I am satisfied that no verbal agreement had been made to modify or vary the written agreement of the parties. Moreover, Clause 18 of the original agreement expressly provides that any clause or provision may be changed by a written agreement.

Question 2. This question has no bearing at all upon my decision which is not based upon the action of either Mr. Kaplan or the Palestine Trust Co. Ltd., to which it refers.

Question 3. This is not a question of law.

Question 4. This question has no bearing upon my decision. No extension of time was demanded by the plaintiff in his notarial notice but on the contrary the object of the notarial notice was to give time and an additional chance to the defendant in accordance with the Ottoman Civil Procedure Code for his fulfilment of the agreement.

Question 5. This is not a question of law.

After having heard the parties and their counsel and witnesses and having read their written pleadings and after having considered the allegations and claims of both parties and the evidence submitted in support thereof I hereby make and publish my award as follows:

I award and direct that the defendant do pay to the plaintiff the sum of £P. 1000 as liquidated damages as I am satisfied that the defendant has committed a breach of his agreement and has persisted in refusing to fulfil the conditions of the said agreement after a notarial notice was sent to him. And I do further award and direct that the said defendant do pay the costs of this my award amounting to £P. 57.150 as arbitrator's fees and expenses and £P. 25 as plaintiff's advocate's fees and 685 mils expenses incurred by architect Mr. Richard Kauffmann.

In witness whereof I have hereunto set my hand this 19th day of March, 1934.

(Sgd.) I. Braude
Arbitrator.

HELD: that since the parties had appeared at a hearing subsequent to the expiration of the three months allowed by the Arbitration Ordinance they had by implication enlarged the time for making the award for a further period of three months and were estopped from denying the validity of the award.

HELD ALSO that a request to the arbitrator to reconsider or take some new matter into his consideration, after the case had been closed on both sides and the time for making the award had expired is such a recognition of the authority of the arbitrator as continuing, that the consent of the party making it to an extension of time may be fairly implied.

Appeal by way of special leave from a judgment of the District Court (C.D.C.Ja. No. 234/34) dismissing an application for confirmation of an award in favour of the applicant. The facts and pleadings are more completely set out in the judgment.

Bernard Joseph — for the appellant.
M. Seligman — for the respondent.

JUDGMENT.

(Delivered by McDonnell, C. J.).

This is an appeal by way of special leave granted by this Court under Section 15, Sub-Section 2, of the Arbitration Ordinance, 1926 (as amended), against the order of the Jaffa District Court of 9th October refusing present appellant's application to confirm an arbitration award.

A dispute having arisen between the parties to this appeal, on 15th October, 1933, they submitted their dispute to an arbitrator. On 19th March, 1934, the arbitrator made and published his award and on the 7th May, 1934, present appellant applied to the Jaffa District Court for its enforcement. The present respondent opposed the application alleging, inter alia, that as the award was made out of time it was bad. Appellant contended that the conduct of the parties during the arbitration proceedings constituted a parol consent to the extension of the period of arbitration. The Court, however, dismissed this contention and gave the following judgment thereon:—

JUDGMENT OF THE DISTRICT COURT.

"This is an application to confirm an award arising out of a contract, which is opposed by the defendant on several grounds.

As to the first point raised by the defendant, that the award bears insufficient stamps, the Court refuses this opposition for the reason that the defendant should have mentioned it in his written reply. (Russell, 12th Ed., page 460).

As regards the second point, that the arbitrator refused to submit legal points to the Court for opinion. The Court also refuses this. The last application made to the arbitrator to do so was on 8th February, 1934. The arbitrator had full power to grant or refuse it, and the applicant could have applied to the Court to instruct the arbitrator to grant it. The defendant had sufficient time to make an application to the Court to instruct the arbitrator to submit to the Court legal points but he never did so and now gives excuses which are inadmissible.

As regards the third point, that the arbitrator gave a decision on a legal point whilst he had no jurisdiction to do so. The Court finds that there is nothing which would prevent him from doing that. It is not unusual that persons who are appointed as arbitrators sometimes have a better legal knowledge than advocates.

Another objection is made, that the arbitrator did not give detailed reasons as to the conclusion he arrived at. The Court finds that the arbitrator was wise in not giving the detailed reasons. The duty of the arbitrator is to give a

decision directly on the matters before him and the conclusions he arrives at. The more precise his judgment, the better.

We come now to the important and serious point of law to be discussed, viz: whether the award was given after the legal period or not.

It is admitted that the arbitration deed was drawn on 15th October, 1933, and since no mention was made as to the period for giving the award it should have been given on 15th January, 1934. The plaintiff stated and argued before us that the conduct of both parties in the arbitration proceedings show that there was a verbal consent to extend the period of arbitration.

The Court finds that there was such a consent on the part of the parties up to the date of 8th February, 1934, when the last written pleading was submitted by defendant. It was stated, and the arbitrator mentioned it in his award, that the last sitting was on 8th March, 1934. As to whether there was a sitting on that date or not, is a question of fact, and the Court is of the opinion that it is not necessary, in view of the circumstances of the case, for the Court to decide this question of fact.

If we presume that there was a verbal consent for the extension of the period to the 8th March, 1934, we cannot presume or think that it was extended to the 19th March, 1934, when the arbitrator made his award. In case the period of arbitration was extended to the 8th March, 1934, the award should have been made on the 8th or two or three days later. But the award was only made on the 19th March, 1934, and the Court decides that there was no extension to that date.

The Court, therefore, is of the opinion that the award was made after the expiry of the period of arbitration and for this reason dismisses the application for its confirmation with costs."

Appellants, on the 16th October, 1934, applied to the District Court for special leave to appeal upon the grounds therein stated: namely, that the Court erred in holding that the authority conferred upon the arbitrator by the parties appearing before him on the 8th of March did not entitle the arbitrator to make an award later than two or three days thereafter, and, relying on the authority of Tyerman v. Smith (English & Empire Digest, Vol. 2,

p. 416), averred that any award made within thirty days from that date would have been a valid and enforceable award.

Respondents opposed the application, and on the 13th December, 1934, the Jaffa District Court refused the application stating the following reasons for doing so in their judgment:—

> "1. What is a 'reasonable' time is a question of fact to be determined in the light of all the relevant circumstances. In Bedwas Navigation Colliery Co. (1921) Ltd. v. South Wales Coal Mines Executive (151 L.T. Reports at p. 423) Scrutton L.J. used these words:— "Now, 'reasonable necessity' after considering all the facts, is not a question of law; it is a question of degree, which is a question of fact", and it seems to me that the same reasoning applies here. In this case the trial Court has found that eleven days was not a reasonable period.
>
> 2. It is settled law that an arbitrator has no power to extend time when the period for making an award has expired. See Russell on Arbitration, 12th Edition, pp. 355 et seq.".

As stated above, this Appeal Court granted leave to appeal on the 22nd day of May, 1935, and similar grounds to those presented to the Jaffa District Court by appellant were again advanced as reasons for leave being granted.

With regard to the reasons for the refusal to grant leave to appeal by the Jaffa District Court, the first reason quotes the dictum of Scrutton, L.J. in the case of Bedwas Navigation Colliery Co. v. South Wales Mines Executive, 151 L.T. Reports, at page 423. This case had reference to a contract to supply small coal to a company which was engaged in coal carbonization. Small coal cannot be produced by itself, and to do so, you must produce large coal, and the appellants, in attempting to fulfil their contract to supply small coal, exceeded their permitted output or quota under the Coal Mines Act of 1930, and the question then arose whether it was reasonably necessary for the appellants to exceed their statutory output or quota to fulfil their contraact to supply small coal to the Coal Carbonization Company, and it was with reference to the reasonableness of the excess that the dictum of Scrutton L. J.'s judgment is quoted — a dictum admirable in itself, but of no material help to our present case, dealing, as it does, with a conclusion of fact by an arbitrator arising out of a contract and not

with what was a reasonable extension of time when an award of arbitration has been enlarged.

As regards the second ground for refusal, I cannot see how it can be rendered applicable; for provision (c) of the Schedule to the Ordinance provides:—

> "(c) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award",

and in this appeal we have to deal not with the arbitrator extending the time for the granting of an award, but with the parties extending the time by implication.

Appellant in this appeal contends that the District Court erred in refusing to confirm the award because it was made eleven days after the parties appeared before the arbitrator on the 8th March; that by virtue of the fact that the parties appeared before the arbitrator on the 8th March, the time for the giving of the arbitrator's award was by the conduct of the parties impliedly extended and enlarged for a further three months.

Respondent has contended that the proceedings on the 8th March were no proceedings at all and were in fact a trick to enlarge the arbitrator's time.

A copy, however, of the proceedings has been called for by the Court and put in by the arbitrator which is as follows:—

"ARBITRATION PROCEEDINGS

in the case of

J. Weiss v. I. Shulman

on the 8th March, 1934.

Mr. Seligman representing Mr. Shulman.
Mr. Weiss appeared in person.

Mr. Seligman: Clause 18 of the agreement says "may be changed in writing" it does not mean it shall be in writing.

Point 2 of para. 24 of my pleadings refer to Mr. Kaplan of the Trust Co. or the Trust Co. who had no authority to order statutes or call upon Shulman to do anything.

Point 3 means that the arbitrator is to submit to Court and ask whether the evidence is sufficient.

(sgd) M. Seligman.
Joseph Weiss."

In view of these proceedings, I must conclude that the conduct of the parties was such, that it must be taken to amount to a consent on their part to an enlargement of the time, and a consequent continuation and revival of the arbitrator's authority, and that they are now estopped from denying the validity of the award by their attendance before him (after the time when his powers came to an end), for a request to the arbitrator to reconsider or take some new matter into his consideration, after the case has been closed on both sides and the time for making the award had expired, (which I am satisfied from the report of the meeting of the 8th February was indeed a fact), is such a recognition of his authority as continuing, that the consent of the party making it to extend the time may be fairly implied, for it manifestly refers to an award which the arbitrator has still to make (see R. v. Hill, (1819), 7 Price, 636).

Counsel for respondent has argued that the principle of estoppel laid down in several cases, referred to by Counsel for appellant and cited in support of this contention, can no longer be applied since the said cases were prior in date to the Arbitration Act of 1899.

The statute, however, does not exclude the common law principle of estoppel, and this argument cannot be sustained.

In the alternative he has contended that if the meeting of the 8th February be held to be an enlargement of the time in which the arbitrator might make his award, then such enlargement was an enlargement to the 8th February only, and in support of this contention he quotes Russell on Arbitration, 12th Edition, page 357, where under a paragraph headed "How enlargement should be made", it states: —

"Unless the submission prescribes the mode in which the enlargement is to be made, the arbitrator may, it seems, adopt any mode that expresses his intention of enlarging the

time. A verbal appointment made to both parties for a future meeting to be held on a day beyond the limit of the original period, to which neither party objected, was considered a sufficient enlargement to that day, and the award made on that day was sustained as made within due time (Burley v. Stephens (1836), 1 M. & W. 156; 5 L.J. (n.s.) Ex. 92)."

The present case, however, I am of opinion, is entirely different to that of the case quoted, for in that case a verbal appointment was made to both parties for a future meeting to be held on a day beyond the limit of the original period to which neither party objected, and the award was made on that day and held to be within due time.

In the appeal before us, we have reference by the respondent on the 8th February, 1934, to written pleadings of the 21st January, 1934, where he requests the arbitrator to state a case for the opinion of the Court on certain questions, and in such reference he states that one of the said pleadings must be construed to mean that the arbitrator is to submit to Court and ask whether the evidence is sufficient; thereby, in my opinion, manifestly consenting to an enlargement and a revival of the arbitrator's authority for at least a sufficient time to obtain the opinion of the Court.

The next question to which we must direct our attention is the limit of time we must allow for the making of the award after the implied extension, and in the absence of any agreed limit by the parties and any provision contained in the Arbitration Ordinance with regard to the limit of time upon an enlargement, I am constrained to hold that it must be considered as a new submission and taken to be an enlargement for a further period of three months; the time limited by the Ordinance for the making of an award after entering on the reference.

Accordingly, I am of opinion that the appeal must be allowed, the judgment of the lower Court must be quashed, and the award of the arbitrator of the 19th March, 1934, enforced.

Costs to be paid by respondents including LP.2 advocate's fees.

Delivered the 26th day of June, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 174/35.

BEFORE:

The Chief Justice (McDonnell, C. J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Ahmad Musa el Ja'ouni et al — APPELLANTS.

v.

Taju As'ad el Ja'ouni — RESPONDENTS.

Arbitration award submitted for confirmation — Power of Court to remit award — Remission by Court of own motion — Judgment remitting to arbitrators is final judgment and subject to appeal — Section 12 (1) Arbitration Ordinance, 1926 — Rules 2 (6), (7), Arbitration Rules, 1928.

An award of arbitrators was submitted to the District Court for confirmation but was remitted by the Court of its own motion to the arbitrators for reconsideration in order to hear the claims and evidence of both parties and deliver a new award. Leave to appeal to the Court of Appeal having been obtained it was argued on appeal that the Court could not of its own motion remit the award as no application for remission had been made and no fees paid therefor.

HELD: Dismissing the appeal that under Section 12 (1) of the Arbitration Ordinance, 1926, the Court had a discretion of its own motion and independently of an application by one of the parties to remit the matters to the arbitrators.

HELD ALSO by an Interlocutory Order that the judgment of the District Court was subject to leave to appeal, that it was not necessary for a point of law to be set out upon which such leave was given and that the judgment was not an interlocutory but a final judgment.

HELD FURTHER that although fees had been paid only for opposition to confirmation and not for setting aside the award yet since the applicant for confirmation had not appealed from the judgment setting it aside he was estopped from arguing as to

whether the Court was right in accepting the petition as one for setting the award aside.

Appeal from a judgment of the District Court (C.D.C.Jm. No. 66/35) remitting an award to the arbitrators for reconsideration.

M. Kehaty — for appellant.
E. D. Goitein — for respondent.

INTERLOCUTORY ORDER.

We are satisfied that the judgment in this case was subject to leave to appeal, that it was not necessary for a point of law to be set out upon which such leave was given, and that the judgment was not an interlocutory but a final judgment.

The last preliminary question raised by respondent arising out of the terms of the petition of February 26, 1935, is as to whether the Court was right in accepting it as a petition to set aside the award, in accordance with the prayer at the close thereof, although the fee paid was not the fee prescribed by Section 2 (6) of the Arbitration Rules, 1928, to be paid on an application to set aside an award, but half the fee payable on an opposition to enforcement as laid down in Section 2 (7) of the Arbitration Rules, 1928.

The respondent in his application of the 19th February, 1935, applied to enforce the award. He did not appeal from the judgment setting it aside. He is therefore estopped from raising the point above referred to now.

The preliminary objections are therefore overruled.

JUDGMENT.

We are satisfied that under Section 12 (1) of the Arbitration Ordinance, 1926, which empowers the Court from time to time to remit matters referred to the reconsideration of the arbitrators, the Court has a discretion of its own motion and independently of an application by one of the parties to remit the matters to the arbitrators.

For this reason we dismiss the appeal with costs to include £P. 2 advocate's fees.

Delivered the 19th day of May, 1936.

BILLS OF EXCHANGE.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 30/33.

BEFORE:

The Chief Justice (McDonnell, C. J.), Khaldi, J. and Frumkin, J.

IN THE CASE OF:

A. Nasser — APPELLANT.

v.

Shalhoub Brothers — RESPONDENTS.

Promissory note executed prior to enactment of Stamp Duty Ordinance, 1927 — Insufficient stamp duty on document — Fine levied as at date of first reception in Palestine — Ottoman Stamp Law, 1906 — Section 5 (1) (b), Interpretation Ordinance, 1929.

A promissory note made in Egypt before the date of the enactment of the Stamp Duty Ordinance, 1927, was sued upon by the plaintiff after the enactment of the said Ordinance. Defendant pleaded that the note was improperly stamped in accordance with the law of Palestine. The issue before the Court was whether the fine payable was that prescribed under the Ottoman Stamp Law, 1906, or under the Ordinance. Upon evidence being tendered to the Court to the effect that the note was made prior to the Ordinance the Court held the old Ottoman Stamp Law to be applicable and levied the fine under it. On appeal:—

HELD: setting aside the judgment of the court of trial that the relevant date was not the date of making of the promissory note but the date of its first reception in Palestine.

Appeal from the judgment of the District Court of Jerusalem.

A. Hanania — for appellant.
N. Abcarius Bey — for respondent.

JUDGMENT.

The judgment of the District Court says that it was decided to apply the Ottoman Stamp Law because of the promissory note having been written before the coming into force of the Stamp Duty Ordinance, 1927, and that therefore a fine under the old law must be paid.

We set aside the judgment of the District Court because we hold that the relevant date is not the date of the making of the promissory note but of the reception of it in Palestine: and therefore we remit the case to the District Court to make a finding whether the note was received into Palestine before the coming into operation of the Stamp Duty Ordinance, 1927, and to give judgment accordingly.

Costs to follow the event.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 49/33.

BEFORE:

The Chief Justice (McDonnell, C.J.), Baker, J. and Frumkin, J.

IN THE CASE OF:

Anglo-Palestine Bank Ltd. — APPELLANT.

v.

The Committee of the Great Synagogue of Tel-Aviv — RESPONDENTS.

Signature of Society on promissory note — Plea of incorrect signature — Admission of liability contained in submission to arbitration — Estoppel.

A registered Society having overdrawn its bank account gave notes to the Bank as security, signed by the Society through two of its members. In an action upon the notes the Society pleaded that according to its Rules three members were obliged to sign all undertakings obligatory upon the Society. The trial court found

for the Society on this ground and dismissed the action. On appeal to the Court of Appeal, attorney for appellant did not confine himself to the plea in the court of trial, but produced a submission to arbitration signed by the parties as evidence that the matter was under arbitration and should not be dealt with by the Court of Appeal. The submission to arbitration, signed by the Society contained a preamble admitting the correctness of the signature on the notes in suit. The submission was in the following form:

"Whereas the Anglo-Palestine Bank Ltd., Jaffa, claims from the Great Synagogue, Tel-Aviv, the sum of £P. 3230.680 according to the notes signed by the Great Synagogue and which are detailed as follows: (here follow details of the notes),

and whereas the Great Synagogue of Tel-Aviv has claims against this debt,

"Both parties have agreed to refer the matter to arbitration. The Anglo-Palestine Bank Ltd. has appointed Mr. S. Saltzman as arbitrator on its side, and the Great Synagogue, Mr. S. Ashkenazi as arbitrator on its side. And both parties have appointed by mutual agreement, Mr. Joseph Kodranski as deciding arbitrator and as chairman of the arbitration. If one of the arbitrators will resign or will not be able to continue with his task before the award will be given, the party that appointed him will then appoint another one within one month; and if the umpire resign or will not be able to continue with his task before the award is issued, both parties will then, by mutual agreement, appoint another umpire within one month.

"The arbitrators will settle the said dispute and will issue a final decision by majority without right to appeal.

(Sgd) Committee of the Great Synagogue:

D. Z. Pinkas
I. M. Sacharoff
H. Churgin
A. Chalfin

(Sgd) Anglo-Palestine Company Limited:

Ben Tovim, Chason

HELD: by majority of the Court, setting aside the judgment of the Court of trial and giving judgment for the Bank that the submission to arbitration involved the adoption by the Society of the signatures by only two members of the Committee on the bills and that in consequence the Society was estopped from their defence.

Appeal from a judgment of the District Court of Jaffa in favour of the Defendants in the action.

S. Horowitz — for appellant.
M. Zeiger — for respondent.

JUDGMENT.

The Court unanimously holds that the submission to arbitration of 28th July, 1930, involves the adoption by the respondents of the signatures by only two members of the Committee on the bills and that in consequence the respondents are estopped from their defence: the Court by a majority sets aside the judgment of the District Court and gives judgment for the appellant for the amount in the claim with costs in this Court and the District Court and £P. 4 advocate's fees.

JUDGMENT OF FRUMKIN, J.

I concur in that part of the judgment dealing with the question of the signatures on the bills, and that the judgment of the District Court cannot stand; but since that judgment was based on a technical point without going into the defence on its merits, I hold that the case must be remitted for trial on the merits.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

P.C. No. 101/33.

BEFORE:

Lord Atkin, Lord Alness and Lord Maugham.

IN THE CASE OF:

Adib el Hinnawi — APPELLANT.

v.

Ya'qoub Abu el Huda el Faruqi — RESPONDENT.

Promissory note of deceased person—Past services as consideration—Inadequacy of consideration not a defence — Proof of execution of note — Onus on party alleging to prove defence of no consideration.

A promissory note for £P. 4000 was made by a woman in favour of her husband in consideration of work previously performed in "the administration of my real properties, by building, selling, letting out and repairing, estimated between us, agreed upon and accepted by me". Shortly after having made the note the woman died without having paid it. In an action on the note by the husband against the heir of the woman's separate estate, the heir pleaded, inter alia, that no consideration was given for the note. The trial court held that no real consideration was given and that the services rendered to the deceased were not equivalent to the value of the note. The Court of Appeal reversed this decision holding that there was consideration and that the question of adequacy of consideration was not a question for the trial court to consider. On appeal to the Judicial Committee of the Privy Council:—

HELD: confirming the judgment of the Supreme Court of Palestine

(a) that there was consideration for the note and that having regard to the terms of the note the alleged inadequacy of consideration afforded no relevant answer to a demand made upon it,

(b) that it was not the duty of the Court to enquire into the adequacy of consideration, and

(c) that the burden of establishing a plea of no consideration was on the defendant.

Appeal from a decision of the Supreme Court of Palestine sitting as a Court of Appeal, (C.A. No. 141/31, see Collection of Judgments 1919—1933, p. 252) in favour of the plaintiff in the action. The facts and pleadings are more fully set out in the judgment.

JUDGMENT.

(Delivered by Lord Alness).

This is an appeal from a judgment of the Supreme Court of Palestine, dated 5th April, 1932 [1]), reversing a judgment of the District Court of Jaffa, dated 9th November, 1931, and entering judgment for the respondent against the appellant for the equivalent in Palestine currency of £E. 4000, with interest and costs.

The action out of which the appeal arises was begun on 7th February, 1928, in the District Court of Jaffa by the respondent, who was the widower of one Fatmeh Mohamad el Hinnawi, against the appellant, as the heir of Fatmeh, claiming payment of the said sum of £E. 4,000 which was alleged to be due to the respondent upon a promissory note, dated 7th November, 1926, and interest. The defence offered by the appellant, called his "statement of reply" was in substance (1) that the promissory note was not executed by the said Fatmeh, and (2) that there was no consideration for the note.

On 18th March, 1928, the action was heard before the District Court of Jaffa, when it was dismissed on the grounds (1) that the promissory note was invalid, and (2) that in law the respondent was not entitled to establish that the deceased had made the note.

On 21st May, 1928, the respondent appealed from the said judgment to the Supreme Court of Palestine. On February 5, 1929, that Court unanimously allowed the appeal, and set aside the judgment of the District Court. They remitted the action to the District Court for comparison of the finger prints of the deceased, and for hearing evidence with regard to the making of the note; and they further ordered that, in the event of the District Court being satisfied that the note was duly executed, the question

[1]) See C. of J., p. 252.

whether consideration was given therefor or not should be taken into account, and a fresh judgment given.

On 31st March, 1929, the case again came on for hearing before the District Court of Jaffa, when evidence and argument were duly heard. On 25th July, 1929, the District Court found as a fact that the finger print on the note was that of the deceased Fatmeh, and they entered judgment for the respondent against the appellant for £E. 4.000 and costs. The District Court, however, omitted to deal with the question of whether consideration had been given for the note, as, in the circumstances, they were directed to do.

On 3rd February, 1930, the appellant appealed from that judgment to the Supreme Court of Palestine. He pleaded inter alia that no consideration for the promissory note had been given, and pointed out that no decision on that matter had been given by the District Court. On 26th May, 1931, the appeal was heard by the Supreme Court of Palestine when they remitted the case to the District Court of Jaffa, in order that the question whether consideration had been given for the promissory note might be considered, and, after evidence being given, if that should be thought necessary, be determined. The District Court heard evidence on the matter, and, on 9th November, 1931, they delivered judgment. They held that there was no real consideration for the promissory note, and, being of opinion that the services rendered to the deceased by the respondent were not equivalent to the value of the note, they dismissed the action.

The respondent appealed to the Court of Appeal, and, on 5th April, 1932, that Court allowed the appeal, set aside the judgment of the District Court, and entered judgment in favour of the respondent with costs. The Court of Appeal held that the burden was on the appellant to show that no consideration had been given by the respondent for the note and that that defence had not been made out. They further held that it was not for the Court of first instance to enquire into the adequacy of the consideration for the note, but to consider whether there had or had not been any consideration given.

By orders dated 26th May, 1932, and 7th September, 1932, the appellant obtained leave to appeal to His Majesty in Council, and the appeal has now been heard.

The Appellant's counsel argued (1) that there was no consi-

deration given for the promissory note, and (2) that the promissory note was obtained by undue influence on the part of the respondent—particularly in view of the relationship of husband and wife which subsisted at the date when the note was made between the respondent and the deceased Fatmeh.

With regard to the first ground of appeal, their Lordships are satisfied that consideration was given for the promissory note, and that the judgment of the Court of Appeal on that point is unassailable. They are further of opinion that, having regard to the terms of the promissory note, the alleged inadequacy of consideration affords no relevant answer to a demand made upon it. With regard to the plea of undue influence, their Lordships are of opinion that, inasmach as the plea was not pressed in the Courts below, with the result that there is neither specific evidence nor any direct finding with regard to it, they are absolved from the necessity of dealing with the matter in detail now. It is manifest from the proceedings that it was open to the appellant to have urged the plea in the Courts below to an issue — in other words, to have claimed and obtained a judicial decision upon it. The appellant omitted to do this, and it is therefore quite impossible, in their Lordships' opinion, on the materials available to them, to set aside the judgment appealed against, and to affirm the plea of undue influence. Their Lordships are further of opinion that, having regard to the sum at stake between the parties, and to the protracted character of the litigation regarding it which ensued, it would not be reasonable or proper for the Board now to make a remit for enquiry into the question of undue influence, as they were invited by the appellant to do, and they must accordingly decline to take that course. In the circumstances recited, the appeal fails, and the appellant must pay the costs of it. Their Lordships with humbly advise His Majesty accordingly.

Delivered the 27th day of February, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 3/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Maria Tagger — APPELLANT.

v.

The Arab Bank Ltd. — RESPONDENT.

Liability of guarantor of promissory note — Validity of promissory note made by bankrupt — Discharge of guarantor by failure of principal indebtedness — Liability of bankrupt towards creditors — Arts. 153, 156, 157, Ottoman Commercial Code.

A promissory note was made by a bankrupt and signed by his wife as guarantor. In an action in the Magistrate's Court by the payee against the bankrupt and the guarantor the claim against the bankrupt was withdrawn and the claim against the guarantor dismissed on the ground that she had guaranteed a note made by a bankrupt and which was null and void. On appeal to the District Court the judgment dismissing the claim against the guarantor was set aside and judgment entered against her for the amount of the note. On leave to appeal to the Court of Appeal being granted:—

HELD: dismissing the appeal, (a) that a bankrupt could validly make a promissory note, (b) that under Arts. 153, 156 and 157 of the Ottoman Commercial Code, the note is invalid against the syndic and the creditors in bankruptcy, but it does not follow that the note is invalid against the bankrupt, who would be liable thereon to the extent of any assets not included in the bankruptcy, and (c) that since the principal debtor could be held liable on the note the guarantor was also liable.

Appeal from a judgment of the District Court of Jerusalem (C.A.D.C. Jm. No. 55/33) setting aside the judgment of the Magistrate in favour of tbe defendant in the action.

M. Grossman — for appellant.
Suleiman Eff. Salah — for respondent.

JUDGMENT.

The appellant, Maria Tagger is asking the Court to hold that she is not liable upon a promissory note in favour of the respondent, the Arab Bank Ltd., which she signed as guarantor for Nessim Tagger.

The ground of her appeal is that as Nessim Tagger was bankrupt at the time he made the promissory note, his signature was invalid; and that as the principal debtor was not liable upon the note, the guarantor could not be made liable thereon.

The appellant, however, has not been able to cite authority for her argument that a bankrupt cannot make a promissory note.

Under Articles 153, 156 and 157 of the Ottoman Commercial Code, upon which the appellant relies, it is clear that the note is invalid against the Syndic in bankruptcy and the creditors in bankruptcy; but it does not follow that the note is invalid against the bankrupt; who would be liable thereon to the extent of any assets not included in the bankruptcy.

It follows that the guarantor is also liable.

The appeal is dismissed with costs including LP.6 advocate's fees.

Delivered the 14th day of November, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 182/34.

BEFORE:

Baker, J., Frumkin, J. and Abdul Hadi, J.

IN THE CASE OF:

Fayez Mohamad Sakallah — APPELLANT.

v.

Adel Esh-Shawa — RESPONDENT.

Allegation of failure of consideration for promissory note — Statement in note of value received — Admissibility of oral evidence to contradict document — Evidence of parties to the action — Administration of decisive oath.

Plaintiff undertook to deliver a certain specified quantity of barley to defendant and took a promissory note from him stating that it was in consideration of barley received and accepted by defendant. In fact, at the time of the making of the note plaintiff had merely instructed his agent to deliver, but defendant had not, as yet, received the barley. In an action on the note before the District Court, defendant pleaded that he never received the barley whereupon the Court heard witnesses in addition to the parties and came to the conclusion after hearing such witnesses that defendant had never received the barley and that there was therefore a failure of consideration. On appeal:—

HELD: quashing the judgment of the District Court (a) that the District Court erred in calling witnesses in support of defendant's allegation that there was a failure of consideration (b) that evidence cannot be heard to contradict a written document and that the trial Court was wrong in hearing evidence other than the evidence of the parties, and (c) that the case should be remitted for a new judgment and to allow the defendant, should he so desire, to administer the decisive oath to the plaintiff.

Appeal from a judgment of the District Court of Jaffa (C.D.C. Ja. No. 51/34) in favour of the defendant in the action.

E. D. Goitein — for appellant.
Fuad Nashashibi — for respondent.

JUDGMENT.

The appellant is the holder of a promissory note for £P.135 wherein the respondent states that it is in consideration of barley received and accepted by him. The appellant sued for the value of the note and the respondent alleged he had never received the barley and produced in support thereof a delivery order addressed by the appellant to one Yusef Abu Shaban.

The lower Court then, in our opinion quite erroneously, allowed witnesses to be heard in support of the respondent's allegation that there was a failure of consideration.

The law is quite clear that evidence cannot be heard to contradict a written document and the lower Court was wrong in hearing evidence other than the parties to the action: and this evidence does not contradict the contents of the promissory note.

The judgment of the lower Court must be quashed and the case returned for a fresh judgment to be given, after, if the respondent so desires, administering the decisive oath to the appellant.

Costs to be costs in the cause.

Delivered the 18th day of November, 1935.

In the District Court of Jaffa.

C.D.C.Ja. No. 313/34.

BEFORE:

The President (Copland, J.) and Shehadeh, J.

IN THE CASE OF:

Shlomo Jamil — PLAINTIFF.

v.

The Palestine Gas Co.,

Brown and Sacks — DEFENDANTS.

Co-operative Society as Bank — Stamp duty on cheque on co-operative society—Exemption from stamp duty—Item 6(8), Schedule, Stamp Duty Ordinance, 1927.

A company which had a bank account with a Co-operative Society Bank issued an unstamped cheque for £P.250 which was endorsed by the payee to the plaintiff. The cheque not having been met on presentation to the Bank, the plaintiff brought this action. Plea — that the cheque was unstamped and inadmissible in evidence.

HELD: dismissing the action that the cheque did not fall within the exemption provided by Item 6 (8) of the Schedule to the Stamp Duty Ordinance, 1927, since it was not given in respect of money payable by virtue of the Rules of the Society, nor was it a bill given by or to a registered Co-operative Credit Society.

Dr. M. Gershman — for plaintiff.
P. Goldberg — for defendants.

JUDGMENT.

In this case the plaintiff is suing the defendant company now in liquidation on a cheque for £P.250 drawn by the defendants in favour of Sacks and endorsed to the plaintiff. The cheque was drawn on an account of the defendants in the Ashrai Bank, and was not met on presentation, there being no funds available.

The first point in the defence is that the cheque is not stamped as required by law. The exemption given by Item 6 (8) of the Schedule of the Stamp Duty Ordinance, 1927, says:

> "A bill given by or to a registered co-operative Agricultural Society or a registered Co-operative Credit Society... in respect of money payable by virtue of the Rules of the Society."

In our opinion this cheque does not fall within this exemption because it is not in respect of money payable by virtue of the Rules of the Society nor is it a bill given by or to a registered Co-operative Credit Society.

It is a cheque drawn in the ordinary course of banking business, and must bear a stamp just as any cheque drawn on any regular bank must. It cannot, if not stamped, be sued on.

The action therefore fails and is dismissed with costs and £P. 2 advocate's fees.

Delivered the 8th day of November, 1934.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C.Ja. No. 104/36.

BEFORE:

The Relieving President (Edwards, J.) and Mani, J.

IN THE CASE OF:

Pawel Belke — APPELLANT.

v.

Felix Karp — RESPONDENT.

Promissory notes made in Poland — Limitation of actions a matter of procedure — Application of lex fori — Limitation of actions on promissory note — Section 95, Bills of Exchange Ordinance, 1929.

In February, 1931, seven bills for a total amount of 2400 Polish zlotys were made in Poland in favour of the plaintiff, maturing on dates between 28th August, 1931, and 30th April, 1932. On the 24th day of January, 1936, action was brought on the notes before the Magistrate at Tel Aviv. Defendant pleaded that according to Polish law which was applicable, the bills were prescribed. The learned Magistrate in giving judgment for the plaintiff found that it was immaterial whether Polish or Palestine law was applied since in either case the period of prescription had not elapsed. Defendant appealed and the District Court remitted the case for further evidence to be heard on the Polish law. The learned Magistrate, on the re-hearing, heard expert witnesses on the Polish law and allowed the claim in part holding that the balance was prescribed in accordance with Polish law. On appeal from this decision:—

HELD: setting aside the judgment of the Magistrate and entering judgment for the plaintiff for the entire amount claimed that a question of limitation of actions is a matter of procedure and as such to be governed by the local law of the country where the action is brought and that since under the Bills of Exchange Ordinance, 1929, the period of prescription was five years and the period had not elapsed the claim was in time.

Appeal to the District Court from a judgment of the Magistrate dismissing in part an action on promissory notes made in Poland.

M. Kirschenbaum — for appellant.
Philip Joseph — for respondent.

JUDGMENT.

This is an appeal from a judgment of the Tel-Aviv Magistrate's Court dismissing a claim on promissory notes on the ground of prescription according to the Palestine law. The bills in question were drawn in Poland and according to the finding of the Magistrate, the Polish law on this matter is that the period of prescription is one of three years after maturity.

In our opinion, the matter of limitation of actions is a question of procedure and is to be governed by the local law of the country before which the action is brought. (Dicey's Conflict of Laws, — Limitation of Actions). In this country Section 95 of the Bills of Exchange Ordinance, 1929, fixes at five years the period of prescription. This period has not yet elapsed with regard to the bills in question.

The judgment of the Court below is therefore set aside and judgment entered for the appellant for the sum of 2400 Polish zlotys to be paid in Palestine currency at the rate of exchange on the day of payment with costs and £P. 4 advocate's fees.

Delivered the 24th day of May, 1936.

BROKERS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 121/34.

BEFORE:

The Chief Justice (McDonnell, C. J,), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Aziz Lammam — APPELLANT.

v.

Hanna Asfour — RESPONDENT.

Validity of agreement to pay brokerage for sale of house — Functions and licensing of broker — Plea by signatory of illegality of contract — Licence not required by land broker — Ottoman Brokerage Regulations, 1st Safar, 1306, held repealed — Repeal of law by implication where reading of prior statute leads to absurdity — Interpretation of Statutes — Recourse to preamble of Ordinance in case of ambiguity — Government notices in Official Gazette held void of legal effect — Legislation in pari materia — Sec. 8, Brokers Ordinance, 1919.

The plaintiff, a licenced broker entered into a written agreement with the defendant, an advocate, whereby the broker was granted the right of selling a house for the defendant for a sum of £P.3665 on specified conditions amongst which were stipulations that the right to sell was to terminate at a certain time and that if the broker sold the house for more than £P.3665 he was to be entitled to keep the surplus over that sum. The broker, within the period stipulated, sold the house for £P.4000 which sum the purchaser paid to the defendant. Defendant refused to pay tbe broker the excess of £P.335 and action was filed in the District Court to recover this sum. The defendant, relying upon the Brokers Ordinance, 1919, and certain articles of the Ottoman Brokerage Regulations, 1st Safar, 1306, pleaded that the agreement was illegal and unenforceable. The plaintiff replied that the Ottoman Brokerage Regulations were repealed by implication by the Brokers Ordinance, 1919, and that the Ordinance did not,

in any event, apply to land brokers. The District Court held that the Ottoman Brokerage Regulations were repealed but that the plaintiff was a broker, and as such, was prohibited by Section 8 of the Ordinance from taking part in commercial affairs on his own account and dismissed the action. On appeal to the Court of Appeal:—

HELD: setting aside the judgment of the District Court and giving judgment in favour of the plaintiff for the amount of his claim that (a) since the effect of holding the Ottoman Brokerage Regulations to be still in force would, on such Regulations being read together with the Brokers Ordinance, 1919, lead to wholly absurd consequences, the Regulations must, in spite of the absence of any express repealing provision be taken to be repealed, (b) the legislator, in drafting the Brokers Ordinance, 1919, had deliberately omitted a provision for brokerage fees on land transactions. A land broker was therefore not a broker within the meaning of the Ordinance, and the transaction giving rise to the action was not, therefore, a transaction prohibited by the Ordinance.

Appeal from a judgment of the District Court of Haifa, (C.D.C. Ha. No. 41/34) in favour of the defendant in the action. The facts and pleadings are more fully set out in the judgments of the District Court and Court of Appeal, both of which are reported below.

E. D. Goitein — for appellant.
Moghannem Moghannem — for respondent.

JUDGMENT OF THE DISTRICT COURT.

We agree with the plaintiff's contention that the Regulations of the 1st Safar, 1306, in so far as they related to brokers were repealed by implication by the Ordinance of 15th January, 1919. It is not necessary to give reasons for this conclusion because we are against the plaintiff on another ground.

The last paragraph of Section 8 of the Ordinance (Section 10 in Bentwich, Vol. 1, p. 52) states in unequivocal terms:

> "A person carrying on the business of a broker is forbidden to take part in commercial affairs in his own name or on his own account".

There is no definition of a broker in the Ordinance. Can it be said that the Ordinance only applies to brokers whose operations

are concerned with merchandise (including cereals), freight and insurance, i.e. the items mentioned in the tariff annexed to the Ordinance? We think not. The more reasonable construction in our view is to say that the provisions of the last paragraph of Section 8 apply to brokers indiscriminately whatever their line of business may be and that if there be no provision in the tariff for their fees, that is merely a lacuna in the Ordinance. Actually, it can be understood why immovable property was omitted from the tariff — it was because transactions in immovable property (save leases for a period not exceeding three years) were prohibited when the Ordinance was promulgated by the terms of the Proclamation of 15th November, 1918.

In coming to the conclusion set forth above we are not influenced by the Notice dated 18th February, 1924, signed by the Director of Customs and published in Official Gazette No. 110 nor by the Notice signed by the Chief Secretary, and published in the Official Gazette some time in the year 1925. In our view neither of these notices has any legislative value.

The plaintiff is admittedly a broker and as such is prohibited from taking part in commercial affairs on his own account. Therefore, he cannot succeed in this action which must be dismissed with costs.

Judgment given in presence of the parties, subject to a right of appeal.

Delivered the 25th day of June, 1934.

JUDGMENT OF THE COURT OF APPEAL.

In this case the appellant, a licensed broker, entered into an agreement with the respondent whereby the appellant was granted by the respondent the right of selling a house in Haifa for a sum, exclusive of charges, and commission, of LP. 3665 on condition that the appellant paid the respondent LP.100 forthwith, LP.900 on the execution of the contract of sale, and the balance at the time of transfer. The right to sell, granted to the appellant, was to remain in force until 8 p.m. on the 4th November, 1933, and if no contract of sale was executed by then, the sum of LP.100 paid by the appellant to the respondent was to be forfeited.

In the event of the respondent revoking the agreement before the same hour on the same day, the respondent was to return to

the appellant the sum of LP.100 paid on the execution of the agreement together with LP.100 as liquidated damages.

Finally, by Clause 7 of the agreement, it was provided that "any increase you may obtain in the price shall be yours without any argument whatsoever", in other words, if the appellant sold the house for more than LP.3665 he was to be entitled to keep the surplus over that sum.

This is in fact what happened: the house was sold within the prescribed period, through the intervention of the appellant, for LP.4000 and this sum was paid by the purchaser to the respondent who then refused to pay to the appellant the sum of LP.335 the excess obtained over the LP.3665 which was provided for as the price of the house in Clause 2 of the contract.

It is for the recovery of this sum of LP.335 that the action has been brought by the Appellant.

The respondent who is an advocate has repudiated liability on the ground that the action was based on an illegal contract. We need merely state this fact without comment and need not elaborate our strong disapproval of the ethics of such a defence being put forward in such an action by a lawyer who was himself the party to be charged under the contract.

In finding a legal basis for this defence the respondent attempts to ride two horses at once and bases himself upon both the Ottoman Brokerage Regulations of the 1st of Safar, 1306, and upon the Brokers Ordinance, 1919, the latter of which he claims did not repeal the former.

The District Court held the Ottoman Brokers Regulations were repealed by implication by the Brokers Ordinance, 1919, but that in view of the provisions in the last paragraph of Section 8 of that Ordinance that "a person carrying on the business of a broker is forbidden to take part in commercial affairs, in his own name or on his own account", the plaintiff could not succeed in his claim, and therefore gave judgment for the defendant.

The Ottoman Brokerage Regulations of 1st Safar, 1306, are printed in French on page 14 of Volume IV of Young's Corps de Droit Ottoman. The Palestine Brokers Ordinance is to be found on page 1 of the Official Gazette of the 16th October, 1919.

There is certainly no express declaration in the Ordinance that the Ottoman Brokers Regulations shall no longer be in force,

but it must be obvious that the Ordinance was settled by a draftsman who had the Ottoman Regulations under his eyes and adopted some of their provisions, in certain cases in full, in others with alterations and, that on the other hand, he omitted to enact yet others of the provisions contained in the Regulations.

Article 1 of the Regulations defines brokers. There is no such definition section in the Ordinance, a fact which, as we shall see, is of some importance.

Article 2 of the Regulations is reproduced as Section 3 of the Ordinance with this omission that a Chamber of Commerce is under the Ottoman Regulations to be the recipient of the testimonials as to the character of the would-be broker.

Articles 3 and 13 of the Regulations provide for different classes of brokers, who shall pay different fees to the Chamber of Commerce while section 2 of the Ordinance prescribes only one uniform fee of one pound which all brokers must pay to the Government.

Article 4 of the Regulations is reproduced as Section 4 of the Ordinance with these additions that an unlicensed person practising as a broker is made liable to a fine as is provided in different terms in Article 14 of the Regulations, and an unlicensed person is expressly prevented from recovering his fees in Court; a matter which is not provided for in the Ottoman Regulations.

Article 5 of the Regulations allowing a bankrupt when discharged to be licensed as a broker is not reproduced in the Ordinance.

Article 6 of the Regulations is also not reproduced.

Article 7 of the Regulations finds its counterpart in Section 5 of the Ordinance, with these additions that a broker who loses his book is fined ten pounds if he does not report the loss immediately and is fined two pounds if he does report it on application for a new book.

Articles 8 to 11 of the Regulations are not reproduced in the Ordinance. Article 12 of the Regulations is reproduced as Section 6 of the Ordinance. Article 13 of the Regulations has been dealt with in connection with Article 3. Articles 14 and 15 of the Regulations are not reproduced save to the extent referred to already in dealing with Article 4. Article 16 of the Regulations finds its counterpart in Section 7 of the Ordinance. Article 17 of the Regu-

lations is not reproduced. Articles 18 and 19 are reproduced in Section 8 of the Ordinance.

The tariff of brokerage fees attached to the Regulations is, with some alterations, summarised in the tariff affixed to the Ordinance.

There are, however, alterations. In the Regulations the brokerage fee on the sale of certain silks is one per cent payable by the purchaser and not one per cent payable by the vendor, as is prescribed in the Ordinance for articles of merchandise other than cereals.

Again, under the Regulations the vendor alone pays on a sale of coal, and he pays two per cent; on a sale of wool or mohair, moreover, the vendor and purchaser are, under the Regulations, each liable to pay one per cent.

Finally, under the Regulations the vendor has to pay one-eight per cent on a foreign exchange and the vendor and purchaser have each to pay two per cent on a sale or lease of immovable property. There are no charges similar to these last two in the Ordinance.

In view of the numerous inconsistencies which we have spoken of between the Ordinance and the Regulations, we have no hesitation in saying that in spite of the absence of any express repeal of the Regulations and of the fact that repeal by implication is never to be favoured, in the present case the Regulations must be taken to be so repealed on the authority of Dr. Lushington in The India (1864) 33 L.J. Adm. 193 who is quoted on p. 312 of the third edition of Craies on Statute Law as saying "the prior statute would I conceive be repealed by implication . . if the two statutes together would lead to wholly absurd consequences".

The consequences, if we were to hold the Regulations still in force, would undoubtedly be absurd. To take two instances, the Government would licence brokers under the Ordinance while under the Regulations brokers would be licensed by the Chambers of Commerce, which have now been re-established; secondly a broker might sue for fees on a percentage payable under one of the enactments and the vendor or purchaser whom he sued might reply that only a lesser percentage was payable, or that he was not liable to pay any percentage, as the case might be, under the other of the enactments.

Again, this interpretation that the Ordinance impliedly repeals the Regulations is not in conflict with, and can be read into, the words of the preamble to the Ordinance, a source of elucidation to which we are permitted by the rules of legal interpretation to have recourse in cases of ambiguity.

The preamble runs as follow:—

> "Whereas a regulation of 1st September, 1306, (26th September, 1888) requires any person carrying on the business of a broker to obtain a licence from the Chamber of Commerce and, Whereas the Chambers of Commerce do not exist in O. E. T. (South) and it is desirable to make other provisions for licensing brokers, it is hereby ordered as follows:—"

We hold that the recital that "it is desirable to make other provisions for licensing brokers" does not mean merely, as at first sight might appear, that it is desirable that brokers shall be licensed otherwise than by the Chamber of Commerce, but that the whole question of the licensing of brokers must be provided for anew, as is in fact done in various particulars by the Ordinance.

Hence, we hold that the Ordinance, by implication, repeals the Regulations.

As we have seen, the tariff in the Regulations provides for fees in respect of selling and leasing immovable property and, further, the definition of the functions of a broker in Article 1 of the Regulations which, as we said before, it is important to consider, comprises agency in respect of immovable property and lands.

No provisions of this nature occur in the Ordinance, but on page 536 of the Official Gazette of the 1st March, 1924, appeared a notice signed by the Director of Customs and Trade on the 18th February, 1924, stating that the Brokers Ordinance, 1919, was still in force and giving a definition of a broker which was nothing more than a translation of the definition in Article 1 of the Regulations, the relevant part of which for our purposes is "A broker is an agent who acts for commission as intermediary between seller and buyer in . . immovable property, land . ."

Again, on page 558 of the Official Gazette of 1st November, 1925, appeared a further notice signed on this occasion by the Chief Secretary on the 19th October, 1925, the relevant part of which runs as follows:

> "It is notified for information of the public that brokerage fees payable on a contract concerning immovable property are, in accordance with the Ottoman Regulations of the 1st Sefer, 1306, 2% payable by the vendor and 2% payable by the purchaser."

It will be observed in passing that the Chief Secretary was under the impression that the Regulations were still in force. Now, although these two notices are from a legal point of view so much waste paper inasmuch as neither the Director of Customs and Trade nor even the Chief Secretary had any authority or power to amend the law, they seem to indicate that the Executive realised that the Ordinance of 1919 on the face of it did not provide for brokerage in respect of the sale or leasing of land.

The District Court, in referring to there being no provision of this sort in the tariff, said:—

> "Actually it can be understood why immovable property was omitted from the tariff — it was because transactions in immovable property (save leases for a period not exceeding three years) were prohibited when the Ordinance was promulgated by the terms of the Proclamation of 18th November, 1918."

The answer to this is to point out that if brokerage in respect of most land transactions was omitted for this reason, it provided no reason, why no provision was made for brokerage in respect of leases for a period not exceeding three years.

As was said by Cockburn, C. J. in Regina v. Price (1871), L.R. 6 Q.B. p. 411 at p. 416, "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."

This Court constituted as it is now, held in Giaconda Miara v. Henry Zimmermann, C.A. No. 135/33*) that it was immaterial, if this principle was applied, that in that case it was the legislature of Palestine that was passing an Ordinance in pari materia with an Act of the Imperial Parliament.

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*) Reported in C. of J. p. 708.

So in the present instance, the legislature of Palestine in legislating in pari materia with the Ottoman Brokerage Regulations must be taken to have deliberately omitted the definition of the functions of a broker, which include inter alia what we in England should call those of a land agent, and to have deliberately omitted a provision for brokerage fees on land transactions. This omission, when land transactions became common, could only have been cured by legislation and most certainly was not remedied by the notices to which we have referred which were issued by the Director of Customs and Trade and by the Chief Secretary.

This being so, we need not stop to consider whether Section 8 of the Ordinance applies to the transaction, inasmuch as we hold that the appellant was not a broker within the meaning of the Ordinance.

For the above reason, we set aside the judgment of the District Court and substitute for it a judgment for the appellant for LP.335 with interest at 9% from the date of the commencement of the action with LP.4 advocate's fees and costs here and in the court below.

Delivered the 18th day of December, 1935.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C.Ja. No. 119/35

BEFORE:

The President (Copland, J.), Mani, J. and Nammar, J.

IN THE CASE OF:

Daniel Bruhand — APPELLANT.

v.

Meir Narbolinsky

Gershon Rotzky — RESPONDENTS.

Action for brokerage fee — Completion of contract of sale of immovable — Sec. 6(2), Brokers Ordinance.

The respondents who are licenced brokers sold for the appellant his house to a certain Mr. K. for LP.4600. An agreement was drafted and signed by the appellant as vendor and handed to the purchaser K. who paid the appellant LP. 200. as part of the purchase price. In an action by the respondents before the Magistrate for brokerage fees the appellant pleaded that although the agreement contained all the necessary stipulations to make it binding yet as it was never signed by the purchaser the brokers could not, on the authority of Ratner v. Turkenitz, C.A. No. 1/29 *), recover brokerage fees. The Magistrate gave judgment for the respondents. On appeal to the District Court:

HELD: that the plea was good, since a transaction of sale is not considered complete until a legal contract is signed by both parties.

Appeal from the judgment of the Magistrate's Court of Tel-Aviv dated 12th February, 1935.

Kadury — for appellant.
Heyrouti — for respondent.

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*) C. of J. p. 121, P.L.R. p. 406.

JUDGMENT.

In our opinion a broker is entitled to a fee when the parties have completed the transaction and a transaction for the sale of an immovable is complete when a legal contract has been signed by both parties. (Ratner v. Turkenitz)*).

In this case, there was no complete transaction inasmuch as the document produced is only a memorandum signed by one party.

The judgment of the Court below is therefore set aside and the respondent's action dismissed with costs and LP.2 advocate's fees.

Delivered the 26th, day of April, 1935.

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*) C. of J. p. 121, P.L.R. p. 406.

BUSINESS NAMES.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C.Ja. No. 452/35

BEFORE:

The President (Copland, J.) and Mani, J.

IN THE CASE OF:

Office Efficiency Institute,
Zvi Hayimi & Dr. A. L. Zwillinger APPELLANTS.

v.

R. & W. Silberstein Bros. RESPONDENTS.

Action for goods sold and delivered — Plea of non-registration of business name — Default remedied by application to register — Sec. 10, Registration of Business Names Ordinance, 1935.

In an action before the magistrate on a contract for the purchase of a machine the defendant pleaded by way of preliminary objection that the plaintiff was a firm carrying on business under a business name and as such required to be registered under the Registration of Business Names Ordinance, 1935, and that being unregistered it could not sue. Before the merits of the case were entered into the case was adjourned and plaintiff forthwith applied to the Registrar of Business Names for registration and at the next hearing produced to the magistrate the Registrar's acknowledgment of receipt of the application. The magistrate dismissed plaintiff's claim on the ground that under Section 10 of the Registration of Business Names Ordinance, 1935, the effect of default was to deprive him of his right to enforce his claim in a court of law. On appeal to the District Court:

HELD: Allowing the appeal, that since the plaintiff had applied for the registration of its business name it was no longer in default, and that considering the circumstances the relief

provided in Section 10(2) of the Ordinance should have been granted.

Appeal from the judgment of the Magistrate's Court of Tel-Aviv dated 22nd October, 1935. (Case No. 7609/35).

Foguel — for appellants.
Nissim Levy — for respondents.

JUDGMENT.

In our opinion, the appellants are no longer in default inasmuch as they have applied for the registration of their business name. Furthermore, taking into consideration the circumstances of the case, the appellants should have been granted relief in accordance with Section 10(2) of the Registration of Business Names Ordinance, 1935.

The judgment of the Court below is therefore set aside and the case remitted to the magistrate to be heard on its merits.

Delivered the 12th day of February, 1936.

CHARITABLE TRUST.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 178/33.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Khayat, J.

IN THE CASE OF:

The Administrators of the
"Tefilah le Moshe" Synagogue — APPELLANTS.

v.

Jehuda Hanoch
Shlomo Hanoch — RESPONDENTS.

Conversion of privately endowed synagogue into charitable trust— Sections 3, 37, Charitable Trusts Ordinance, 1924-25 — Consent of High Commissioner required for such conversion — Cause or matter in connection with religious building — Article 3, Palestine (Holy Places) Order-in-Council, 1924.

In 1889, one, Moshe Hanoch built synagogue premises in Jerusalem and endowed them as a religious endowment. In 1928, the Rabbinical Court of Jerusalem, after hearing evidence and examining documents issued a declaration that the synagogue had been a religious endowment for some 40 years. In 1929, the administrators of the synagogue decided to convert it into a charitable trust under the Charitable Trusts Ordinance, 1924-25, and applied to the District Court for an order to this effect. The respondents, two of the grandsons of the dedicator opposed the application claiming the premises as their private property. The District Court dismissed the application on the ground that a trust in relation to immovable property could only be created by documents conforming with the provisions of Sec. 3 of the Charitable Trusts Ordinance, 1924-25, and that such documents had not been produced. The administrators appealed and during the hearing of the appeal it was revealed that no decision had been obtained from the High Commissioner as was required by Article 3 of the Palestine (Holy Places) Order-in-Council, 1924.

HELD dismissing the appeal that the District Court was wrong in hearing and determining the action pending reference to the High Commissioner under Article 3 of the Palestine (Holy Places) Order-in-Council, 1924, and that the action must be remitted to the District Court to proceed in accordance with the High Commissioner's decision under the said Article.

Appeal from a judgment of the District Court of Jerusalem C.D.C.Jm. No. 122/33) dismissing the application of the plaintiffs in the action.

For the appellants — M. Levanon.
For the first respondent — S. Mizrachi.
For the second respondent — M. Gratch.

JUDGMENT.

In accordance with the judgments of this Court in L.A. 52/32[1]), Aziz Daumat v. Shoghi Rabbani and L.A. 2/33 [1]), Subhi Khadra v. Rt. Rev. Bishop Hajjar, we hold that the District Court was wrong in hearing and determining the action pending reference to the High Commissioner under Article 3 of the Palestine (Holy Places) Order-in-Council, 1924, and the issue of His Excellency's decision thereon. The judgment of the District Court is therefore set aside and the case is remitted to the District Court to proceed therein in accordance with Article 3 of the beforementioned Order-in-Council in accordance with the High Commissioner's decision.

Costs will follow the event.

Delivered the 17th day of January, 1935.

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[1])C. of J. p. 983.

CHIEF EXECUTION OFFICER.

In the Supreme Court sitting as a Court of Appeal.

H.C. No. 83/35.

BEFORE:

The Acting Chief Justice (Corrie, J.) and Khayat, J.

IN THE CASE OF:

Yousef Esh-Shanti — PETITIONER.

v.

The Chief Execution Officer, Jaffa
Nasri Farah — RESPONDENTS.

Execution of judgment debt — Order by Chief Execution Officer for payment by instalments — Discretion of Chief Execution Officer not interferred with by High Court — Alteration of order for payment by instalments.

The petitioner, the judgment debtor of a debt of £P. 57.565, was examined by the Chief Execution Officer and ordered to pay the debt in monthly instalments of £P. 5. On an application to the High Court for an order directed to the Chief Execution Officer to show cause why his said order should not be set aside;

HELD: dismissing the application (a) that the question of payment by instalments is within the discretion of the Chief Execution Officer, (b) that in the absence of evidence to the contrary the High Court was bound to assume that there was evidence before the Chief Execution Officer to support his order, (c) that it was for the Chief Execution Officer to determine whether in the light of new evidence produced after the date of his order he would vary his order.

Application to the High Court for an order to issue against the Chief Execution Officer to show cause why he should not alter his decision regarding payment by instalments.

ORDER.

The question of payment by instalments is within the Chief Execution Officer's discretion.

The evidence upon which his order of the 26th July, 1935, was based is not before us; but in the absence of evidence to the contrary, we are bound to assume that there was evidence before the Chief Execution Officer to support his order.

Since the Chief Execution Officer made his order, the petitioner has obtained a certificate of poverty from the mukhtars and elders of Qualqilia.

It is for the Chief Execution Officer to determine whether in the light of this certificate he will vary his order of 26th July, 1935.

The petition is dismissed.

Delivered the 8th day of October, 1935.

CITIZENSHIP,

In the High Court of Justice.

H.C. No. 71/33.

BEFORE:

The Chief Justice (McDonnell, C.J.) and Frumkin, J.

IN THE CASE OF:

Nehama Wecker — PETITIONER.

v.

Director of Immigration — RESPONDENT.

Application for Palestinian citizenship — Proof of loss of foreign nationality — Proof of Russian law — Jurisdiction of Rabbinical Court to grant divorce to foreigners — Citizenship of wife dependent on citizenship of husband.

In November, 1920, petitioner without passport or permission from the Russian Government left Russia with Z, her intended husband, for Roumania where they were married. They came to Palestine in 1921 on immigration permits issued by the Government of Palestine and were granted a decree of divorce in September, 1925, by the Rabbinical Court. Subsequent to the divorce petitioner applied in her own name for a certificate of Palestinian citizenship which was refused on the ground that the divorce was invalid as being between foreigners and therefore petitioner's husband was the proper party to apply for citizenship for her. Upon a petition to the High Court an order nisi was issued to the Director of Immigration to show cause why he should not recognize the divorce as legal.

HELD: Making the order nisi absolute that under Russian law persons who left Russia after 7th November, 1917, without the permission of the Soviet authorities, are deprived of the benefits of Russian citizenship. The husband of the petitioner was therefore not a foreigner in September, 1925, and the Rabbinical Court had

jurisdiction to grant the divorce. The petitioner was therefore properly divorced and entitled to apply in her own name.

Olshan — for petitioner.
Kantrovitch, J.G.A. — for respondent.

ORDER.

We are satisfied that this case is governed by Section 1 (b) of the Decree of the 15th December, 1921, which provides that persons who left Russia after 7th November, 1917, without the permission of the Soviet authorities, are deprived of the rights of Russian citizenship.

This must be read in the light of Section 12 (a) of the Law of the 29th October, 1924, which lays it down that the citizenship of the Union of S. S. R. has been lost by persons deprived of citizenship under the provisions of legislative acts of the allied Republics issued prior to the 6th July, 1923, or deprived under the laws of the Union of the S. S. R.

It is clear then that the husband of the petitioner had lost his Russian citizenship in the autumn of 1925 at which date the Rabbinical Court issued a decree of divorce between him and the Petitioner and as in consequence the parties to the divorce proceedings were not foreigners the Rabbinical Court had jurisdiction. This being so we make the rule absolute.

Order made the 4th day of January, 1935.

CIVIL CLAIM.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C.Ja. No. 446/35.

BEFORE:

The President, (Copland, J.) and Mani, J.

IN THE CASE OF:

Shlomo Halfon
Bouba Halfon — APPELLANTS.

v.

Jack Solomon Halperin — RESPONDENT.

Compensation in lieu of diyet — Arts. 171, 182, 183, Ottoman Penal Code — Compensation dependent on conviction of wrongdoer — Accident due to negligence of deceased — Error of judgment when "in the grip of peril" not necessarily negligence.

Appellants' son who was riding his bicycle on the highway was killed by the car of the respondent. In a prosecution before the Chief Magistrate the evidence showed that deceased was negligent and that the accused had made an error of judgment. The accused was discharged, the magistrate holding that a person failing to do the best thing "when in the grip of peril" was not necessarily negligent since error of judgment was not the serious negligence necessary to a conviction under Article 182 of the Ottoman Penal Code. The appellants who had filed a civil claim for compensation in lieu of diyet which claim was dismissed by the magistrate appealed from the dismissal. On appeal the respondent contended that the civil claim was dependent upon a conviction and that since accused was acquitted no compensation was payable.

HELD: Dismissing the appeal that the question of diyet under Articles 171 and 182 of the Ottoman Penal Code is dependent on the conviction of the wrongdoer by the criminal court

and since the accused was acquitted there could be no claim for compensation in lieu of diyet.

HELD ALSO: That where the translation of an Ottoman law in force in Palestine is questioned the court should hear evidence as to the correct translation.

Appeal from the judgment of the Chief Magistrate's Court of Jaffa dated 21st October, 1935, (Case No. 578/35).

Rosenblueth — for appellants.
Seligman — for respondent.

JUDGMENT.

This is an appeal from a judgment of the Chief Magistrate dismissing a civil claim brought in a criminal case by the heirs of the deceased, who met his death in a collision with a car driven by the Respondent. The Respondent was acquitted in the criminal charge under Article 182, the evidence showing very clearly that the accident was mainly if not solely due to the negligence of the deceased and that though the Appellant may have committed an error of judgment, that error did not amount to culpable negligence so as to render him guilty of manslaughter.

It is not correct to say in the appeal, that the Chief Magistrate did not mention the civil claim at all nor give any reason for its rejection. In his own handwriting there are to be found the words "Held, civil claim fails", and it is clear from the preceding part of the record that he came to this conclusion feeling himself bound by the Bentwich translation of Article 182 of the Ottoman Penal Code which supports his decision.

Now no official sanctity attaches to any of the various translations of the Ottoman Laws which are to be found in use in these Courts, even the Arabic version in some cases is incorrect. For the true rendering it is often necessary to go back to the Turkish text of the original law. The Bentwich translation is the one most generally in use, and is on the whole by far the most accurate, though unfortunately it has been out of print for many years. My own particular copy has been corrected from the original Turkish text and the Bentwich translation of Article 182 correctly reproduces the sense of the original. In such a case I think that the Chief Magistrate should have heard evidence as to the correct translation, and in declining to do so he erred.

The appellants however argued that on the true construction of Article 182 the Respondent is liable to pay diyet in any case even where he has been acquitted of the criminal charge and they advance in support of their contention the decision of the Supreme Court in the Municipality of Haifa v. Khoury. (C.A. No. 88/30*) where it was held that a civil claim could be brought under the somewhat similar Article 183, though there had been no conviction for a criminal offence under that article.

The main difficulty, however, against this argument lies in the words of the judgment of Mr. Justice Baker,—

> "For the purposes of this appeal we can exclude the two beforementioned Articles 171 and 182 of the Ottoman Penal Code, for it is clear that the question of personal rights or diyet under these two articles is dependent on the conviction of the wrongdoer by a Criminal Court."

and Mr. Justice Frumkin would appear also to hold the same views.

The appellants ask us to disregard this opinion, on the ground that it is obiter dictum, inasmuch as the judgment was dealing with Article 183 and not with Article 182. I am not sure that it can be said to be obiter dictum, for both these articles and others were under the consideration of the learned Judges of the Supreme Court, and their construction of Article 183 was based on an analysis of all the various articles dealing with civil claims in criminal proceedings. Even if it were obiter, I should have very considerable hesitation in disregarding a considered opinion emanating from such a source, the highest court of appeal in this country. Holding, as I do, that we are bound by this judgment of the Supreme Court, this appeal fails, and the Chief Magistrate's decision must be affirmed though for reasons different from those given by him. The appellants must pay the costs of this appeal.

Delivered the 13th day of January, 1936.

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*) C. of J. p. 1343; P. L. R. p. 724.

CIVIL PROCEDURE.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C.Ja. No. 49/33*).

BEFORE:

The President (Copland, J.) and Mani, J.

IN THE CASE of:

Dov Tzedek — APPELLANT.

v.

Arieh Leon Freund — RESPONDENT.

Civil procedure — Right of unsuccessful party to make opposition to judgment by default before service of judgment on him.

The plaintiff (respondent) who had obtained judgment by default before the Magistrate did not proceed to serve the judgment upon the defendant (appellant). The defendant, therefore, took out a copy of the judgment, served it on the plaintiff and proceeded before the magistrate by way of opposition. The magistrate dismissed the opposition, holding that until the plaintiff had served him with a copy of the judgment no right of opposition arose. On appeal from such dismissal,

HELD: That a defendant could make opposition before any service is made on him of the judgment opposed.

Appeal against the judgment of the Magistrate's Court of Tel-Aviv dated the 6th January, 1935, whereby the opposition lodged by the appellant was dismissed and the judgment issued in default against him to pay to the respondent the sum of LP.36.328 mils was confirmed together with interest as from the 2nd December, 1934, and the provisional attachment confirmed.

Bedolach — for appellant.
Rabinowitch — for respondent.

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*) Compare: C. A. No. 81/35, post p. 102.

JUDGMENT.

In our opinion, there is nothing in law which precludes a defendant against whom a judgment by default was given by a Court, from making an opposition before that Court before any service be made to him of the judgment in question. The delay of five days applies only when such service was made.

The judgment of the Court below is, therefore, set aside and the case remited for rehearing.

Delivered the 12th day of February, 1935.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 138/33.

BEFORE:

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

IN THE CASE OF:

Europidi Mavromatis — APPELLANT.

v.

Selim Ayoub — RESPONDENT.

Civil procedure — Application for adjournment — Death of advocate's grandmother not good ground for adjournment — Effect of failure to serve grounds of appeal.

On the day of the hearing of an appeal by the Court ot Appeal, the appellant's advocate applied for an adjournment on the ground that his grandmother had died on the day before and was to be buried on the day of the hearing. Respondent opposed the adjournment on the ground that no sufficient cause for the grant of an adjournment had been shown.

HELD: that the death of a grandmother of counsel engaged in an action could not be considered as fit and proper ground for an adjournment.

F. Husseini — for appellant.
Auster — for respondent.

JUDGMENT.

Appellant in this appeal has applied for the adjournment of the hearing of this appeal on the ground that yesterday his grandmother died and was being buried today. The adjournment is opposed by respondent. We cannot and do not consider the death of a grandmother of counsel engaged in an action as being fit and proper grounds for an adjournment, and the application is dismissed.

The notice of appeal in this case was lodged on the 1st of August, 1933, the notice stating that grounds would be lodged later. It was, however, not until yesterday, the 13th May, 1934, that any grounds of appeal were lodged in this Court: and respondent has not even yet been served with grounds of appeal.

No good cause has been shown why grounds of appeal have not been lodged for a period of nine months and a half, and following the ruling contained in numerous cases before this Court — C. A. No. 76/27 [1]), L. A. No. 10/32 [2]), etc. — the appeal is dismissed with costs and advocate's fees assessed at LP. 2.

Delivered the 14th day of May, 1934.

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[1]) C. of J. p. 149; P. L. R. p. 182.
[2]) C. of J. p. 329.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 88/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Selim Jibrin — APPELLANT.

v.

Elias Farah — RESPONDENT.

Action for monies due under contract for the sale of oranges — Plea of payment — Contradictory admissions by the parties dated the same day — Admissibility of oral evidence to determine order in which such admissions signed.

By written agreement respondent purchased appellant's crop of oranges from his grove at Yazour and undertook to pay for same on specified dates. The agreement provided for the payment of a specified sum as liquidated damages in the event of breach. Appellant having sued the respondent for the balance of purchase monies due, the respondent pleaded payment and produced a receipt dated February 1, 1934, and signed by the appellant. Appellant thereupon produced a letter of the same date (a Thursday) signed by the respondent and addressed to him acknowledging receipt of oranges and undertaking to make payment "next Friday". The appellant having applied to the court to hear oral evidence as to the priority in time of the documents the court divided in opinion as to whether such evidence was admissible, and accordingly, the claim was dismissed. On appeal,

HELD: that the court of trial having before it contradictory admissions by the parties of the same date should have heard oral evidence to determine their priority.

Abu Ghazale — for appellant.
Respondent in person.

JUDGMENT.

On the 1st February, 1934, the appellant Selim Jibrin signed a receipt for LP. 40, the balance of his account with the respondent, Elias Farah.

On the same day the respondent signed a letter in which he admitted that LP. 40 was still due from him to the appellant.

The question of the respondent's liability thus turns upon the order in which these documents were signed.

Having before it contradictory admissions by the parties of the same date, the court should have heard evidence to determine this question.

The judgment of the District Court is therefore set aside and the case remitted for completion. Costs will follow the event.

Delivered the 15th day of April, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 81/35.

BEFORE:

Baker, J., Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Daoud Abdel Ghani el Attari
and three others — APPELLANTS.

v.

Haj Khalil Taha — RESPONDENT.

Civil procedure — Grounds of appeal out of time — Appeal by losing party before judgment served on him — Article 22, Appendix, Ottoman Code of Civil Procedure.

The respondent who had sued the four appellants obtained judgment on March 13th, 1935, in the presence of the first appellant and in the absence of the other three. Although respondent had not served a copy of the judgment on any of them all four appellants filed notice of appeal on April 12th, 1935, but grounds of appeal were not filed within the prescribed period.

HELD: that the appeal with regards the first appellant was out of time and that, following C.A. No.102/28*) the other three appellants were not entitled to appeal before they had been served with a copy of the judgment.

For second appellant — no appearance.
Other appellants — in person.
For respondent — Sheikh Said Kassab.

JUDGMENT.

Judgment of the District Court in this appeal was given in the presence of the first appellant on the 13th March, 1935.

All the appellants filed a notice of appeal on the 12th April, 1935, which contained no grounds of appeal. Grounds of appeal

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*) C. of J. p. 152; P.L.R. p. 368.

were filed on the 30th April, 1935, so that the appeal with regards to first appellant is out of time and his appeal must be dismissed.

Upon consideration of the appeal with regards to the second, third and fourth appellants, who were served with a copy of the judgment on the 27th September, 1935, and the 20th September, 1935, respectively, Article 22 of the Appendix to the Civil Procedure Code prescribes that the period for lodging appeals against judgments shall be thirty days from the date of the service of the judgment on the persons adjudged against, so that in our present case, grounds and notice of appeal were lodged some five months prior to the service of a copy of the judgment upon the appellants.

The law is silent with regards to the effect of lodging an appeal prior to the service of a copy of the judgment appealed against but this Court in the case of Khalil Sarah v. Yousef Khoury and others, C.A. No. 102/28 *), has decided that under such circumstances an appeal cannot be heard. Accordingly the appeal of the 2nd, 3rd and 4th appellants must also be dismissed. Appellants to pay the cost of the appeal and advocate's fees assessed at LP. 3.

Delivered the 8th day of April, 1936.

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* C. of J. p. 152; P. L. R. p. 368.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C. Ja. No. 42/36.

BEFORE:

The President (Copland, J.) and Mani, J.

IN THE CASE OF:

Agon Garzoun — APPELLANT.

v.

Moshe Proper — RESPONDENT.

Opposition to judgment by default — Service of summons by posting on door — Validity of such service — Article 11, Ottoman Magistrates' Law — Rule 4*), Magistrates' Courts (Procedure) Rules, (Laws of Palestine, 1933, p. 2371).

Appellant made opposition to a judgment given against him by default by the Magistrate on the ground that he had never been served with a copy of the summons having been out of the city at the time of alleged service and for some time thereafter. At the hearing of the opposition it transpired that the process-server had found the door of appellant's residence locked and had affixed the summons to the door in the presence of witnesses. The Magistrate held relying upon Article 11 of the Ottoman Magistrates' Law and upon Rule 4*) of the Magistrates' Courts (Procedure) Rules, (Laws of Palestine, 1933, p. 2371) that the service was in accordance with law and dismissed the opposition. On appeal,

HELD: that although the manner of service was good yet if the party to be served was out of town and could not have knowledge of the summons the service was defective.

Appeal from the judgment of the Magistrate's Court of Tel-Aviv dated the 14th May, 1935, (Case No. 2904/35).

Gershman — for appellant.
Rabinowitch — for respondent.

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* Now revoked. See Schedule Two to the Statute Law Revision Ordinance, 1934.

JUDGMENT.

In our opinion, the posting on the appellant's house of the summons is a good service, provided the appellant was in town, but if he were outside as it is alleged in the case and could not have knowledge of the summons, the service is defective and the opposition must succeed.

The judgment of the Court below is, therefore, set aside and the case remitted in order to hear the appellant's evidence on this point.

Delivered the 11th day of February, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 52/36.

BEFORE:

The Chief Justice (McDonnell, C.J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Farha Flora Setty — APPELLANT.

v.

Kety Seetty — RESPONDENT.

Civil procedure — Notice of appeal not properly entered where respondent incorrectly named — Discretion of court to grant extension of time under Rule 2 (a), Civil Appeal Rules — English Rules of Supreme Court not applicable.

In an estate matter before the District Court two applications were filed, — one by Habiba Setty for an order for administration and one by the appellant for probate. The court acted upon the application of Habiba Setty and made an order for administration against which appellant appealed. By inadvertance, counsel for appellant wrote the name of the respondent in the notice of appeal "Kety Seetty" instead of "Habiba Setty". At the hearing appellant applied for an extension of time to file a new notice of appeal contending that the mistake was a clerical error and was a

reasonable ground for enabling the court to grant an extension of time for filing the notice of appeal.

HELD: Dismissing the appeal,

(a) That the mistake was not such a reasonable ground for the delay in entering notice of appeal as enabled the court to exercise the discretion conferred upon it by rule 2(a) of the Civil Appeal Rules (Laws of Palestine p. 2326).

(b) That the respondent having been improperly named, the Court of Appeal was not seised of the appeal.

(c) That procedure based on the English Rules of the Supreme Court is not applicable in the courts except insofar as the said Rules have been embodied in the practice of the courts of Palestine.

Eliash and Ben Aharon — for appellant.
Amdur — for respondent.

INTERLOCUTORY JUDGMENT.

The Appellant has very properly not pursued the application grounded upon Section (2) of the Civil Appeals Rules of Court of 1st June, 1921, and has confined himself to that based upon Section (1) of the same Rules.

Even if we were to hold that a citation of a respondent by a wrong first name in a notice of appeal nullified that notice in such a way as to enable the appellant to say it had not been entered in time, we could not hold that this mistake was a reasonable ground for the delay in entering a correct notice of appeal so as to enable us to exercise the discretion conferred upon us by Section (1) of the Rules of Court in question.

The application is dismissed with £P.2 advocate's fee and costs.

Delivered the 12th day of June, 1936.

JUDGMENT.

The arguments which Mr. Eliash has addressed to us are based upon the English Rules of the Supreme Court. We are not concerned with procedure based upon these rules except insofar as they have been embodied in the practice of the Courts of Palestine by Rules of Court amending the Ottoman Code of Civil

Procedure. No suggestion that this was so in respect of any of the English Rules relied upon was made by the Appellant's advocate.

The matter is clearly governed by Chajuss v. Kazzaz and another, C.A. No. 109/33 [1]), which followed Hos & Co. v. Rushdi, C. A. No. 155/32 [2]), and is distinguishable from Bitar v. Borsig Hall Co. Ltd., C. A. No. 98/32 [3]), inasmuch as in the present case the advocate for Habiba (Eva) Setty expressly stated in his pleading of June 1st, 1936, that he represented no party by name of Kety Seetty, and therefore could not accept service of the appeal.

For this reason the appeal is dismissed with costs to include £P.2 advocate's fees.

Delivered the 19th day of June, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 68/36.

BEFORE:

The Chief Justice (Trusted, C. J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Alexander Fried — APPELLANT.

v.

Alexander Fried, Hoek van Holland Co. Ltd. — RESPONDENT.

Civil procedure — Appeal from Magistrate to District Court lodged without guarantee — Art. 186, Ottoman Code of Civil Procedure not applicable to such appeal — Arts. 43, 44, 96, Ottoman Magistrates' Law.

The appellant appealed from a judgment of the magistrate to the District Court of Jaffa and lodged no guarantee as security. The District Court dismissed the appeal on the sole ground of the

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[1]) C. of J. p. 336.
[2]) C. of J. p. 332.
[3]) C. of J. p. 1561.

failure to file the guarantee. Upon leave to appeal to the Supreme Court on a point of law being granted it appeared in argument before the Supreme Court that the practice in the District Court of Jaffa had always been to require a guarantee and that the practice in the other District Courts was otherwise. The respondent relied on Article 186 of the Ottoman Code of Civil Procedure and Article 96 of the Ottoman Magistrate's Law. The appellant argued that the matter was fully dealt with by Articles 43 and 44 of the Ottoman Magistrates' Law and that therefore Article 186 of the Code was not applicable.

HELD, allowing the appeal: That there was no provision of law which required a guarantee to be produced on appeal from a judgment of the Magistrate.

Appeal from the judgment of the District Court of Jaffa, dated the 11th May, 1936.

Kleinzeller — for appellant.
Gershman — for respondent.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa, dated the 11th May, 1936, on a point of law formulated by the President in the following proposition.

> "Should a guarantee be required from a dissatisfied party before he can appeal to the District Court from a judgment of a Magistrate's Court?"

So far it has not been the general practice to require such a guarantee to be produced, and there is no provision of law which requires it.

We are of opinion that this appeal should be allowed and the case remitted to the District Court in order to enter into its merits, with costs and LP. 3 advocate's fees.

Delivered the 14th day of April, 1937.

COMPANIES.

In the District Court of Jerusalem.

C.D.C. Jm. No. 237/34.

BEFORE:

The President (Plunkett, J.), Valero, J. and Ali Hasna, J.

IN THE CASE OF:

Eretz Israel Foundation Fund,
Keren Hayesod Limited — APPELLANT.

v.

Commissioners of Stamp Duties — RESPONDENT.

Stamp duty on debenture issued by foreign company registered in Palestine — Meaning of "formed or established in Palestine" — Section 48, and Items 16, 25, Schedule, Stamp Duty Ordinance, 1927.

The appellant, a limited company incorporated in England and doing business in Palestine as a foreign company, executed in England a debenture in the amount of £.500,000. charging certain of its property in Palestine as well as its property in England. The appellants having submitted the debenture to the respondents for assessment, the latter held that the debenture was a marketable security within the meaning of Section 48 of the Stamp Duty Ordinance, 1927, and as such attracted the duty set out in Item 25 of the Schedule to the said Ordinance. Upon a case being stated by the Commissioners for the opinion of the District Court the appellants contended that Section 48 of the Stamp Duty Ordinance, 1927, applied only to companies formed or established in Palestine and did not apply to companies incorporated abroad but registered in Palestine as a foreign company.

HELD: Upholding the decision of the Commissioners that a foreign company doing business in Palestine is deemed to be a company "established" in Palestine within the meaning of Section 48 and that as such its debentures were liable to stamp duty.

Horowitz — for appellants.
Kantrovitch, J.G.A. — for respondents.

JUDGMENT.

The court finds that the appellant company is deemed to be a company "established" in Palestine within the meaning of Section 48 of the Stamp Duty Ordinance, 1927, and as such is liable to stamp duty according to Item 16 (Schedule) of the said Ordinance.

Delivered the 31st day of May, 1935.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C.Ja. No. 100/35.

BEFORE:

The President (Copland, J.), Shehade, J. and Mani, J.

IN THE CASE OF:

Mahmoud el Hindi — APPELLANT.

v.

Russian Steamship Co. through its agent Isaac Hos — RESPONDENTS.

Venue of action against foreign company—Agent sued in Palestine.

A foreign shipping company brought barley for the plaintiff (appellant) in one of its steamships. Plaintiff claimed a short delivery of 104 sacks of barley and sued the shipping company through its offloading agent at Jaffa for the value of the missing sacks. Plea: that the company could not be sued in Palestine through its offloading agent since the company had no branch office here nor any legal representative to be served on behalf of the company.

HELD: Recepting the plea and dismissing the action that an agent is not necessarily a legal representative of a foreign company unless it is so definitely proved.

Appeal from the judgment of the Magistrate's Court of Jaffa, dated the 29th day of January, 1935, whereby the appellant's action for the sum of LP.47.610 was dismissed with costs.

Zein-el-Din — for appellant.
Assaf Goldberg — for respondent.

JUGDMENT.

An agent is not necessarily a legal representative of a foreign company unless it is so definitely proved.

The appeal is dimissed with costs.

Delivered the 22nd day of March, 1935.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C.Ja. No. 367/35.

BEFORE:

The President (Copland, J.) and Nammar, J.

IN THE CASE OF:

The Palestine Iron and Brass Foundry Company Limited — APPELLANT.

v.

Société Favouria of Paris — RESPONDENT.

Goods ordered by company from foreign firm — Order signed by manager held sufficient — Necessity of translation of documents produced in foreign language — Advocate for party as witness — Articles of association of company is matter of internal regulation of company.

The appellant company by letter stamped with the company seal and signed by the manager ordered metals from the respondent, a French firm, which the firm delivered. In an action for the price of the metals the appellant pleaded (inter alia) that the correspondence was in French and should have been translated into one of the official languages before being received in evidence, and further, that the order should have been signed by at least two directors in accordance with the articles of association of the company; The magistrate held that all the pleas failed and awarded judgment to the respondent. On appeal,

HELD: 1. Dismissing the appeal that a court may demand that documents produced in a foreign language be translated into one of the official languages yet it cannot be compelled to do so and

2. That the order having been signed by the manager the respondents were entitled to assume that he acted with authority.

Appeal from the judgment of the Chief Magistrate's Court of Jaffa dated 1st October, 1935, (Case No. 188/35).

Subhi Ayoubi — for appellant.
Amdur — for respondent.

JUDGMENT.

The first ground of appeal is that the correspondence on which this action is based is in French and should have been translated into one of the official languages. A Court may demand that translations are provided if it wishes but I know of no rule which compels it to do so, and the point is singularly inept when the appellant company itself conducted all the correspondence in French.

Another ground of appeal is that the respondent's advocate appeared as a witness in order to produce the correspondence.

It is generally undesireable that an advocate should appear as witness in one of his cases. If he is an essential witness then he should transfer his brief to some one else to appear for him. But there is nothing illegal in his so appearing.

The arguement that the appellants did not receive the goods is an untruth, to the knowledge of the appellants, since from their letter it is clear that they wanted to return the goods received as they alleged that they were not suitable.

The final point is that the order should have been signed by at least two of the directors. It was in fact signed by the manager over of the stamp of the company. Of course there is no such rule. If there were one, the conduct of all directors by a company would become impossible. The order was signed by the manager and the respondents were entitled to assume that he acted with authority, and the appellants never queried that authority in the correspondence or denied that the manager had power to order goods for the company until these proceedings were commenced.

On every point the appeal fails and must be dismissed with costs and LP. 5 advocate's fees.

One word more: Exception has been taken to a certain remark of the Chief Magistrate in which he described the defence as a fraudulent attempt to avoid payment for goods received.

I agree entirely with these observations — the defence is dishonest, and dishonest defences are far too common in this country and have a disastrous effect on the reputation of this country for commercial morality. This is an action which never should have been defended.

Delivered the 31st day of October, 1935.

In the High Court of Justice.

H. C. No. 5/36.

BEFORE:

The Chief Justice (McDonnell, C. J.) and Frumkin, J.

IN THE CASE OF:

Isaac Levy
Simon Belder — PETITIONERS.

v.

The Director of Lands — RESPONDENT.

Voluntary winding-up of citrus plantation company — Distribution of assets amongst the members in kind—Land Registry fee payable on transfer from company to members — Rule 3, Transfer of Land (Fees) Rules, 1935.

A limited company, formed in England in 1928 for the purpose, acquired and planted land in Palestine on behalf of its members and took transfer of the land into the name of the company, paying the 3% transfer fee under the Land Transfer Rules, 1920. In 1934, the company having decided that the members could more advantageously operate individual parcels passed a resolution providing for the voluntary liquidation of the company and the appointment of the first petitioner as liquidator, and proceeded towards a division of the land and other assets. The liquidator prepared files in the Land Registry for the transfer of partitioned parcels to the members but before their completion the Land Registrar insisted on payment of 3% of the market value in accordance with one of the first three sub-rules of Rule 3 of the Transfer of Land (Fees) Rules, 1935. The first petitioner objected

to paying this fee on the ground that the company was transferring to its own members who had already been called upon to pay 3% transfer fees, and that further, the transaction was not a sale, exchange or gift but a transfer from the company as trustee to beneficiary and as such should be treated merely as a correction of the Register. The respondent having, by order dated the 17th December, 1935, confirmed the decision of the Registrar, the liquidator together with one of the proposed transferees petitioned the High Court for an order calling upon the respondent to show cause why his order dated the 17th December, 1935, should not be set aside and why the transaction should not be treated as a correction of the Register under Rule 3 (15) of the Transfer of Land (Fees) Rules, 1935.

HELD: That the transaction in question was not a sale, gift or bequest, nor under the circumstances of the case was it an exchange of rights, and that therefore the 3% payable under the first three sub-rules of Rule 3 was not payable on this transaction. The transaction could not be treated as a correction of the register*.

A. Levin — for petitioners.
Kantrovitch, J.G.A. — for respondent.

ORDER.

The Director of Land Registration's ruling of the 17th December, 1935, lays down that the fee chargeable is 3%, that is to say that it is either a sale or exchange or a gift or bequest under Section 3 (1), (2) or (3) of the Transfer of Land (Fees) Rules, 1935.

The transaction in question is clearly neither a sale nor a gift or bequest. In view of the fact that the seven years contemplated in clause 3 (1) of the memorandum of association have elapsed, and that in consequence a right to distribute the property among members had come into existence, we cannot hold that the

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* ED. NOTE: Following upon this decision a new rule was made on the 20th June, 1936, (see Palestine Gazette, 1936, Supp. 2, p. 634) adding an additional sub-rule to Rule 3 as follows:

"(18) TRANSFER BY COMPANY OR OTHER CORPORATE BODY. 3% on the market value of the properties or rights transferred by any company or other corporate body, (whether in liquidation or not) to any member, contributory, debenture holder or creditor of such company or corporate body, or to any other person, provided that such fee shall in no case be less than 500 mils."

powers vested in the liquidator to divide the assets among the contributories involve an exchange of rights as contemplated in Section 3 (2).

This being so, it is clear that a fee of 3% is not chargeable and to that extent we set aside the ruling contained in the Director of Land Registration's communication of the 17th December, 1935, but we cannot agree with that part of the petitioner's application which asks that the transaction should be treated as a correction of the Register, and in any event there is not under Section 3 (15) of the Transfer of Land (Fees) Rules, 1935, any fee leviable, as the Director of Land Registration appears from his letter to imagine, for correction of the Register.

Furthermore, it is not for us on this application, as the petitioner appears now to suggest, to lay down whether or not the fee chargeable comes under Section 3 (10) of the Rules which relates to partition and sub-division.

To the extent above stated, therefore the rule nisi is made absolute with costs to include £P. 2 advocates' fees.

Delivered the 13th day of April, 1936.

CONTEMPT OF COURT.

In the High Court of Justice.

H. C. No. 59/34.

BEFORE:

The Chief Justice, (McDonnell, C.J.) and Baker, J.

IN THE APPLICATION OF:

The Attorney-General — PETITIONER.

v.

Mordechai Avnieli — RESPONDENT.

Newspaper article declaring convicted man to be innocent — Action "pending" before the court — Contempt of court by editor of newspaper — Section 4 (1), Contempt of Court Ordinance, 1929.

After the conviction of an accused person for murder and while an appeal from the conviction was pending before the Court of Appeal a newspaper of which the respondent was the responsible editor published an article declaring that the convicted man was innocent and imputing that the court perversely imposed the sentence of death upon him. Upon the motion of the Attorney-General made under Section 4 (1) of the Contempt of Court Ordinance, 1929, the High Court summoned the respondent to show cause why he should not be punished for contempt of court.

HELD: Adjudging the respondent punishable for contempt of court that proceedings were "pending" within the meaning of Section 4 (1) even though they were pending only in the Court of Appeal; Held further that a contempt by writing calculated to prejudice proceeedings could be committed in cases in which there was no jury, the purpose of the principle being not to protect the court or the individual judges but of protecting the public from the evils resulting from weakening the authority and influence of the court.

Kingsley-Heath — for petitioner.
Levitsky — for respondent.

ORDER.

This is a return to a rule nisi calling upon Mordechai Avnieli, an advocate, the responsible editor of the Hayarden newspaper to show cause why he should not be punished in accordance with Section 4 of the Contempt of Court Ordinance, 1929, for publishing an article on June 19, 1934, entitled, "At Cross Roads" calculated to prejudice the proceedings in a certain case, namely Abraham Stavsky v. The Attorney-General now pending before the Court of Appeal.

The appellant in that case was sentenced to death for an offence contrary to Article 170 of the Ottoman Penal Code and Section 3 (1) (b) and (c) of the Criminal Law Amendment Ordinance (No. 2) 1927, and from that conviction there is an automatic appeal under Section 61 of the Trial Upon Information Ordinance, 1924, as replaced by Section 7 of the Trial Upon Information (Amendment) Ordinance, 1929, (No. 37 of 1929). For this reason there can be no doubt that the case is "pending" within the meaning of Section 4 of the Contempt of Court Ordinance, 1929, (No. 12 of 1929).

We do not propose to do more than to state that the article, more than once asseverates that the convicted man is innocent. "With us, Jews," it says in one place "the innocence of Stavsky is now more than an "internal conviction." For the overweighing majority this is already a part of his "credo"."

The writer says again:—

"I commenced fighting on his behalf a year ago... simply because the charge was absurd and false."

In another paragraph he says "Here we stand before the question of elementary honesty and with it in that sacred area called justice. There are instances where it is simply impossible to believe that the Judges — whoever they may be — did not recognize the truth." This, the writer says, occurred in certain cases in which Jews were charged in Kiev and Leipzig; "but," he goes on, "nobody will persuade us to believe that in this case they were 'blind' and "did not see the truth"."

We need not deal further with an article which contains what are undoubtedly other gross contempts.

This has been recognized by counsel for the respondent, who says he most abjectly, unreservedly and fully apologises.

The responsible editor, he states, was absent through illness during the week in which the article appeared, though no medical evidence to that affect was tendered to us and no steps were taken under Section 11 of the Press Ordinance, 1933, (No. 3 of 1933).

Counsel further drew our attention to an Order-in-Council issued by His Excellency the High Commissioner on June 23, 1934, suspending, for one month, the publication of the paper in question, which, we may note, has only been in existence for two months, under Section 19 (2) of the Press Ordinance 1933 (No. 3 of 1933) on the ground that certain matters appearing in the issues of the 13th, 15th, 17th and 19th June, 1934, (the last of which is said to be the article in issue in this case) were likely to endanger the public peace.

We do not see that this can be urged in mitigation though it certainly imputes a lack of a sense of responsibility to the newspaper in question. His Excellency is concerned with a prevention of the publication of matter tending towards a breach of the peace. Our concern is to ensure that nothing is published calculated to prejudice pending proceedings. In the words of Wills J., in the case of R. v. Davies, L.R. (1906) 1 K. B. p. 34, which was quoted by this Court, constituted exactly as it is now, in the Attorney-General v. Rubashoff, High Court No. 11/30 [1]).

> "What then is the principle which is the root of, and underlies the cases in which persons have been punished for attacks upon Courts?... It will be found to be not the purpose of protecting either the Court as a whole or the individual judges of the Court from a repetition of them, but of protecting the public and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired." "The real offence," Wills J. goes on to say "is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone."

This Court, again constituted exactly as it is today, in the Attorney-General v. Schwartz (High Court No. 10/30 [2]) held that

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[1]) C. of J. p. 369; P.L.R. p. 876.

[2]) C. of J. p. 1353; P.L.R. p. 883.

a contempt by writing calculated to prejudice proceedings could be committed in cases in which there was no jury.

We wish to add to what we said in that case on this point, the following extract from the judgment of Lord Alverstone in R. v. Tibbits, L.R. (1902) 1 K. B. p. 77 at p. 88.

> "With reference to the argument which was strongly urged, that there was no evidence of any intention to pervert the course of justice, we are clearly of opinion, for the reasons given in the authorities to which we have referred, that this is one of the cases in which the intent may properly be inferred from the articles themselves and the circumstances under which they were published. It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place, but it certainly is not confined to such cases."

In an earlier part of the same judgment (at p. 87) Lord Alverstone referring to an earlier case, R. v. Fisher (1811), 2 Camp. p. 563, says:—

> "But, if the judgment of Lord Ellenborough is examined, it will be noted that the main ground of the judgment is that publication would tend to pervert the public mind and disturb the course of justice and therefore be illegal."

That is the gravamen of such an offence, and in taking into account the apology and the alleged absence through illness of the editor, we cannot close our eyes to the fact that no less than three Jewish newspapers have been simultaneously cited before us in respect of contempt in connection with the same case.

We wish clearly to warn newspaper editors that in the event of any continuance of such conduct we shall not hesitate to inflict stern sentences of imprisonment in addition to fines.

In the present case we impose a fine of £P.75 and order that the respondent Avnieli be detained and, if necessary, lodged in the Jerusalem Central Prison until this sum is paid.

Delivered the 12th day of July, 1934.

In the District Court of Jaffa.

C.D.C.Ja. No. 272/34.

BEFORE:

The President (Copland, J.) and Nammar, J.

IN THE CASE OF:

Siegbert Wolff — PLAINTIFF.

v.

David Wengrenovitch
The Palestine Orient Co. — DEFENDANTS.

Action for partnership accounts — Receivers and managers appointed by court to act jointly — Refusal of joint receiver to hand over books of firm to other receiver for inspection — Court order to hand over books not complied with — Section 6 (1), Contempt of Court Ordinance, 1929.

The plaintiff, who alleged that he was a partner in the firm known as the Palestine Orient Co. but that his name had been omitted from the registration in the Official Gazette took an action against his alleged partner (first defendant) and against the firm for an accounting. During the course of the proceedings an auditor was appointed jointly with the first defendant to act as receivers and managers. Access to the books having been refused to the auditor, the plaintiff moved the court to punish the first defendant for contempt of court.

HELD: that the refusal to deliver up the books was a contempt of court, and although the court may have erred in making the order of appointment yet, once made the order should have been first obeyed and then questioned.

Eliash and Karwassarsky — for plaintiff.
P. Joseph — for defendants.

JUDGMENT.

This is an application for contempt of court against David Wengrenovitch for disobeying the order of this court of June 11, 1934.

When the case came before this court on June 11, the question of the agreement between the partnership and the Limited Company was raised, but nothing was stated as to the assets and books of the partnership not being in possesion of Mr. D. Wengrenovitch.

As the court was satisfied that there was a prima facie case, it was proposed to appoint Mr. Benzion Cohen as a receiver pending the final determination of the action. The defendant, however, suggested that Mr. David Wengrenovitch should be appointed together with Mr. Cohen and it was on the defendant's request that Mr. D. Wengrenovitch was appointed with Mr. Cohen both to be joint managers and receivers, and in case of difference of opinion, that of Mr. Cohen to prevail, subject to reference to this court.

Mr. Benzion Cohen was refused by Mr. D. Wengrenovitch to have access to the books and assets of the partnership; hence this application for contempt of court.

We are satisfied that Mr. Wengrenovitch did in fact refuse to allow Mr. Cohen to have access to the assets and the books and that he, Mr. Wengrenovitch, was not justified in any way in so doing. Whether the order was right or wrong, it should have been obeyed. No order of a court can be disregarded — it must be obeyed first and then it can be queried. The person concerned has his remedies open to him to apply for setting aside the order or changing it.

We find without any hesitation that Mr. Wengrenovitch did commit an offence under the Contempt of Court Ordinance, 1929, and we have considered whether to send him to prison straightaway without giving him the option of a fine. But we however decide that he should pay a fine of £P. 25 and order him to give the receiver, Mr. Benzion Cohen full access to all books etc., and assets of the partnership as in the order of this court of June 11, 1934, by midday Thursday, June 21, 1934. Failure to obey this order will render him liable to be convicted on another charge of contempt, and if this takes place we may not be content with fining him only.

In default of payment of the L.P. 25 fine by June 21, he will go to prison for three calendar months.

Delivered the 20th day of June, 1934.

CONTRACT.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A. No. 190/33.

IN THE CASE OF :

Izidor Rabinovitch — APPELLANT.

v.

Sh. Z. Pogatchoff — RESPONDENT.

Contract for schooling of children in boarding school — Children withdrawn because of illness — Schoolmaster not entitled to fee for entire period of contract — Art. 443, Mejelle.

Appeal from the judgment of the Magistrate's Court of Tel Aviv dated the 15th day of May, 1933, whereby appellant was ordered to return to respondent bills for the sum of LP. 27 with half costs.

Appellant placed two of his children in the boarding school of the respondent and contracted to keep them there for a period of one year giving promissory notes as security for payment. The children became ill and upon the advice of a doctor the appellant removed them from the school. Respondent refused to deliver up the unmatured notes and upon action being brought by appellant for the notes or their value,

HELD: that the illness constituted a "hindering obstacle" under Article 443 of the Mejelle and that the contract should be declared dissolved.

Porter — for appellant.
Heyrouti — for respondent.

JUDGMENT.

After consideration the court holds that if the illness of the children was of such nature that they had to be removed definitely from school such an illness constitutes a "hindering obstacle" as spoken of in Article 443 of the Mejelle and the contract between parties should be declared dissolved.

The judgment of the court below is, therefore, set aside and the case remitted in order to ascertain the above technical point.

Delivered the 21st day of June, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 157/34.

BEFORE:

The Chief Justice (Trusted C.J.), Manning, J. and Abdul Hadi, J.

IN THE CASE OF:

Joseph Klein
Israel Shaffer — APPELLANTS.

v.

Henry Rock et al — RESPONDENTS.

Contract for the sale of land — Failure to produce all documents required for transfer considered as breach — Impossibility of performance — Effect of insanity of one of several vendors — Ejusdem generis rule of interpretation — Construction of general words followed by particular words.

Appellants entered into an agreement of sale with the respondents under which the respondents undertook jointly and severally to transfer land to the appellants and, (by clause 6) "in order to enable second party (appellants) to prepare the transaction in the Land Registry to produce all the necessary documents connected with the said transfer as certificate of mukhtar... etc." The contract also contained a provision for the payment of liquidated damages in the event of breach. The respondents having produced all the documents required for the transfer with the exception of

the title-deed contended that a title-deed was not one of the documents contemplated by clause 6 which they were obliged to produce. The appellants, after serving due notice on the respondents to produce the title-deed sued in the District Court for the return of the purchase monies already paid and for liquidated damages alleging the failure to produce the title-deed as a breach and alleging further that the respondents were not at any material time in a position to transfer since one of the persons who signed as vendor was insane and there was no person authorized to transfer his share.

The District Court found that the said party was in fact insane and that the contract was therefore impossible of performance, but upon the application of the ejusdem generis rule of interpretation a title-deed was not of the same nature as the documents contemplated by clause 5, and therefore disallowed the claim for damages and ordered only the refund of the purchase monies paid. On appeal to the Court of Appeal,

HELD: that upon the true construction of the agreement in accordance with the ejusdem generis rule the words in clause 5 included the title-deed and that the respondents, by refusing to deliver the title-deed were in default and liable to pay the damages provided in the agreement, and that the insanity of one of the parties did not under the circumstances relieve the respondents in any way from the liability to pay damages.

Appeal from the judgment of the District Court of Jaffa dated the 5th June, 1934.

Horowitz and Hutory — for appellants.
Eliash and Ben Shemesh — for respondents.

JUDGMENT OF THE DISTRICT COURT.

(Copand, J. and Shehadeh, J.)

(C.D.C.Ja. No. 114/34).

By an agreement dated 4th June, 1933, the defendants undertook to sell to the plaintiffs the property known as Bayarath Mattha situated near the railway station in Tel-Aviv and registered in the Jaffa Land Registry Block 57, Parcel 74. The area was stated to be twenty-two dunums approximately and the price was fixed at £P. 350 per metric dunum, on the ascertained area.

By clause 5 of the contract, the plaintiffs undertook to prepare

the transfer of the plot within a period of four months from the date of the agreement but if within this period of four months a legal obstacle should appear which would prevent the defendants from signing the documents of transfer, it was agreed that the time for completion should be extended by one month, to enable the defendants to remove such obstacle.

Clause 5 reads as follows:—

> "In order to enable second party to prepare the transaction in the Land Registry, first party undertakes to produce to second party all of the necessary documents connected with the said transfer, as certificate of mukhtar, the plan of the said orange grove signed by the mukhtar and the adjoining neighbours, werko and tithe receipts, and all other documents necessary for the said transfer as required by second party and to sign upon the request of second party all the documents connected with the said transfer."

By clause 11, if there was default by either party to the contract, the sum of £P. 3000 was to be payable as liquidated damages without any necessity for a notarial notice. Under clause 3 the sum of £P. 1000 was paid to the defendants on signing the contract. If the defendants were in default, then this sum was to be returnable to the plaintiffs, in addition to the damages.

On or about the 6th September, 1933, after a prior application, the plaintiffs served a notarial notice on the defendants calling upon the latter to produce within 7 days from date of service the following documents:

1. A kushan or extract showing the defendants' ownership to the plot in question.
2. A certificate from a mukhtar.
3. A plan signed by the adjoining neighbours and the mukhtar.
4. Werko and tithe receipts for all taxes due up to date.
5. The application form to the Land Registry in favour of the plaintiffs duly signed by defendants.

To this the defendants replied by another notarial notice on on or about the 20th September, 1933, saying that they had disclosed all documents which were in their possession and of which they had knowledge, and forwarding at the same time the application form for the transfer duly signed as requested.

In the meantime, trouble would seem to have arisen over the transaction so far as the requirements of the Land Registry Department were concerned. On the 18th July, 1933, the Jaffa Land Registry had forwarded the file of this particular transaction to the Director of Lands for his authority to complete. The hitch occurred over the identity of the property to be sold with that described in two old Turkish kushans which had been produced by the defendants in proof of their title. These title deeds apparently did not comprise the whole of the property but only 5160 shares out of 18,432 shares, and there was also uncertainty over the boundaries. This was duly pointed out by the Director of Lands in a letter dated 20th July, 1933, and he refused to allow the sale and returned the file to Jaffa. We have had the advantage of hearing the evidence of the then Registrar of Jaffa, Mr. Anton Barakat, and from his evidence it is clear that when the file was forwarded on 18th July, 1933, to the Director of Lands for approval the mukhtar's certificate in relation to the old kushans had been duly produced, the werko certificate which includes tithes had been given that no taxes were then owing on the property to be transferred, and that a plan duly signed by the necessary person had been filed, and it was only by the fact that the Director of Lands was not satisfied that the Turkish kushans sufficiently described the property to be sold, that the transaction was not then passed. On the 20th November, 1933, an extract of the Land Registry records was filed shewing the correct title — this however was after the date fixed for completion. The sale was eventually completed, but to other purchasers, on the strength of this last extract.

In another case between the same parties tried before this Court on 23rd January, 1934, in Civil Case No. 485/33, but in which their respective position as plaintiffs and defendants were reversed, a claim for damages by the defendants in this action for breach of this same contract by the present plaintiffs was dismissed on the ground that the present Defendants were never in a position to complete since one of the vendors Zaki Rock was, at the time of signing the contract, and had been for some years previously, a person of unsound mind and that the power of attorney held by his mother to sign on his behalf was therefore invalid. The contract being for the vendors to be under a joint and several liability to transfer all their shares in this property, the contract was impossible of performance since Zaki Rock's shares could not be transferred. I may here remark that the position has now been

regularized, since by an order of this Court dated 1st May, 1934, in Estate Case No. 37/34, Mr. Henri Rock has been appointed guardian of the property and estate of Zaki Rock, during his incapacity or until further order. The same difficulty therefore cannot occur again.

It seems to me that the case turns entirely upon the construction to be placed upon clauses 5 and 6 of the agreement of the 4th June, 1933, that is to say, what is the meaning of the phrase "second party" (plaintiffs) "undertakes to prepare the transfer of the said plot..." in clause 5, and whether the defendants under clause 6, were under the obligation to furnish the extract which was eventually produced on the 20th November, 1933, or whether under clause 5 the plaintiffs should have searched for and supplied it. Reading these two clauses together, I think that the correct interpretation to be assigned to them is that it was the duty of the plaintiffs to prepare all the necessary formalities of transfer, which would include the furnishing of all documents required with the exception of those set out in clause 6, the duty of supplying which fall to the defendants. In clause 6 these documents are described as "all the necessary documents connected with the said transfer as certificate of mukhtar, the plan of the said orange grove signed by the mukhtar and the adjoining neighbours, werko and tithe receipts, and all other documents necessary for the said transfer as required by the plaintiffs." It has been argued for the plaintiffs that the words "all other documents necessary for the said transfer" include documents of title, and that the kushans produced by the defendants, which were already in the Land Registry file, being defective, the defendants were under the obligation to supply further evidence of title. The short answer to this argument is this—that if that had been the intention of the parties, it would have been very easy to have said so, for it cannot be contended that a document of title is not, at least, of equal importance to a mukhtar's certificate, a plan, or a werko receipt. It is of course of infinitely greater importance, being the primary proof of the right to dispose of the property by way of sale.

In constructing a document you cannot take words irrespective of their context, out of their context, and assign to them a meaning. It is a general rule of construction that where there is a general description of certain things followed by illustrations or examples of those things and further general words, those further

general words must, unless there is something in the context repugnant to that construction, be ejusdem generis with the examples. Now none of the documents specifically set out in clause 6 can by any stretch of the imagination be held to be of the same nature as a document of title, that is, a kushan or a Land Registry extract. The documents specifically described are all what may be termed incidental to the transfer, important incidentals no doubt, but none the less incidentals. I am of opinion therefore that, on the true construction of these clauses, it was the duty of the plaintiffs, to search for and obtain the necessary proof of title. It was not impossible for them to do so. Anyone, on showing that he is interested in certain property, such as a prospective purchaser by agreement, can search the Registers.

On these grounds I hold that the frustration of this sale was due to the default of the purchasers, since the vendors were under no obligation to furnish any documents which were not in their possession, and that the fact that, as already held by this court, the vendors were unable to complete is immaterial. Both sides were in default, and neither is therefore entitled to damages. The claim for damages by the plaintiffs fails.

The plaintiffs however are entitled to the return of the amount paid by them on account of the purchase price, and judgment for £P. 1000 will be entered in their favour.

With regard to the question of costs, after hearing further arguments I have reached this conclusion: If the defendants, had paid into Court the amount of the sum paid on account, that is £P.1000, with a denial of liability for any damages, then no costs would have been awarded against them. They did not do so however, and they put the plaintiffs to proof of the payment of the deposit. There was no real defence to the claim for the deposit, and it should have been admitted.

In these circumstances, the plaintiffs will get their action costs on the sum of £P.1000, together with one quarter of the costs of the provisional attachment. As regards other costs each side will bear their own. No advocates' fees to either side. The provisional attachment previously granted is confirmed as varied by the supplementary order of the 15th February, 1934.

Dated the 5th day of June, 1934.

JUDGMENT OF THE CHIEF JUSTICE.

By a contract entered into in June, 1933, certain members of the Rock family, all of them jointly and severally forming one part and described as the first party, undertook to sell and transfer, and Messrs. Klein and Shaffer jointly and severally forming the second part, described as the second party, undertook to buy and receive certain land the boundaries of which are set out together with a reference to its registration in the books of the Land Registry.

Clause 5 of the contract provides:

> "Second party undertakes to prepare the transfer of the said plot of land in his name or in the name of his nominee within a period of four months from the date of this agreement, and first party undertakes hereby to appear in the Land Registry Jaffa within the said period upon the first written request of second party in order to sign the documents of transfer in the name of second party or his nominee.
>
> In event that during the period of the said four months a legal obstacle will appear, which will unable first party to sign the documents of transfer in the Land Registry after being required by second party to appear in the Land Registry, it is agreed hereby by both parties that a delay of one month from the date of said request will be granted to the first party to remove the said obstacle."

and Clause 6 provides:

> "In order to enable second party to prepare the transaction in the Land Registry, first party undertakes to produce to second party all the necessary documents connected with the said transfer, as certificate of mukhtar, the plan of the said orange grove signed by the mukhtar and the adjoining neighbours, werko and tithe receipts, and all other documents necessary for the said transfer as required by second party and to sign upon the request of second party all the documents connected with the said transfer."

It may be noted that apart from Clause 6, there was no reference in the contract to any kushan or the production of a kushan.

The contract contains a provision for the payment of liquidated damages in the event of breach.

By a notarial notice dated 6th September, 1933, the second party called upon the first party to furnish certain documents including a kushan or extract, but they did not do so.

The contract was not carried out and Klein and Shaffer (the second party) as plaintiffs brought an action in the District Court of Jaffa against the first party claiming damages on the ground that the defendants had failed in their obligation to supply certain documents, and on the ground that they had no title in, or title-deed in respect of the land, and because one Zaki Rock was at all material times insane and there was no person duly authorised to transfer his share of the property.

It is clear that in the course of the case, reference was made to the insanity of Zaki Rock. The District Court in its judgment stated,— "The contract being for the vendors to be under a joint and several liability to transfer all their shares in this property, the contract was impossible of performance since Zaki Rock's shares could not be transferred, but it does not appear to have decided the case on this ground as it goes on to say,— "It seems to me that the case turns entirely upon the construction to be placed upon Clauses 5 and 6 of the agreement."

As I have stated, the first party, (defendants in the action) failed to produce any kushan or extract in response to the request in the notarial notice but it is admitted such an extract could have been found by search, and the short point — as the case was treated by the District Court was such failure a breach of contract by the first party or, upon the true construction of the contract, was the obligation upon the second party to find the extract in the Land Registry. The appeal before us was argued on similar lines.

The District Court carefully considered the question and in its judgment discussed it at length. It applied the ejusdem generis rule to the expression "all other documents necessary for the said transfer", and came to the conclusion that a kushan or extract was not of the same nature as the documents set out earlier in the clause and went on to hold,— "I am of opinion therefore, that, on the true construction of this clause, it was the duty of the plaintiffs (second party) to search for and obtain the necessary proof of title. It was not impossible for them to do so — anyone, on showing that he is interested in certain property, such as a prospective purchaser by agreement, can search the registers. On these grounds I hold that the frustration of this sale was due to the

default of the purchasers, since the vendors were under no obligation to furnish any documents which were not in their possession, and that the fact that, as already held by this court, the vendors were unable to complete, is immaterial. Both sides were in default, and neither is therefore entitled to damages. The claim for damages by the plaintiffs fails.".

It is not therefore clear if the Court was of opinion that the class or genus of documents, to which it was of opinion Clause 6 referred, was created by the nature or importance of the documents or by their being in the possession of the first party.

The ejusdem generis rule of construction provides that when general words follow particular words the general words wil usually (but not universally) be constructed as being limited to things or matter of the same class or genus as the particular words, for example in the expression "shops, warehouses and other buildings", buildings would generally be constructed as meaning buildings of the same class as shops or warehouses and would not include, say, schools.

A somewhat similar question of construction arises when the general words are placed first and are followed by particular words and I respectfully agree with that part of Lord Sumner's speech in Ambatielos v. Anton Jurgens Margarine Works, (1923) A.C. 175, at p. 190, where I understand him to say that the following words, in such a clause, may be an illustration, or explanation or a precise statement of what is meant by the general words, depending upon the word or expression used to connect them with the general words. If they are joined by the words "for example" they are illustrations, if by "such as" they are explanations, if, by "that is to say", they are a precise statement.

I appreciate that Lord Sumner dissented from the other learned Lords but the charter-party under consideration contained the word "etc." after the particular words, the effect of which is discussed in their Lordships' speeches; in particular see Viscount Finlay's speech at p. 187.

I may add that in order to avoid any possible ambiguity in such provisions, it is not unusual for the draftsman to insert the phrase "without prejudice to the generality of the foregoing". When this is inserted, no doubt the meaning is more clear but I do not think any argument should be based upon its omission. I think the connecting words must be given their ordinary meaning and the clause as a whole construed accordingly.

The words which we have to construe in clause 6 of the contract are "In order to enable second party to prepare the transaction in the Land Registry..."

In the first place the documents contemplated are those to enable the second party to prepare the transaction; reference is then made to the necessary documents and we have particular documents connected by the word "as". In my view the documents then mentioned are clearly illustrations and are not a precise statement of what was to be produced.

Had the clause provided that the first party undertakes to produce the certificate of the mukhtar, the plan, the werko and tithe receipts and all other documents necessary, it might be argued that the ejusdem generis rule applied but, with all respect to the Court below, I fail to see any distinction in importance between an extract and a mukhtar's certificate, which is a statutory requisite to a transfer, but it does not so provide. In my opinion the latter part of the clause is substantially a repetition of the first part, but I certainly do not think that it operates to diminish, or was intended to diminish, the obligation of the first party, and I am of opinion that the words "all the necessary documents connected with the said transfer as certificate of mukhtar, the plan of the said orange grove signed by the mukhtar and the adjoining neighbours, werko and tithe receipts, and all other documents necessary for the said transfer as required by second party" include the extract.

The second party asked for an extract and the first party did not supply it.

A further point arises. Clause 5 of the contract provides, — "second party undertakes to prepare the transfer of the said plot of land in his name or in the name of his nominee within a period of four months from the date of this agreement", and it is argued that preparing the transfer involves searching the registers and that if the two Clauses 5 and 6 are read together the meaning is that the first party is only to provide those documents which the second party cannot get by their own efforts in the Land Registry; but in my opinion the words at the beginning of Clause 6, "In order to enable" are inconsistent with this argument as it is common knowledge that to prepare the transaction a document of title would be necessary.

In my judgment, therefore, the District Court was wrong and this appeal should be allowed and the case remitted to the

District Court to consider the other matters which are raised. As there is another case between the same parties arising out of the same contract, it would be convenient that they should be tried together.

The judgment of the District Court is therefore set aside, with LP. 10 advocate's fees. Costs to follow the event.

Delivered the 21st day of April, 1937.

JUDGMENT OF MR. JUSTICE MANNING.

This appeal from the District Court of Jaffa raises a difficult question with regard to the construction of a clause in an agreement. The respondents undertook to sell certain land to the appellants and after the agreement had been signed they were called upon by the appellants to produce certain documents. The case in the Court below and the argument before us were conducted on the footing that all the documents required were produced except one, viz, — "a kushan or extract showing the defendants' ownership to the plot in question". As this document was not produced the appellants repudiated the agreement and sued the respondents for LP. 4000, i. e. LP. 3000 damages for breach of contract, and LP. 1000, part of the purchase price which had been paid in advance. The District Court held that the frustration of the sale was due to the default of the appellants and consequently dismissed the claim for damages, but gave judgment for the LP. 1000 which had been paid in advance.

The relevant clauses of the agreement are as follows:

> "5. Second party undertakes to prepare the transfer of the said plot of land in his name or in the name of his nominee within a period of four months from the date of this agreement, and first party undertakes hereby to appear in the Land Registry Jaffa within the said period upon the first written request of second party in order to sign the documents of transfer in the name of second party or his nominee.
>
> In event that during the period of the said four months a legal obstacle will appear, which will unable first party to sign the documents of tranfer in the Land Registry after being required by second party to appear in the Land Registry, it is agreed hereby by both parties that a delay of

one month from the date of said request will be granted to first party to remove the said obstacle.

6. In order to enable second party to prepare the transaction in the Land Registry, first party undertakes to produce to second party all the necessary documents connected with the said transfer, as certificate of mukhtar, the plan of the said orange grove signed by the mukhtar and the adjoining neighbours, werko and tithe receipts, and all other documents necessary for the said transfer as required by second party and to sign upon the request of second party all documents connected with the said transfer.

11. In event of breach of the said contract or one of its stipulations the defaulting party shall pay to the other party an amount of LP.3000 as liquidated damages agreed upon by both parties without any necessity of sending notarial or other notifications. In event the 1st party will be defaulting party, he will be obliged besides the payment of the damages mentioned above to return to the second party the amount received by him on account of this contract".

Copland, J., who delivered the judgment of the Court below, held that the respondents were not bound by the terms of clause 6 to produce the document called for. He relied on the "ejusdem generis" rule of construction. In another part of his judgment he dealt with the intention of the parties and held that if it had been the intention of the parties that the respondents should produce the document, then it would certainly have been specifically mentioned in the agreement.

The difficulty arises from the general words following the specific examples in clause 6, viz: "all other documents necessary for the said transfer as required by second party". The respondents did actually produce two old Turkish kushans in proof of their title, but the Director of Lands was not satisfied that they sufficiently described the property and refused to agree to the transfer. To get the correct title an extract had then to be procured from the Land Registry records. The appellants refused to procure it, and it was eventually obtained by the respondents but after the date for completion for the agreement; and the land was sold by them to other purchasers.

After much fluctuation of opinion I find myself in disagreement with the decision of the Court below. It seems to me that it was

the intention of the parties that the appellants should prepare the transfer of the land and that in order to enable them to do this, the respondents undertook to produce all documents which might be necessary to effect the transfer. Mr. Horowitz, for the appellants stated in his arguments that when clause 6 was drawn up, there was no reason to think that any documents of title would be necessary other than the two old Turkish Kushans in the possession of the respondents. These turned out to be inaccurate, and consequently inefficacious to effect the transfer; but the parties had provided for such a contingency by making it incumbent on the respondents to produce all necessary documents other than those specifically mentioned. I think that the Court below misdirected itself in gauging the intention of the parties, and that this intention was the primary consideration, and not the application of the "ejusdem generis" rule of construction. The respondents therefore committed a breach of clause 6 of the agreement and under the terms of clause 11 rendered themselves liable to damages.

There remains, however, another matter for consideration and it arises in this way. One of the parties to the contract of sale was Zaki Rock. When the sale fell through owing to the refusal of the respondents to produce the extract from the Land Registry, one Henry Rock, on behalf of Zaki Rock and others, sued the appellants in the District Court for damages for breach of contract, the default alleged being a breach of clause 5, viz: failure to prepare the transfer. Neither in the statement of claim nor in the defence was any allusion made to the mental condition of Zaki Rock, but while a preliminary point was being argued as to the sufficiency of a power of attorney, the Court itself drew the attention of the parties to the facts that in some previous proceedings it had found Zaki Rock to be insane. The Court without hearing any evidence or any argument as to whether there had been a breach of contract by the defendants (the present appellants), dismissed the action on the ground that Zaki Rock was insane, that the power of attorney given by him was therefore null and void, and that consequently the plaintiffs (the present respondents) were unable to give a valid title. The District Court ordered the dismissal of the action on the 23rd January, 1934, and a short written judgment was delivered a month later, viz: on the 23rd February, 1934. The serial number of this action was No. 485 of 1933*, and I shall refer to it again by this number.

* C. of J. p. 1512.

Between the date of the order dismissing the action and the delivery of the written judgment, — viz: on February 15th, 1934, the appellants filed their statement of claim in the action which is now the subject of this appeal. In addition to pleading that the respondents had committed a breach of contract they also pleaded that the respondents were not in a position to comply with their obligations under the agreement because (inter alia) Zaki Rock was at all material times insane and there was no person authorised to transfer his share of the property. The advocate for the appellants repeated this argument in his opening address to the Court. No evidence was adduced by either side on the point; the parties apparently had in mind the decision of the Court in action No. 485 of 1933. The Court dismissed the appellant's claim for damages for breach on the ground already referred to, and in the course of its judgment made a passing reference to its previous decision that Zaki Rock was a person of unsound mind and that the contract was therefore "impossible of performance".

The present respondents appealed from the decision of the District Court in action No. 485 of 1933*. It transpired that there was no evidence before the District Court as to the extent of Zaki Rock's unsoundness of mind or as to the date when it began. As the unsoundness of mind was the ground of the decision, this Court had to send the case back for re-trial.

I have already decided that on the merits of this present case it is the respondents who have committed a breach of the contract. The question then arises, can the unsoundness of mind of Zaki Rock, whatsoever its nature may be and whenever it arose, affect the liability of the respondents to pay damages to the appellants? The District Court decided in action No. 485 of 1933*, not on the ground of any illegality in the contract, but on the ground of impossibility of performance. In the present proceedings the validity of the contract had not been impugned by either party, what the appellants pleaded was that the insanity of Zaki Rock rendered it impossible for the respondents to fulfil their undertaking to transfer the land.

Zaki Rock was a party to the contract of sale through his attorney Labibeh Rock, and one Henry Rock signed the contract on behalf of all the members of the Rock family concerned including Zaki. But Zaki Rock was not a defendant in the present

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* C. of J. p. 1512.

proceedings. The contract was made between the members of the Rock family, jointly and severally, and the appellants. The validity of the contract has not been challenged on the ground of Zaki Rock's insanity; Zaki Rock is not a party to the action; the liabilities of the other members of the Rock family who have been sued are joint and several; and they have been adjudged to have committed a breach of contract. In these circumstances I cannot see that Zaki Rock's insanity can help to relieve the respondents in any way from the liability they have incurred to pay damages.

It may be asked what is to become of the other action, No. 485 of 1933*, which was remitted for re-trial? In my opinion any issue involved has now become merely academic. The main issue in both cases was, who had committed a breach of contract, the Rock family or the present appellants? In the present appeal I have decided that it was the Rock family who committed the breach and, incidentally, that the appellants did not commit a breach. If this decision is correct, then the members of the Rock family who contracted (except Zaki, who is not a party in this appeal) are bound by it, and it would be futile for them to continue proceedings in the District Court for damages for breach.

There has been no appeal against that part of the judgment ordering payment of LP.1000 to the appellants. I think that the question of damages is one for the Court below and that the order of this Court should be that that part of the judgment ordering the payment of LP. 1000 do stand and that the case be remitted to the District Court with directions to enter judgment for the plaintiffs on the issue of breach of contract and to assess the damages.

Delivered the 21st day of April, 1937.

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* C. of J. p. 1512.

In the District Court of Jaffa.

C.D.C.Ja. No. 130/32.

BEFORE:

The President (Copland, J. and Mani, J.

IN THE CASE OF:

Haim Z. Lichtblau & Sons — PLAINTIFFS.

v.

"Hamashke", Israel Lifshitz & Son — DEFENDANTS.

Contract for exclusive sale by commission agent — Stamp duty on contract — Section 25 (1), Stamp Duty Ordinance, 1927 — Creation of monopoly in trade — Illegality of contract in restraint of trade — Article 239, Ottoman Penal Code.

By an agreement in writing dated the 12th day of April, 1931, the plaintiffs who were commission agents entered into a contract with four firms of which the defendants was one, under which the said firms who were manufacturers of spirits and liquors undertook to market their products exclusively through the plaintiffs as agents. The contract contained, inter alia, clauses to the following effect: (a) a clause providing for each of the firms to pay in certain specified amounts for the creation of a special fund, (b) a clause binding all the said firms to endeavour to force all producers of beverages in Palestine to use only the alcohol of the said firms and (c) a clause containing a stipulation for £P. 2000. damages in the event of breach by either party or any of the parties of the four firms. The defendants having committed a number of breaches of the agreement the plaintiffs sued them for damages. Pleas: (1) That the contract was not properly stamped since it contained a number of undertakings to pay money each of which is a promissory note and should be stamped in accordance with Sec. 25 (1) of the Stamp Duty Ordinance, 1927. (b) That the agreement is illegal being for the purposes of creating a "ring" of producers of alcohol with a view to raising the price "by combining together in order to sell or prevent the sale" of alcohol, contrary to the provisions of Art. 239 of the Ottoman Penal Code.

HELD dismissing the action: 1. That although the contract contains various provisions for the payment of money yet these were integral parts of the agreement itself and need not be stamped separately, the true interpretation of "promissory note" being that it is meant to include documents the contents of which consist substantially of a promise to pay a definite sum of money and of nothing else.

2. That the contract was illegal since its intention was to create for the members of one of the parties to it a monopoly in the supply of alcohol to producers of beverages thus contravening Art. 239 of the Ottoman Penal Code, and therefore invalid under Art. 64 of the Ottoman Code of Civil Procedure.

Karwassarsky — for plaintiffs.
Eliash — for defendants.

JUDGMENT.

This is an action brought by plaintiffs to enforce a claim for damages for breach of an agreement entered into between the parties.

Two preliminary points have been raised by the defendants:

(1) That the contract which has been sued upon, is illegal, and

(2) That the document which is relied upon by the plaintiffs is not properly stamped.

I will deal with the second point first. The defendant state that the contract in issue, as it contains promises to pay various sums of money, must be stamped as a promissory note, whereas in fact it is only stamped as an agreement. They rely on a judgment of the Supreme Court in which it was held that the particular agreement, inasmuch as it contained a promise to pay certain sums of money and was not stamped as a promissory note, could not be produced in evidence. That case* which came before the Supreme Court was based on a partnership agreement and a supplemental agreement which was endorsed on the previous agreement at a later date. This supplemental agreement runs as follows:

"The first party... has paid £P. 50 to the second party... for completion of the work. Any profits or losses resulting

* Reference is to Salwany v. Sarandah, C. of J. p. 1654.

shall be kept by the second party pending the dissolution of their partnership. The second party undertakes to pay, every 15 days, to the first party the sum of £P. 50 as instalments due for the sum of £P. 200."

Now I think it is clear that the Court of Appeal regarded this supplemental agreement as a separate document and apart from the partnership agreement which was dated a month earlier. That case, therefore, should be distinguished from the present case.

The contract in the present case contains various clauses and it contains provisions as to the payment of money, but they are all integral parts of the agreement itself. If the decision of the Court of Appeal was to be applied in this case, then practically every agreement, bond, guarantee, mortgage deed, and every document containing, say 1000 clauses, with one clause only as to the payment of money, will have to be stamped as a promissory note, which is absurd. The law on this subject is clearly laid down by Lord Lindley in the case of Mortgage Insurance Corporation v. Commissioners of Inland Revenue (1888), 21 Q.B.D. 352, where he says:

"If the instrument is not merely a promise to pay, but contains a promise to pay in connection with a number of other stipulations, then I think it is not a promissory note within the meaning of the section". In the same case, Lord Bowen, speaking about promissory notes says: "The true interpretation is that they are meant to include documents, the contents of which consist substantially of a promise to pay a definite sum of money and of nothing else". In our opinion the contract with which we are dealing contains a great deal more than a promise to pay, and we, therefore, hold that it was not necessary to stamp it as a promissory note.

Turning to the second point: Is the contract illegal?

In our opinion the earlier agreement of March, 1931, and the present contract of April, 1931, must be read and construed as one. Clause 34 of the contract on which particular stress has been laid reads as follows:

"The members of the party of the first part bind themselves to negotiate within eight days from the date of signature hereof with the producers of drinks in the country, and to endeavour by all possible means to force them to use for their products only the alcohol produced by the members

of the party of the first part, even by means of entering into a general competition and reducing the prices up to the point of loss unto the last possible degree, and to force them not to produce fruit-alcohol, but to buy alcohol from the members of the party of the first part for their drinks."

I do not think that clause can be severed from the rest of the agreement because it contains the intention of the whole agreement. The intention of the clause is to create for the members of the party of the first part a monopoly in the supply of alcohol to manufacturers of alcohol, and producers of drinks in the country. We are satisfied that the object of the agreement was to create a monopoly. Perhaps it was not necessary for the plaintiffs to insert their intention in the contract, but they have done so very frankly and intended by the agreement that all producers of drinks in the country should buy their alcohol and their alcohol alone.

We have now to consider whether this clause is contrary to Article 239 of the Ottoman Penal Code. It is quite true that Article 239 is not being applied in this country. I say so because during the eleven years in which I have been here, no such case has come before me but nevertheless the article is still law and has never been replaced. Whenever we have a contract which is contrary to any particular law, we cannot hear an action to enforce that contract. It is not for us to say that the law is obsolete. The article in question still remains on the statutes and it is therefore still law.

We are of opinion that the contract is contrary to Article 239 of the Ottoman Penal Code and we are further of opinion that it is contrary to public policy and falls within Article 64 of the Ottoman Code of Civil Procedure. On this ground, we hold that the contract is illegal, and the action must therefore fail.

The case is dismissed with costs and £P. 5 advocate's fees.

Delivered the 8th day of July, 1932.

In the District Court of Jaffa.

C.D.C.Ja. No. 23/34.

BEFORE:

The President (Copland J.) and Mani, J.

IN THE CASE OF:

Agudath Hapardessanim Ramatayim Ltd. PLAINTIFF.

v.

Abed Kharroub DEFENDANT.

Contract for the sale of orange crop — Red scale pest not foreseeable — Contract terminated by act of God.

Plaintiff company entered in August into a written contract with defendant for the sale of its oranges, at the time of contract still on the trees, to the defendant. In December defendant examined the fruit and refused to take it because of the incidence of red scale pest as a result of which the oranges could not be exported.

HELD: that red scale pest cannot be foreseen and is an act of God, which if it results in making the fruit unfit for export entitles the purchaser to cancel the contract.

Dunkelblum — for plaintiff.
Turtledove — for defendant.

JUGDMENT.

We are satisfied that the interpretatiou placed on clause 6 of the contract by the plaintiffs is the correct one, and the substance of this clause is a common feature of all orange contracts. But, we are satisfied, after hearing the evidence, that the incidence of red scale last season was such that no reasonable person could have foreseen it, in other words an act of God. As a result, practically none of the oranges grown in this particular area was fit for export.

Claim dismissed. Judgment for the defendant on counterclaim for £P. 400 with interest from date of action. Costs £P. 5 advocate's fees.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 93/34.

BEFORE:

The Chief Justice (McDonnell, C. J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Tewfiq Suwein — APPELLANT.

v.

Hassan Sheikh Ali — RESPONDENT.

Contract for the sale of oranges not yet visible on the trees — Damages for breach of contract — Art. 205, Mejelle — Rule of procedure not to override provisions of substantive law — Substantive law contained in Ottoman Code of Civil Procedure — Ottoman Code of Civil Procedure a creature of statute — Art. 64, Ottoman Code of Civil Procedure.

By written agreement dated the 28th day of February, 1933, the respondent sold to appellant the orange crop "visible on the trees of his orchard . . . . . for the year 1933—1934." The contract contained provisions for the payment of damages in the event of breach. The respondent having failed to make delivery of the oranges, appellant took action in the District Court for damages. The action was dismissed, the District Court holding that the contract was invalid since fruit was not visible on the trees until April and a contract could not validly be made under Article 205 of the Mejelle in respect of goods not yet visible. Upon appeal,

HELD: that the contract was valid under Article 64 of the Ottoman Code of Civil Procedure, as amended. Although in general a rule of procedure could not override the provisions of a substantive law like the Mejelle yet account had to be taken of the special situation of the legislature of the Ottoman Empire which, as a civil institution, could not amend the Mejelle which was a codification of the Moslem religious law. When the Ottoman legislature, therefore, wished to introduce a change in the law of contracts, it was compelled to introduce such change by amending

the Code of Civil Procedure, which unlike the Mejelle, is a creature of statute.

Kanafani — for appellant.
Subhi Ayoubi — for respondent.

JUDGMENT.

There is an apparent conflict between Article 205 of the Mejelle, which provides that the sale of a non-existing thing is invalid and Article 64 of the Ottoman Code of Civil Procedure as amended on 16th Jumadi-el-Awal, 1332, the relevant paragraph of which runs :—

> "Contracts, the subject-matter of which comes into existence in the future, will be recognised by the Courts."

As a rule, the provisions of a legislative enactment relating to procedure could not override the provisions of a substantive law, but one has here to take account of the fact of the special situation of the legislature of the Ottoman Empire which, as a civil institution, had no machinery enabling it directly to amend or repeal the provisions of the Mejelle which was a codification of the Moslem religious law.

When the Ottoman legislature, therefore, wished to introduce a change in the law of contracts, it was compelled to have recourse to the method of introducing such change by amending the Code of Civil Procedure, which unlike the Mejelle, is a creature of statute.

The contract in issue is therefore to be governed by Article 64 of the Ottoman Code of Civil Procedure. The judgment of the District Court must be set aside and the case remitted for trial. Costs to follow the event.

Delivered the 9th day of May, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 100/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Subhi Aweidah — APPELLANT.

v.

Yechiel Mandelzis — RESPONDENT.

Breach of contract — Readiness and willingness to complete a condition precedent to the recovery of damages — Burden on plaintiff to prove readiness and willingness whether pleaded by defendant or not.

In an action in the District Court for damages for the breach of a contract for the sale of land the defendant pleaded that the plaintiff had not been ready and willing to complete the transfer. The District Court awarded damages holding that the defendant had not satisfied the court that the plaintiff "had done anything to show his unwillingness to purchase or to repudiate the contract." On appeal,

HELD: Readiness and willingness to carry out his obligation has always been a condition precedent to the plaintiff's right to recover damages, and although not expressly pleaded, the onus is on the plaintiff to prove it. It is not sufficient for the court to rely upon the failure of the defendant to produce evidence to prove that the plaintiff was unwilling to complete, since the court is not in a position to give judgment in favour of the plaintiff without positive evidence that he was ready and willing to complete.

Abcarius — for appellant.
Horowitz — for respondent.

JUDGMENT.

This is an appeal from the judgment of the District Court of Haifa dated the 19th April, 1934. Grounds of Appeal were filed on the 14th May, 1934, and further Grounds of Appeal were filed

on the 30th March, 1935. The latter not having been filed within the period allowed by law, cannot be taken into consideration.

By the judgment of the District Court the plaintiff (respondent) was awarded damages against the defendant (appellant) for breach of a contract for the sale of land.

The main question raised by the appellant is whether or not the respondent was ready and willing to carry out the contract at the date fixed for completion. The judgment of the District Court deals with this question in the following terms — "The defendant did not satisfy the court that the plaintiff has done anything to show his unwillingness to purchase or to repudiate the contract."

The appellant relies on the judgment of the Judicial Committee of the Privy Council in Chedid and Others v. Tanenbaum, P.C. No. 47/32*, Palestine Law Reports, page 831, at page 844:

> "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 today in England it need not to be expressly pleaded, but the onus of proving it is nevertheless on the plaintiff."

The appellant argues that the District Court has not found that the respondent was ready and willing to carry out his obligation as required by this judgment, and hence that the judgment of the District Court cannot stand.

We hold, in accordance with the judgment cited, that it was not sufficient for the District Court to rely upon the failure of the defendant to produce evidence to prove that the plaintiff was unwilling to complete. The Court was not in a position to give judgment in favour of the plaintiff without positive evidence that he was ready and willing to complete.

The judgment of the District Court is therefore set aside and the case is remitted for the court to decide, upon such evidence as may be submitted, whether as a fact the respondent was ready and willing to carry out his obligations or not and to give judgment accordingly. Costs will follow the event.

Delivered the 14th day of November, 1935.

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* C. of J. p. 406.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 101/34.

BEFORE:

The Acting Chief Justice (Corrie, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Hassan Rahman Murad
Ahmad Rahman Murad — APPELLANTS.

v.

Ibrahim Sahyoun — RESPONDENT.

Damages for breach of contract for the sale of land—Plea of force majeure — Inability to transfer due to refusal of Sharia Court to sanction sale — Oral evidence to correct clerical error in agreement—Admissibility of evidence of parties to action — Application of Art. 108, Ottoman Code of Civil Procedure — Art. 80, Ottoman Code of Civil Procedure.

By written agreement appellants undertook to sell, and respondent to buy, land. A clause in the contract provided that appellants (erroneously written respondent) were to obtain from the Sharia Courts the authority required by law in order to transfer the minors' share in the land. The appellants having failed to transfer within the time provided by the contract, the respondent sued in the District Court for the damages set out in the contract. The appellants pleaded (a) that they were unable to transfer because the Sharia Court had, upon grounds not stated, refused its permission to the transfer and that this was a cause outside their control, and hence by virtue of the proviso to Article 108 of the Ottoman Code of Civil Procedure they were not liable for damages, (b) that in any event it was the respondent's duty under the contract to provide the certificate of the Sharia Court, to which respondent replied that this was a clerical error. The court thereupon heard oral evidence to ascertain whether there was the Clerical error alleged. The court having decided that a clerical error existed, and that the duty was on the appellants to produce the certificate and that they had not done so, awarded damages to the respondent.

On appeal,

HELD: Dismissing the appeal, (a) that even if the Sharia Court's refusal to sanction the sale of the minors' shares was based upon the view that the price was inadequate, this was an objection which the appellants could have removed by adding from their own monies to the agreed purchase price for the minors' shares, a sum sufficient to satisfy the Sharia Court. But even if the Court's refusal was based upon some objection which it was not within appellant's power to remove, the proviso to Article 108 of the Ottoman Code of Civil Procedure would not be applicable. The possibility that the Court might refuse to sanction the sale was a contingency that the appellants could have foreseen and have provided for in the contract for sale and hence the proviso to Article 108 afforded the appellants no defence.

(b) That in view of the provisions of Article 80 of the Ottoman Code of Civil Procedure the evidence of witnesses other than the parties to the action, was not admissible to explain the terms of the contract. Since, however, in arriving at their conclusion as to the meaning of clause 3 of the contract the District Court relied, in the first instance, upon the wording of the contract itself, and would have come to the same conclusion even if it had not heard the witnesses to whose evidence objection was made, the admission of the oral evidence although an irregularity was not an irregularity of such a nature as to require that the judgment of the District Court should be set aside.

Appeal from the judgment of the District Court of Haifa (C.D.C.Ha. No. 37/34) dated the 12th day of May, 1934.

Dajani — for appellants.
Sahyoun — for respondent.

JUDGMENT.

This is an appeal against a judgment of the District Court, Haifa, awarding damages to the Respondent, Ibrahim Sahyoun, against the appellants, Hassan and Ahmad, sons of Haj Abdul Rahman Murad, for breach of contract for the sale of land.

The question at issue between the parties depends upon the meaning of Clause 3 of the contract and the first ground of appeal put forward by the appellants is that in interpreting this clause the District Court wrongly admitted evidence in that they did not

rely solely upon the wording of the contract, but heard witnesses with regard thereto.

In view of the provisions of Article 80 of the Ottoman Code of Civil Procedure and of the judgment of this Court in Fast v. Abdulhadi (Civil Appeal No. 105/34)*, we hold that the evidence of witnesses, other than parties to the action, was not admissible to explain the terms of the contract.

It is clear, however, that in arriving at their conclusion as to the meaning of the clause, the District Court relied, in the first instance, upon the wording of the contract itself, and that it would have come to the same conclusion even if it had not heard the witnesses to whose evidence objection is made.

That such is the fact, appears from the passage in the District Court's judgment which reads:—

> "Notwithstanding the fact that this point, i.e. the clerical error in substituting "the second party" in the first paragraph of clause 3 for "the first party," is clear from the contract itself as shown above, the Court however, to strengthen its conviction heard witnesses on the point who supported the Court's conclusion by stating that the expression "second party" was inadvertently substituted for "first party".

The admission of oral evidence therefore, though an irregularity, was not an irregularity of such a nature as to require that the judgment of the District Court should be set aside.

The appellants further maintain that the District Court was mistaken in the meaning which it gave to Clause 3 of the contract.

The clause reads as follows:

> "The second party undertook to take all administrative and legal steps to prepare the transfer transaction. He has furthermore undertaken and bound himself to obtain from the competent Courts the authority required by law in order to transfer the minors' share in the said six dunams within four months from the date of this contract. The first party, however, is at liberty to request from the second party a further period of two months in addition to the four months provided above, if the delay is caused by the Supreme Moslem Council in issuing the above mentioned authority".

The question at issue between the parties is upon which of them lay the obligation to obtain authority for the sale of the minors' shares.

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* p. 151.

Now there is clearly a discrepancy between the first and second parts of this clause. If it was for the second party to obtain the authority of the Court within four months, then clearly it was for the second party to request from the first party an extension of the time for this purpose, and not for the first party to make such a request to the second party.

Having regard to the other clauses of the contract we hold that the District Court was right in its view that the words "the second party" at the beginning of clause 3 were a clerical error for "the first party," and that it was upon the first party, that is to say, the present appellants and Badrieh, widow of the late Mohammad Murad, jointly and severally, to obtain the authority of the Court for the sale of the minors' shares.

In fact, the appellants recognised this obligation and applied to the Sharia Court to authorise the sale. The Court, however, upon grounds which are not stated, refused to give its authority; and the appellants now argue that their failure to carry out the contract was due to a cause outside their control, and hence that by virtue of the proviso to Article 108 of the Ottoman Code of Civil Procedure they are not liable for damages.

We cannot accept this view. If, as seems probable, the refusal of the Sharia Court to sanction the sale of the minors' shares was based upon the view that the price offered was inadequate, this was an objection which the appellants could have removed by adding from their own monies to the agreed purchase money for the minors' shares, a sum sufficient to satisfy the Sharia Court. But even if the Court's refusal was based upon some objection which it was not within the appellants' power to remove, the proviso to Article 108 would not be applicable.

The possibility that the Court might refuse to sanction the sale was a contingency which the appellants could have foreseen and have provided for in the contract for sale; and hence, in accordance with the judgment of this Court in Gabrielovitch v. Negri (Civil Appeal, No. 98/34), the proviso to Article 108 affords the appellants no defence.

The appeal must be dismissed with costs.

Delivered the 25th day of May, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 105/34.

BEFORE:

The Chief Justice (McDonnell, C.J.) Baker, J. and Khayat, J.

IN THE CASE OF:

F. & H. Fast — APPELLANTS.

v.

Auni Abdul Hadi — RESPONDENT.

Breach of contract — Recovery of money paid under contract — Interpretation of documents — Admissibility of oral evidence of parties to action, of parties to agreement, and of interpreter to one of the parties — Article 80, Ottoman Code of Civil Procedure — Section 14, Evidence Ordinance.

In an action before the District Court arising out of an agreement the lower court came to the conclusion that the text of the agreement, with special reference to clause 3 thereof was ambiguous, and, being unable to arrive at the true meaning, allowed not only the parties to the action, but also the parties to the agreement, to give evidence and also heard the evidence of a person who acted as interpreter to one of the parties to the agreement. On appeal,

HELD: That the lower court were clearly entitled to hear the evidence of the parties to the agreement but were not entitled to call the extraneous evidence which they did.

Smoira — for Appellants.
Abcarius — for respondent.

JUDGMENT.

This is an appeal from a judgment of the Jerusalem District Court whereby the said Court dismissed a claim by appellants for £P. 1,700 and gave judgment against them on a counterclaim for £P. 1,274.829 mils.

Both claim and counter claim arise out of an agreement dated the 7th day of September, 1928, and made between the

appellants, F. Vester and Y. Amdursky, of the one part, and the respondent, on behalf of Tarabe Abdul Hadi of the other part.

After reciting an agreement whereby all the parties agreed to pay £P. 1000 each to enable the St. John's hotel to be purchased from the Committee of Creditors of the insolvent proprietor, one Saliba Saad, and for working capital of the hotel, clause 3 thereof provides that:—

> "Mr. Auni Abdul Hadi undertakes to provide more than 75 per cent of the claims against Mr. Saliba Saad as aforesaid and to hand them over to Messrs. H. and F. Fast against payment of cash of 61.20 per cent of their value as given in the list above mentioned."

At the foot of the document there is a receipt whereby respondent acknowledges having received the sum of £P. 1,700 from H. & F. Fast in accordance with the aforesaid arrangement.

In the lower Court, appellants claimed the return of the beforementioned sum of £P. 1,700 alleging the respondent had not carried out his part of the agreement in that he did not assign the debts he purchased to the appellants in accordance with the beforementioned clause 3 of the agreement.

Respondent alleged there was no question of assigning the debts to appellants under the agreement, that he had purchased debts to the amount of £P. 2,971. and therefore counterclaimed for the sum of £P. 1,271. The amount of the debts purchased by respondent is not denied by appellants.

The lower Court came to the conclusion that the text of the agreement, with special reference to clause 3 thereof was ambiguous, and, being unable to arrive at the true meaning, allowed not only the parties to the action, but also the parties to the agreement to give evidence and also heard the evidence of a person who acted as interpreter to one of the parties to the agreement. The Court then gave the beforementioned judgment against which appellants have appealed.

Appellants in their appeal allege: (1) that respondent has not fulfilled his agreement in that he did not assign the debts to appellants as provided for under the agreement, and (2) that if it be held that the agreement was performed by respondent, then respondent's action on the counterclaim is misconceived and should be brought against the five signatories to the first part of the agreement.

The question for the decision of the lower Court was, and of this Appellate Court is, the construction of the agreement of the 7th September, 1928, and particularly the before-mentioned clause 3.

At the outset, we are of opinion that giving the terms used in the contract their plain, ordinary and popular sense, the intention of the parties can be collected from the words used, and we do not agree with the lower Court that the contract is ambiguous. The lower Court were clearly entitled to hear the evidence of the parties to the agreement* (see Civil Appeal No. 77 of 1932[1], Bank for Agriculture and Industry, etc., v. Halperin, followed in Civil Appeal No. 106 of 1932[2], Muhammad Shaker Husseini v. Horowitz and others), but were not entitled to call the extraneous evidence which they did.

We are of opinion that clause 3 of the agreement, interpreted according to the popular meanings of the words used, cannot be construed to mean that the said debts were to be assigned to the appellants.

The signatories to the agreement were businessmen, one was an advocate of some standing, and if the intention was that the debts should be assigned to appellants, it is incomprehensible why the words "provided and hand over" should have been used instead of the word "assign."

The phrase: "Mr. Auni Abdul Hadi undertakes to provide more than 75 per cent of the claims against Saliba Saad and to hand them over to Messrs H. & F. Fast," in our opinion, can only bear one construction and that is that respondent was to provide himself with the debts of Saliba Saad, in other words, to obtain by purchase, and having done so, hand the receipts for the same to appellants. Accordingly the appeal against the dismissal of appellants' original claim fails.

With regard to the appeal against the judgment in respondent's favour on the counterclaim, we are of opinion that, in accordance with the agreement, respondent was clearly only entitled to look to appellants for payment. The clause which deals with payment states:—

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* ED. NOTE: Quare: Whether this should not read "evidence of the parties to the action?"

[1]) P.L.R. p. 739, C. of J. p. 803.

[2]) C. of J. p. 258.

"to hand over the claims against Saliba Saad to Messrs. H. & F. Fast against payment of cash."

None of the other parties to the agreement are mentioned as being liable for the payment, and they cannot, from the agreement, be held as being in any way liable. If we had any doubt as to this interpretation, the memorandum at the foot of the document which is in the form of a receipt by respondent of the sums of £P. 1,000 and £P. 700 from appellants and which contains the words "sur l'arrangement ci-dessus," makes it abundantly clear that appellants were the only parties to the contract who accepted the liability of payment to respondent.

We are, therefore, satisfied that the action on the counter-claim is properly conceived and lies against appellants, and that this part of the appeal must also be dismissed with costs.

Appellants to pay respondent advocates's fees which we assess at £P. 8.

Delivered the 9th day of May, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 166/34.

BEFORE:

Baker, J., Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Muhammad Abu Zeid — APPELLANT.

v.

Wasfieh Hassan Esheh — RESPONDENT.

Damages for breach of contract — Allegations of breach made by both parties — Admissibility of evidence to prove default.

In an action for damages for breach of a contract for the sale of land the defendant pleaded that the default was committed by the plaintiff. The two judges constituting the District Court having disagreed upon the question whether oral evidence should be heard to prove the respective contentions as to breach, the claim was dismissed. Upon appeal,

HELD: Allowing the appeal that the admissibility of evidence to prove breach was not a question of admitting evidence to vary or alter a written agreement, since evidence must be heard before any court can decide which of the parties to an agreement is in default.

Appeal from the judgment of the District Court of Jaffa (C.D.C.Ja. No. 276/34) dated the first day of October, 1934.

S. Asal — for appellant.
Respondent — in person.

JUDGMENT.

On the 18th June, 1933, appellant and respondent entered into an agreement whereby appellant agreed to sell to respondent his interest — 3 out of 5 shares — in a house situate in Jaffa for the sum of £P. 100. £P. 55 was paid to appellant prior to the completion of the contract and the remaining £P. 45 was covenanted to be paid on the 1st of Muharram, 1353.

Appellant undertook to transfer his interest to respondent on the 1st day of Muharram, 1353, and hand over all documents of title thereto and lastly it was agreed that if either party failed to comply with the agreement the one in default would pay to the other the sum of £P. 200 as liquidated damages.

On 26th May, 1934, the present appellant commenced an action against respondent for the sum prescribed in the agreement as damages in case of a breach thereof, alleging that respondent had failed to pay the balance of the purchase money on the 1st Moharram, 1353, as agreed, despite the fact that she had taken possession of the property.

Respondent alleged that the property was not handed over on the agreed date and that at the time agreed upon for completion in view of an arrangement between the parties she appeared twice at the Notary Public's Office, Jaffa, to pay the balance of the purchase money but that appellant did not appear until too late for the transaction to be completed and that subsequently she had tendered the said balance to appellant but he had refused to accept it. This latter allegation was denied by appellant.

At the hearing before the District Court the two judges thereof disagreed upon the question whether evidence should be heard or not to prove the respective contentions and dismissed appellant's claim.

It is obvious that evidence must be heard before any Court can decide which of the parties to the agreement was in default; it is not a question of admitting evidence to vary or alter a written agreement. The judgment of the lower Court is quashed and the case returned for evidence to be heard and for the lower Court to give a fresh judgment.

Costs to be costs in the cause.

Delivered the 4th day of November, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 173/34.

BEFORE:

Baker, J., Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Dr. Ibrahim Zarrub
as Administrator of the
Estate of Sami Zarrub — APPELLANT.

v.

Hanna Nasr Abyad — RESPONDENT.

Death of party after contract — Liability of estate on contract of deceased — Sale of shares of minors in miri land — Article 52, Ottoman Land Code — Articles 74, 76, Ottoman Code of Civil Procedure — Application of Common Law of England — Art. 46, Palestine Order-in-Council, 1922 — *Actio personalis moritur cum persona.*

The vendor in a contract for the sale of land having died before the date set for the completion of the contract the purchaser served a notice on the administrator of the estate of the vendor requiring him the complete the transfer. Upon the failure of the administrator to complete, the purchaser (respondent) sued in the District Court for the return of the purchase monies paid on account of the transfer and for agreed damages for breach. The appellant pleaded (a) that the heirs were not liable on an agreement made by the ancestor when there had been no breach during the

lifetime of the deceased, and (b) that in accordance with Article 52 of the Ottoman Land Code shares of minors in miri land could not be transferred. The District Court having found for the vendor the appellant appealed. On appeal,

HELD: Dismissing the appeal, (1) That the representative of a deceased person is liable to return the money paid on account of the purchase price of land sold by the deceased but not transferred. (2) That under Article 52 of the Ottoman Land Code a minor's share of miri land may be transferred upon consent of the competent court being obtained, and that since the administrator had not applied for such consent he could not set up his own omission as a defence. (3) That with regard the question of the recovery of damages from the estate the Common Law rule applied that on the death of a party to a contract an accrued right of action for its breach survives to or against his personal representatives, who if sued are liable only to the extent of the assets of the deceased.

Appeal from the judgment of the District Court of Haifa (C.D.C.Ha. No. 138/34) dated the 20th day of October, 1934.

Eliash — for appellant.
Koussa — for respondent.

JUDGMENT.

This is an appeal against the judgment of the Haifa District Court whereby the said Court awarded respondent the sum of £P.350, being, as to £P.200 the return of a deposit given to the late Sami Zarrub, deceased, upon a contract for the sale of land to respondent, and as to the balance of £P.150, this being a sum stipulated in the said contract as liquidated damages in case either party to the contract failed to perform his part thereof.

The facts of the case are as follows:

By virtue of an agreement dated the 28th September, 1933, and made between the late Sami Zarrub and respondent, the said Sami Zarrub, deceased, contracted to transfer certain interests in lands belonging to him to the respondent for the sum of £P. 380, the said transfer to take place within ten days from the date of the agreement.

The present respondent paid to the deceased the sum of £P.200 as a deposit on account of the purchase price and both

parties covenanted to pay to the other in case they committed a breach of the agreement the sum of £P.150 as liquidated damages.

Prior to the date fixed for completion, the vendor, Sami Zarrub, died leaving minor heirs and in due course, present appellant was appointed by the Haifa District Court, administrator of the deceased's estate. The respondent requested the appellant to complete the contract on behalf of his testator, verbally, by way of a registered letter, and by Notarial Notice, but appellant failed to comply, and on 17th July, 1934, respondent filed an action against him for the sum of £P.350 for which he obtained the before-mentioned judgment.

Upon the hearing of this appeal, counsel for appellant argued that heirs cannot be held liable on an agreement made by their ancestor when there has been no breach during the ancestor's life and cited passages from previous judgments of this Court in support thereof. After considering the facts in these cases quoted, however, we are of opinion that these passages have no bearing upon the facts in this present case and cannot be held to support his contention.

Appellant further argued that, in accordance with Article 52 of the Ottoman Land Code shares of minors in miri land cannot be transferred.

It cannot be contested that the representative or representatives of the deceased are liable to return or pay back the sum of £P.200 paid to the deceased as a deposit, and we have to decide whether the respondent as administrator of the estate is liable for the penalty contained in the contract for sale.

With regard to the contention that by virtue of Article 52 of the Ottoman Land Code shares of minors in miri lands cannot be transferred. The said Article forbids the sale of minors' lands by the parents or guardians save with the consent of the Sharia Court, the Court being bound to satisfy itself that the sale is in the interest of the minors and that a proper price be paid. The requisite consent can now be given, however, by the Civil or Religious Court competent under Articles 51 to 54 of the Palestine Order-in-Council, 1922, and where there is none such, by the Civil Court.

No application for such a consent has ever been made by the administrator and he cannot now set up his own laches as a defence.

Respondent has argued that the heirs take the land saddled with the contract to sell and thereby render themselves liable to the penalty clause contained in the contract. In support of this contention, he quotes Articles 74 and 76 of the Ottoman Code of Civil Procedure, which prescribe that:

> "74. Officially authenticated documents shall be admissible as evidence of agreement as between the contracting parties and their heirs and assigns.
>
> "76. A private document bearing the signatures or seals of the contracting parties but not officially authenticated shall have the status of an authenticated document if such signatures and seals are admitted by the contracting parties.

The two Articles, however, which appear under the heading of "Documents", deal with procedure and we interpret them to mean that a document may be produced against a man and his heirs, but it does not say that they are bound by the agreement.

We have been unable to find any Ottoman Law dealing directly with the point in issue, but we are of opinion that the question is to some extent governed by the decision of this Court in the appeal of Abdallah El Sherif v. Muhyi El-Husseini, C. A. No. 83/32*. The Court there decided that the Lower Court should have ascertained whether a sale of land could be performed by the heirs of the original vendor and whether an accrued right of action for its breach survives against his heirs, or whether it is a matter which could only have been performed by their predecessor in title. Should the Court find that it is in the heirs' power to effect the registration and transfer, it should fix a reasonable period for that purpose and give the heirs a delay. On the other hand, should the Court find that the transaction is impossible to perform by the heirs after considering the excuse, it should order the refund of the price. The facts of the case are very similar to those in the present appeal; a testator had agreed to transfer land to the appellant and to pay a certain penalty if he failed to do so. The testator died before the transfer took place. The heirs of the testator were requested to complete the transfer or to pay the penalty, and it would appear from the above quoted judgment that the Court envisaged the liability of the heirs for the payment of the

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* C. of J. p. 968.

penalty if they failed to complete, providing completion was not legally impossible.

In the absence of Ottoman Law on this question, we may also call to our aid the provisions of Article 46 of the Palestine Order-in-Council 1922, conferring power on the Courts, subject to the provisions of the Ottoman Law and the Order-in-Council and the Ordinances in force, to exercise their jurisdiction in conformity with the substance of the Common Law in England.

The Common Law in England is quite clear on the point and may be found on page 334 of the 15th Edition of Chitty on Contracts under the heading of Section 10 "Death of Parties after Contract, and Liabilities of Executors and Administrators," which reads as follows:—

> "The general rule is that the maxim *Actio personalis moritur cum persona* has no application to any breaches of contract, except those which constitute a mere personal wrong. Where, for instance, a person contracts to do an act requiring personal skill, his executors are not liable to an action for breach of contract occasioned by his death. And the cause of action for breach of promise of marriage terminates with the death of either of the parties, at any rate where no special damage is alleged. But in ordinary cases, upon the death of either party to a contract, an accrued right of action for its breach survives to or against his personal representatives. If sued, however, they are liable only to the extent of the assets of the deceased."

For the foregoing reasons, we are of opinion that the judgment of the lower Court must be affirmed and the appeal dismissed with costs and advocate's fees assessed at £P.3.

Delivered the 13th day of January, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 176/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Hanan Blakhard et al — APPELLANTS.

v.

Abdul Kader Ayad and Nine Others — RESPONDENTS.

Contract for sale not signed by all the named vendors — Action for damages against those who signed — Estoppel by receipt of money — Estoppel from denying validity of contract.

By a written contract for the sale of land fifteen persons were named as vendors jointly and severally to transfer certain land to the appellants, but only ten of them (respondents) signed the contract. Upon failure of the respondents to effect transfer the appellants took an action in the District Court against the ten persons who had signed claiming the refund of monies paid on account of purchase price and damages named in the contract. Respondents pleaded that as the contract had been signed only by the ten present respondents, and had not been signed by the other five persons named therein as included in the first party, it was not binding in law upon any of the persons named as parties thereto. The District Court accepted the plea as good and dismissed the action. Upon appeal,

HELD: Dismissing the appeal (a) That since all the fifteen intended vendors were grouped together as a single party and the agreement was one for the sale of the whole of the land and not merely of shares therein that the intention was that the contract should only become operative when signed by all the named vendors. (b) That receipt of money by some of the respondents on account of purchase price would not necessarily operate as an estoppel against them from denying the validity of the contract[1]).

[1]) Compare: C.A. No. 118/36.

Appeal from the judgment of the District Court of Jaffa (C.D.C.Ja. No. 37/34) dated the 19th day of October, 1934.

Eliash — for appellants.
Abcarius — for respondents.

JUDGMENT.

This appeal arises out of a contract of sale dated the 16th October, 1932, and expressed to be made between the ten present respondents and five other persons, jointly and severally as the first party, and the present appellants as the second party.

By Clause 2 of that contract the first party agreed to transfer in the Land Registry the whole of a certain piece of land therein specified to the second party or their nominee or assignee, at a price of £P. 3 per dunam.

Clause 10 of the contract provided for the payment of a sum of £P. 2000 as liquidated damages by a party repudiating or committing a breach of any of the terms of the contract.

On the 11th January, 1935, the appellants filed a statement of claim in the District Court, Jaffa, claiming the sum of £P. 2000 damages for non-fulfilment of the contract, and a sum of £P. 150 paid by the appellants on account of the purchase money.

The defendants named were the ten present respondents and two of the five other persons named in the contract as forming the first party, namely, Halimeh bint Muhammad Jaber, and Amin Badr.

The defendants set up the defence that as the contract had been signed only by the ten present respondents, and had not been signed by the other five persons named therein as included in the first party, it was not binding in law upon any of the persons named as parties thereto.

This argument was accepted by the District Court, which felt itself bound by the judgment of this Court in Abder Rahim v. Muhammad Kheiri Mansur, Civil Appeal No. 29/33*; and accordingly dismissed the action.

Against this judgment, the appellants now appeal, arguing that the present case is distinguishable from the case cited.

The judgment in that case was in the following terms:

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* C. of J. Vol. 3 p. 1108.

"One of the constituent persons comprising the first party to the contract, the subject matter of this action, not having signed the contract in question, it has no validity and we therefore quash the judgment of the District Court and give judgment for the appellant with costs to include £P. 2 advocate's fee, without prejudice to any right in the respondent to sue upon the receipt for the return of the money paid."

The appellants argue that a distinction is to be drawn between that case and the present case in which the vendors are expressed to contract jointly and severally.

It is to be noted, however, that all the fifteen intended vendors named in the contract are included together as a single party: moreover, the agreement is for the sale of the whole of the land and not merely of shares therein: and this is an agreement the performance of which is dependent upon the concurrence of all the owners.

Taking these facts into account, we hold that the intention was that the contract should only become operative when signed by all the named vendors. It follows, in accordance with the judgment cited, that as some of the proposed vendors have not signed, the contract is inoperative: and hence, notwithstanding that they are expressed to contract severally as well as jointly, the persons by whom the contract was signed have incurred no liability thereunder.

As against two of the respondents, however, the appellants argue that they are estopped from denying the validity of the contract by the fact that they have received payment of certain sums of money thereunder as proved by the receipts filed (Exh. 6D and Exh. 6E.).

The fact of such payments and the genuiness of the receipts are not admitted by the respondents.

Assuming, however, that these issues are determined in favour of the appellants, we see no reason to hold that the receipt of these sums would necessarily operate as an estoppel against the respondents: and the appellants' pleadings do not aver any special circumstances under which the receipt of these sums might so operate.

Against one of the respondents, the appellants argue further that he is estopped from denying the validity of the contract by his indorsement upon a notarial notice served upon him.

The indorsement was in the following terms:—

"I, Kamel, reply to your notice that I am prepared to transfer to you but it is for you to effect partition."

Obviously this was not an undertaking to transfer the whole of the land comprised in the contract of sale, in which case partition would be necessary: and it therefore cannot estop the respondent from setting up the invalidity of the contract.

The appeal must, therefore, be dismissed with costs including £P. 4 advocate's fees.

Delivered the 31st day of September, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 18/35.

BEFORE:

The Chief Justice (McDonnell, C. J.), Baker, J. and Frumkin, J.

IN THE CASE OF:

Alfred Rock — APPELLANT.

v.

The Jaffa Union Line Ltd. — RESPONDENT.

Contract for sale of business — Prohibition on vendor to conduct similar business in unrestricted area — Allegation that agreement in restraint of trade and contrary to public policy — Article 64, Ottoman Code of Civil Procedure — Recovery of damages under Arts. 106 — 112, Ottoman Code of Civil Procedure.

The appellant, by written agreement, sold his citrus export business to the respondent company and undertook that he would not enter into or be connected with any business which might compete with the business of the company. Upon an action being taken by the company for damages for breach of the agreement and for an injunction restraining the appellant from committing further acts in breach of the agreement the appellant pleaded, inter alia, (a) that the agreement being in restraint of trade, unrestricted in time or area, was contrary to public policy in Palestine, (b) that

no damages were recoverable at law in a case of this kind since the only provisions as to damages which are contained in Articles 106—112 of the Ottoman Code of Civil Procedure applied to cases of breach or delay in performance of a contract in which the defaulting party has undertaken to do some specific act, and did not apply to breaches of contracts to refrain from doing certain acts. The District Court having awarded damages to the company, the appellant appealed. On appeal,

HELD: Dismissing the appeal, (a) that although the agreement was not restricted as to area yet considering the nature of the business to be protected the area could not be considered as unreasonable and the agreement was not void as being contrary to public policy. The absence of a limit of time will not make a restraint void if it is otherwise reasonable, (b) that although Articles 106—112 of the Ottoman Code of Civil Procedure do not apply to a contract whereby a person covenants to refrain from the performance of certain acts, yet it could not be said that because these Articles do not apply to damages arising out of contracts of restraint, damages specifically mentioned in an agreement as being payable in case of breach could not be claimed. Such a contract is not contrary to Article 64 of the Ottoman Code of Civil Procedure.

Appeal from the judgment of the District Court of Jaffa (C.D.C.Ja. No. 160/34), dated the 21st day of November, 1934.

Eliash — for appellant.
Richardson — for respondent.

JUDGMENT.

This appeal arises out of a claim for damages for breach of a contract made between present appellant and respondents and dated the 15th day of July, 1929, whereby the present appellant and another agreed with respondents for a consideration mentioned in a principal agreement to which this is subsidiary,

> "that they will not directly or indirectly enter into or be connected with any business whatsoever which is or may be competitive with any shipping, chartering, or other business carried on at any time by the respondent Company, and in particular that they will not charter or load or be associated directly or indirectly with any chartering or loading of any

vessel or vessels with citrus fruit for the United Kingdom (whether such chartering or loading takes place at a Port in Palestine, Syria, or Egypt) save with the written consent of respondents first obtained in writing, and in the event of any breach of this covenant by the appellant or the other party, the same may be enforced by the respondents against the defaulting party by injunction and the said defaulting party shall, in addition, be liable to pay the sum of £P. 1,000 to the respondents as liquidated damages in respect of such breach."

Respondents allege that without their consent appellant, since the beginning of 1933, has been carrying on certain activities which were competitive with the business of respondents including, inter alia, the negotiation and making of contracts for the shipment of citrus fruit from Jaffa and Haifa in breach of the terms of the before-mentioned agreement.

On the 19th March, 1934, plaintiff commenced an action in the Jaffa District Court claiming an injunction against appellant restraining him from committing further acts in breach of the said agreement and £P. 1,000 liquidated damages.

The respondents, upon the hearing of the case confined their claim to one for damages and the District Court after hearing evidence found that appellant, after the agreement had been signed, joined, and was the leader of a co-operative society of shippers (presumably for the shipment of citrus fruit although the judgment does not specifically state so) and that he had committed a breach of the covenant contained in the said agreement. The Court also came to the conclusion that the agreement was reasonable and was not in restraint of trade and entered judgment for respondents against appellant for the sum of £P.1,000.

Against this judgment, appellant now appeals requesting that the judgment of the District Court be set aside on the following grounds:

(a) That upon the pleadings of the respondents before the trial Court, the agreement was unreasonable with reference to the interests of the public, in that as a result of the co-operative effort of shippers the cost of shipping had been substantially reduced.

(b) That the business of respondents is that of middlemen, that the activity of the co-operative society made the existence of middlemen unnecessary, that this is not business competitive with

that of respondents but a mere device to avoid the necessity of doing business with the respondents, and that it is not a breach of the agreement.

(c) That the agreement, being in restraint of trade, unrestricted in time and area, is contrary to public policy in Palestine, in so far as the Ottoman legislator considered it objectionable to form any covenant for the purpose of increasing prices of commodities.

(d) That the provisions of the Ottoman Code of Civil Procedure, with regard to damages, have superseded those of the Commercial Code, and under the provisions of the former Code no damages are payable in this case.

With regard to the first ground of appeal, this may be dismissed at once, for appellant entered into an agreement with respondents covenanting not to enter into, or be connected with, any business which was or might be competitive with the business of respondents, and the lower Court has found he had in fact committed a breach of the covenant. Whether by so doing, the cost of freight has been reduced is immaterial in so far as the breach of the covenant is concerned, and it cannot be seriously contended that the agreement, in view of the character of the business to be protected by the restrictive covenant, is unreasonable or injurious in reference to the interests of the Public, for the Public were at no time debarred by the agreement from creating a co-operative society whereby they themselves might reduce freight rates or ship citrus fruit at a lower rate than that charged by respondents.

The second ground of appeal possesses no merit, for the terms of the agreement between the parties are perfectly clear and the lower Court, by virtue of the facts, were fully justified in finding that a breach of the covenant had been committed by appellant.

The agreement is not restricted as to area and considering the nature of the business to be protected, the area cannot be considered unreasonable. With regard to the question of time, it has been held on many occasions that the absence of such a limit will not make a restraint void if it is otherwise reasonable, see Hayward v. Young (1818), 2 Chit. 407; Archer v. Marsh (1837), 6 Ad. & El. 959; Elves v. Crofts (1850), 10 C. B. 241; Catt v. Tourle (1869), 4 Ch. App. 654. The lower Court were satisfied that the agreement, bearing in mind the relationship of the parties, was reasonable and with this finding we concur.

The appellant does not cite any law with regard to his plea that the Ottoman legislator considered it objectionable to form any covenant for the purpose of increasing the prices of commodities. If, however, there is such a law, we have no evidence that the agreement, the subject-matter of this appeal, did in fact increase the price of commodities, and we cannot see how it can be successfully argued that the agreement could indeed cause such a result.

Finally, the appellant has contended that articles 106 to 112 (inclusive) of the Ottoman Code of Civil Procedure, under the heading of Damages, have superseded the law of damages in the Commercial Law and that these articles are not applicable to our present case.

Article 106 undoubtedly applies to damages for breach or delay in performance of a contract in which the defaulting party has undertaken to do some specific act or to deliver specific goods and the succeeding articles referring throughout, as they do, to the contract, thereby are restricted to that class of contract contained in Article 106. The said articles prescribe that, before damages for breach of a contract of the nature defined can be claimed, the party claiming must first serve upon the other party a protest or notice requiring him to perform the covenant or condition which he has delayed to perform.

Contracts whereby a party covenants to refrain from doing certain acts are in quite a different category, and when a breach has been committed by the covenantor it would be futile to serve a notice requesting him to refrain from the commission of an act which he has already performed. Therefore it is obvious that Articles 106 to 112 do not apply to a contract whereby a person covenants to refrain from the performance of certain acts. It cannot however, be said that because articles 106 to 112 of the Ottoman Code of Civil Procedure do not apply to damages arising out of contracts of restraint, that damages specifically mentioned as being payable in case of breach cannot be claimed. The contract is in no way contrary to Article 64 of the Ottoman Code of Civil Procedure and it cannot be argued that it is not in accordance with the present law.

For the above reasons, we are of opinion the appeal fails and must be dismissed and the judgment of the lower Court must be confirmed.

Appellant to pay the costs here and in the Court below

which shall include £P. 3 advocates' fees upon the hearing of this appeal.

Delivered the 20th day of May, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 61/35.

BEFORE:

The Senior Puisne Judge (Manning, J.), Khaldi, J., and Frumkin, J.

IN THE CASE OF:

Yehoshua Hankin — APPELLANT.

v.

Abdul Rahim Hanoun
Yousef Hanoun — RESPONDENTS.

Damages for breach of contract for the sale of land — Failure of vendors to effect transfer — Proof of intention of party — Proper order to be made in event of disagreement of two judges constituting District Court — Shifting of burden of proof — Onus always on person asserting proposition of fact not self evident — Conduct subsequent to breach as evidence.

A clause in a contract for the sale of land provided that if the vendors failed to effect transfer "intending by so doing to keep the land for himself or to sell it to another then he will be liable to pay £P. 3000 as liquidated damages....." Upon breach by the vendors the purchaser sued, inter alia, for the £P. 3000 before the District Court. Upon the issue whether the failure to fulfill was due to an intention on the part of the vendors to keep the land or sell it the court divided in opinion as to whether the relevant intention had been proved by the purchaser (appellant) and the action was dismissed. Upon appeal to the Court of Appeal, the appellant argued that the judge who held that the intention had not been proved had misdirected himself in placing the onus on the purchaser to prove the intentions of the vendors. Appellant contended that since the vendors' intentions was a matter peculiar

within their own knowledge the burden was on them to prove that they had not the relevant intention.

HELD: That the onus of proving the requisite intention rested on the appellant, — that in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively. However, since there was a definite finding by the lower court that the intention which induced the breach arose neither from the desire of the vendors to keep the land nor from their desire to sell it to others, the question of onus did not arise.

HELD ALSO: That in estimating the intention of the vendors in committing the breach the court was entitled to weigh the value as evidence of the conduct of the vendors subsequent to the breach.

Eliash — for appellant.
Auni Abdul Hadi — for respondent.

Appeal from the judgment of the District Court, Jaffa, dated 21st day of January, 1935.

JUDGMENT.

This appeal is concerned with damages for breach of contract. The respondents agreed to sell certain land to the appellant but failed to carry out their agreement. The material clause in the agreement is as follows:

> "Both parties have undertaken to perform all the terms of this agreement completely, and if any of the parties commits a breach of any of the terms he will have to pay to the other party the sum of £P. 1000 by way of liquidated damages without the necessity for sending a notarial notice. If the first party commits a breach or fails to perform his obligations, intending by so doing to keep the land for himself or to sell it to another then he will be liable to pay £P. 3000 as liquidated damages in addition to the £P. 1000 liquidated damages stated above without the necessity of sending a notarial notice. He will also have to refund the sum of £P. 1000 received by him under clause 12 (a) together with legal interest from the date of the receipt of this sum until payment."

The respondents admit that they are liable to pay the appellants £P. 1000 damages and to refund £P. 1450 part of the purchase price which was paid. The appellant, however, contends that they are liable to pay him the £P. 3000 further damages as provided by clause 14.

The issue in the case was, therefore, whether the failure to fulfil the agreement was due to an intention on the part of the respondents either to keep the land for themselves or to sell it to another. The trial took place before a District Court composed of two judges. Copland, J. held that the appellant had failed to prove the relevant intention; Mani, J., held that he had succeeded in proving it. I can find no provision in the law for the proper order to be made in such a disagreement, but in accordance with local practice it was held that the appellant's claim failed. He has appealed to this Court.

The issue was a question of fact, and if this Court had to decide that question, it would find itself in a position of difficulty, as it has neither heard nor seen the witnesses. But Mr. Eliash, who argued the appeal on behalf of the appellant, has argued it on two points of law, viz: that Copland, J. has misdirected himself on two vital matters. The learned judge held that the onus of proof was on the plaintiff, i.e. the appellant in this appeal. Mr. Eliash cites the well-known rule of evidence quoted in the Hailsham edition of Halsbury, Vol. 13, p. 545, viz: that the burden of proof is shifted from the person on whom it would naturally fall when the truth of the allegation lies peculiarly within the knowledge of his opponent. That is, in this case the appellant would in ordinary course have to prove that the intention of the respondents was to keep the land for themselves or to sell it to another, but what their intention actually was is a matter peculiar within their own knowledge, and therefore the burden is on them to prove that they had not the relevant intention.

From an examination of the decided cases it is clear that the rule was never meant to have this effect, — its effect is usually to relieve a party from having to prove a negative averment. In this case Mr. Eliash would use it to throw the burden of proving such an averment on the respondents. Besides, as mentioned on p. 546 of the volume of Halsbury referred to by Mr. Eliash, the validity of the rule as stated on p. 545 has been challenged and the manner of stating it which is least open to objection is: "in considering the amount of evidence necessary to shift the

burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively." I am in full agreement with Copland, J., that the onus of proving the requisite intention in this case rested on the appellant; how much evidence was necessary to shift that onus was a matter for him. I hold that the learned judge did not misdirect himself on this point.

Looking at the judgment of the learned judge it is also quite clear that he considered the evidence before him and came to the conclusion that what prevented the respondents from fulfilling their agreement was the refusal of their brothers to join in the sale. Thus, there was a definite finding on the issue in the case, viz: the intention which induced the breach of contract. The question of onus does not therefore arise. In the case of Robins v. National Trust Co. (1927), 43 T.L.R. 243, Lord Dunedin, in delivering the judgment of the Privy Council, said, at pages 244 and 245:

> "Their Lordships cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition of fact which is not self evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion because it is self evident that he had been born. But to assert that he had been born on a certain date, if the date is material, requires proof. The onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of the other, or, as is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."

The second ground on which the decision of Copland, J., is attacked is that, in estimating the intention of the respondents he held that he could not take into account their conduct subsequent to the breach. This conduct consisted of negotiations on the part of the respondents to sell the land to other persons. There are certainly passages in the judgment which might lead

one to think that the learned judge thought it unnecessary to consider this part of the evidence. But the judgment must be looked at as a whole and it is not fair to pick out isolated passages. It is clear that the learned judge did weigh the value of the subsequent conduct as evidence, but came to the conclusion that it was of no importance as whatever negotiations were entered into were all dependent on the consent of the appellant. Further there can be no doubt that the respondents were entitled to the inference that after action brought they considered the agreement at an end and felt themselves free to enter into negotiations with others for the sale of the land.

Both grounds of appeal fail. In my opinion the appeal should be dismissed with costs.

Delivered the 4th day of November, 1936.

In the Land Court of Jaffa sitting as a Court of Appeal.

L.A.L.C.Ja. No. 67/35.

BEFORE:

The President (Copland, J.) and Shehade, J.

IN THE CASE OF:

Ephraim Finkel — APPELLANT.

v.

Hevra Haddadith "Bait Venahala" Bnei Brak, Ltd. and Bank Lehaklauth Uletaasiah Bnei Brak Ltd. — RESPONDENTS.

Contract — Lease of well — Difficulty of performance not an impossibility of performance entitling avoidance of contract — Recovery of possession of immovable property — Jurisdiction of magistrate — Section 2 (1) (b), Magistrates' Courts Jurisdiction Ordinance, 1924.

In July, 1934, appellant leased a well, building and pipes from respondents for a period of two years, the lessee undertaking to effect on his own account all necessary repairs. Clause 8 of the lease provided that in the event of a breach by the lessee the

leased premises were to revert to the lessor and the lessee was to pay the sum of £P. 150 by way of liquidated damages. Upon failure of the lessee to repair a pump respondents applied for an order from the magistrate for repossession. Appellant pleaded that for technical reasons the pump could not be repaired but would have to be replaced, and that since the contract was impossible of performance the lessee should be entitled to operate the well as best he could until the end of the lease. He pleaded further that an order for restitution was tantamount to an adjudication that he was liable to pay the £P. 150 damages, — a matter outside the jurisdiction of the magistrate's court. The magistrate rejected the pleas and ordered the premises restored. Upon appeal to the Land Court,

HELD: Dismissing the appeal,

(a) That the action for dispossession was within the jurisdiction of the magistrate. The other remedy of the respondents for damages was a remedy distinct from the question of dispossession and the respondents were under no obligation to bring both claims together or at all.

(b) that it was not physically impossible to mend the pump, and that the appellant was confusing difficulty of performance with impossibility of performance.

P. Goldberg — for appellant.
Sassoon — for respondents.

Appeal from the judgment of the Magistrate's Court of Tel-Aviv dated 10th March, 1935.

JUDGMENT.

In my opinion this appeal fails. I agree entirely with the arguments put forward by Mr. Sassoon for the respondents and therefore I need only add a few remarks.

There is nothing to prevent a magistrate dealing with the question of dispossession, even if there may be subsequently a question of damages — the two remedies are distinct, and the respondents are under no obligation to bring both claims together, or at all.

It is perfectly clear that there have been breaches of conditions which are the root of the contract, and they are certainly

not breaches of warranties, even if the distinction between condition and warranty exists in this country as to which I express no opinion.

As to impossibility of performance, the appellant confuses difficulty with impossibility. It may be difficult and expensive to refrain or to carry out the other conditions of the contract, — that is very far from saying that it is impossible.

Both on its merits and on the law this appeal fails and must be dismissed with costs both here and below and £P. 2 advocate's fees.

Delivered the 3rd day of April, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 97/35.

BEFORE:

The Chief Justice (McDonnell, C.J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Isidor Bermann — APPELLANT.

v.

Sara Graus — RESPONDENT.

Breach of contract for the sale of house in course of construction— Transfer accepted before house completed — Waiver of rights to damages by acceptance of transfer — Damages not recoverable for minor omissions subsidiary to main object of contract.

Respondent sold to appellant a plot of land and house in course of construction, the vendor undertaking to complete the building "in an appropriate form of habitation within three months" from the date of the agreement. Before the expiration of the said three months and before the completion of the building the appellant accepted transfer having previously notified the respondent that the acceptance of transfer was not to be considered a waiver by the appellant of his rights to damages in the event of breach. Upon the expiration of the three months appellant took action

before the District Court for damages for breach of contract alleging a number of breaches which, the respondent replied, were all breaches of minor importance and could not be considered as breaches of the main obligation to transfer. The District Court dismissed the action. Upon appeal,

HELD: Dismissing the appeal that by agreeing to the transfer and registration of the house and land which was the main object of the contract, the appellant, in spite of the warnings contained in his notarial notices, waived his rights to any claim arising out of minor omissions subsidiary to the main objects of the contract. Minor omissions such as these are not sufficient ground for allowing damages.

Appeal from the judgment of the District Court of Jaffa (C.D.C.Ja. No. 386/34) dated the 11th day of February, 1935.

Doukhan — for appellant.
Pevsner — for respondent.

JUDGMENT.

We are of opinion that by agreeing to the transfer and registration of the house and land (which took place two days before the date fixed in the contract, viz: on 18.5.1934) which was the main object of the contract, the appellant, in spite of the warnings contained in his notarial notices, waived his rights to any claim arising out of minor omissions subsidiary to the main objects of the contract which had to be completed before the date of registration.

As regards the two additional flats which the appellant has let, the letting of these also took place before the registration and the delivery of the money received by the respondent from the tenants was, under the contract, to be effected before registration. If in fact £. 56 less than the sum agreed upon was paid to the appellant, this may be the subject matter of a separate action for such sum, but does not involve liability for payment of liquidated damages. There were only two matters under the contract which were to be completed after delivery and registration. Both are embodied in Clause 1. These are:—

(a) the completion of the pavement which was to be effected by the 20th June, 1934; and
(b) the completion in an appropriate form for habitation of the room and appurtenances in the lower storey which

was to be effected before July 3, 1934, namely three months from the date of the execution of the contract.

Now the statement of claim makes no mention of the failure to complete the pavement and as to the lower storey, if we refer to para 5, sub-para (j) thereof, we find that the engineers while reporting "In the lower storey the rooms are yet unfit for habitation," gave as their grounds for this ruling the fact that "Painting is not complete, and the installation not yet connected."

We cannot hold that in the circumstances of this case a minor omission such as this is a sufficient ground for allowing damages under the contract.

We therefore dismiss the appeal with costs to include £P. 3 advocate's fee.

Delivered the 20th day of May, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 122/35.

BEFORE:

The Senior Puisne Judge (Manning, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Itzhak Rabhon — APPELLANT.

v.

Shmuel Wald — RESPONDENT.

Damages for breach of contract — Addition to contract made in handwriting of party but not signed — Delay in performance not excused where default due to Government department — Matter outside control of party to contract within meaning of Article 108, Ottoman Code of Civil Procedure — Effect of failure of trial court to hear witnesses.

By written agreement made the 6th day of May, 1934, the appellant agreed to transfer land to respondent on a day not later than the 6th July, 1934. Beneath the signatures of the parties there appeared a writing extending the time for transfer to the 20th July, 1934, but this writing was not signed. Transfer not

having been effected by the 6th July, the respondent sued for the return of monies paid on account of the purchase price and for damages for breach of contract. The appellant pleaded (a) that he had been granted an extension until 20th July to complete the transfer, and (b) that the delay was caused by a Government department, a matter outside his control within the meaning of the proviso to article 108 of the Ottoman Code of Civil Procedure and that he was therefore not liable to damages. The District Court found that no valid extension of time had been given and found for the respondent. Upon appeal to the Court of Appeal,

HELD: By a majority of the court (Manning, J. dissenting on other grounds), dismissing the appeal (1) that the unsigned writing at the bottom of the contract could not be treated as an extension of the time for transfer, more particularly so, in view of other subsequent admissions of the appellant that the date of transfer was the 6th July. (2) That where a party undertakes to effect transfer within a given period he may not be excused on the ground that certain formalities necessary for the completion of the transaction have been delayed as this is a matter which may be foreseen. When entering into a contract, it is for the party undertaking the transfer to see that he be given sufficient time within which it will be possible to have the formalities completed.

HELD FURTHER by the Senior Puisne Judge, that since the appellant had requested that witnesses be heard on the issue whether he was prevented by causes outside his control from fulfilling his agreement and such witnesses had not been heard the case should be remitted to the District Court to hear, on this issue only, the appellants' witnesses and any witnesses whom the respondent desired to call in rebuttal.

Appeal from the judgment of the District Court of Jaffa C.D.C.Ja. No. 618/34) dated the 16th day of April, 1935.

S. Gratch — for appellant.
G. Minkowitch — for respondent.

JUDGMENT.

The only point in issue in this case is whether the period within which the appellant was obliged to effect the transfer of the property expired on the 6th of July, as stated in the contract, or was extended until the 20th of July, as shown by an endorsement

at the foot of the contract which the appellant alleges was written in the handwriting of the respondent.

It is to be noted that the endorsement was not signed by either party and comes after their signatures on the main contract. The parties were even so cautious as to sign the first page of the contract and had the footnote been meant to be part of the contract the parties would certainly have signed it.

The fact that the agreed period was the 6th of July is also supported by a letter sent by the appellant to the respondent on the 3rd of July inviting him to accept transfer on the 6th, otherwise he would be considered to have committed a breach of the contract.

Furthermore, in his written pleadings submitted to the Court below on the 15th April, 1935, appellant admitted that on the date when he was ready to transfer (9th July), he was already in delay of two days, thus again admitting that the agreed date of transfer was the 6th and not the 20th. It is true that in his oral pleadings before the Court below he wanted to rely on the extended date, but in view of the facts stated above, the Court was right in coming to the conclusion to which it came as regards the dates.

On appeal the appellant lays great stress on a new point which he only incidentally touched in the Court below, namely, that the delay was due to a matter outside his control, inasmuch as the file was delayed at some Government department.

It has been held over and over again by this Court that where a party undertakes to effect transfer within a given period he may not be excused on the ground that certain formalities necessary for the completion of the transaction have been delayed, as this is a matter which could be foreseen. When entering into a contract, it is for the party undertaking the transfer to see that he be given sufficient time within which it will be possible to have the formalities completed.

In fact, in the Court below, the appellant did not seriously rely on this argument and he assumed responsibility for having the transfer effected within the agreed period. All his argument turned on the point as to when such period expired, and on that point he did not ask for witnesses to be called.

For this reason, we hold that the appeal must be dismissed with costs and £P. 3 advocate's fees.

JUDGMENT OF THE SENIOR PUISNE JUDGE.

On the 6th May, 1934, the appellant agreed to transfer certain land to the respondent, the transfer to be completed in the Land Registry not later than the 6th July, 1349. The agreement was in writing and signed by both parties, and underneath the signatures the following words appear:

> "We, the undersigned, agree to the extension of the period fixed hereinabove in Clause 5, for the purpose of the transfer in the Land Registry to a further fourteen days, that is to say, until the 20th July 1934."

There are no further signatures.

The transfer was not completed by the 6th July, 1394, and on the 28th November, 1934, the respondent sued the appellant for £P. 225 in the District Court of Jaffa, £P. 125 being part of the purchase price paid in advance, and £P. 100 being a sum stipulated as damages in case of breach.

The appellant in his defence pleaded that he had done everything in his power to have the transfer completed by the 6th July, 1934, and that it was circumstances outside his control which prevented him from fulfilling his agreement on that date. He mentioned a number of witnesses whom he desired to call in support of his contention. He counterclaimed for £P. 100 damages on the ground that he was ready and willing to effect the transfer as soon as circumstances allowed, but that the respondent refused to accept.

It is noteworthy that in his defence the appellant did not in any way rely on the words underneath the signatures to the agreement. His defence amounts to an admission that the date for completion of the transfer was the 6th July, 1934.

When the case came before the District Court, no amendment was made in the pleading of the appellant, but the Court allowed his advocate to argue that according to the additional words in the agreement the date for completion of the transfer was the 20th and not the 6th July, 1934. Some argument was also directed to the point that the appellant had done all in his power to have the transfer completed on the agreed date.

No witnesses were called and the Court gave judgment for the respondent for £P. 225. Relying on a letter written by the appellant on the 3rd July, 1934, it held that the date for completion

was the 6th July, 1934, but it did not deal with the issue as to whether the appellant was prevented by circumstances outside his control from fulfilling his contract on the agreed date..

The Court below was entitled, on the evidence before it, to find that the date for completion was the 6th July, 1934, and this finding should not be interfered with. In fact, I do not see how any other finding could be arrived at in view of the original defence and the letter of the 3rd July, 1934. This letter, written by the appellant, admits that the date for completion was the 6th July, 1934 and leads to the conclusion that appellant regarded the words underneath the signatures as having no effect.

Appellant's counsel, in arguing the appeal before this Court, urged that this letter should not have been received in evidence, as no copy of it was served on him. Reception of documentary evidence in these circumstances is a matter for the discretion of the Court, and there can be no doubt that it was properly admitted in this case in order to meet a defence which had not been suggested in the pleadings.

Another ground of appeal was that the Court below did not allow the appellant to call his witnesses. It is difficult to tell from the record what actually happened after each advocate had addressed the Court twice, but the fact remains that the appellant gave notice that he wished to call witnesses, that the witnesses were not called and that the Court gave no decision on the issue on which of these witnesses were to give evidence. In my opinion, therefore, the case must be remitted to the District Court to hear the appellant's witnesses and any witnesses whom the respondent may call in rebuttal, but only on the issue whether the appellant was prevented by causes outside his control from fulfilling his agreement not later than July 6, 1934.

The Court below rejected the appellant's counterclaim and they will deal with this also on the fresh evidence submitted.

Delivered the 4th day of December, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 151/35.

BEFORE:

The Acting Chief Justice (Manning, J.) and Abdul Hadi, J.

IN THE CASE OF:

Sheikh Mahmoud Shaheen — APPELLANT.

v.

Mahmoud Ali Abu Jaradeh and two Others — RESPONDENTS.

Damages for breach of contract for partition of land — Several persons forming party to contract — Action by some of several joint promisees — Performance of contract prevented by breach of other party — Waiver of right to object to breach.

Six persons jointly formed one party to a contract with the appellant for the partition of land and three of them sued the appellant in the District Court for the damages due under the contract in the event of breach. The appellant pleaded (a) That since the six persons formed one joint party three of them alone could not sue, and (b) That he was prevented from fulfilling his obligations under the contract by the breach of the respondents who had undertaken to confirm a map in the tabu but had not done so. The District Court rejected the first plea and as to the second held that the appellant had waived his rights to plead the same, and awarded to the three respondents as their share, half of the damages due under the contract. Upon appeal:

HELD: Allowing the appeal (a) That where a promise is made to several persons jointly, they are entitled collectively to performance of it. Proceedings to enforce the performance of such a promise can only be taken in the names of all the joint promisees; one of them cannot sue alone, because the promise was made to all of them jointly, and not to any of them separately. (b) That the respondents had committed a breach by not having the map confirmed. The appellant had not waived his right to object to this breach and in any event there could be no question of waiver when the fact was that the appellant was prevented from

fulfilling his agreement by a breach of that same agreement by the respondents.

Appeal from the judgment of the District Court of Jaffa (C.D.C.Ja. No. 181/34) dated the 17th day of June, 1935.

Goitein — for appellant.
Sheikh Abu Saoud — for respondents.

JUDGMENT OF MANNING, J.

This appeal arises out of a contract made between the appellant, of the first part, and the three respondents and three other persons, of the second part. A breach by the appellant was alleged, and the three respondents sued for damages which had been fixed at £P. 200. When the case came before the District Court, Mr. Goitein on behalf of the appellant contended that the three respondents could not sue without joining the other parties of the second part. The Court over-ruled his objection on the assumption that each party of the second part owned one-sixth of the property involved and was consequently entitled in case of breach to one-sixth of the damages. It amended the claim by reducing the damages claimed by one-half and then proceeded to hear the action on its merits.

The Court found that the appellant had committed a breach and awarded the respondents £P. 100 damages. The appellant appealed and Mr. Goitein took the same objection which he had taken in the Court below.

It is admitted that there is no provision in the Ottoman law to meet a case of this kind. The point must therefore be decided according to the law of England, and this means simply that the contract has to be scrutinised to see whether it is joint, several or joint and several. In the first place it may be remarked that the assumption by the Court that each party of the second part owned one-sixth of the property concerned is unfounded; it was admitted by the respondents that they owned the greater part of the subject matter of the contract.

The provision of the contract relating to damages is as follows:

> "Any party who commits a breach of the contract shall pay to the aggrieved party the sum of £P. 200 plus the price paid."

In case of a breach by the appellant, "the aggrieved party" clearly means the six parties of the second part. The making of the contract arose out of a partition of property in which all the parties were interested, but from what has been said above it is clear that they were not equally interested, that is some owned a greater percentage than others, but at the same time they held it in undivided ownership. The covenants made to and by the second party are made generally without any words of severance. Their interests are clearly joint and it is to their interest that they should be construed jointly. The law therefore is as stated in Halsbury's Laws of England, Vol. 7, p. 337.

> "Where a promise is made to several persons jointly, they are entitled collectively to performance of it. Proceedings to enforce the performance of such a promise can only be taken in the names of all the joint promisees; one of them cannot sue alone, because the promise was made to all of them jointly, and not to any of them separately."

I am therefore in agreement with Mr. Goitein that the three respondents could not sue alone for damages for a breach of this agreement.

Mr. Goitein had another ground of appeal. One of the conditions of the contract was that the second party undertook to confirm the map in the tabu. The appellant says this was not done, and the Court below have made a finding to this effect. It is clear from the evidence that this breach by the second party prevented the appellant from fulfilling his obligations under the contract. The Court below took the view that this did not matter as the appellant had waived any objection on this score and had not mentioned this breach of the agreement in his notarial notice. I do not agree with this. There can be no question of waiver when the fact is that the appellant was prevented from fulfilling his agreement by a breach of that same agreement by the respondent. He pleaded this in his defence and he also did mention in his notarial notice. This ground of appeal also succeeds. In my opinion the appeal should be allowed with costs, to include £P. 2 advocate's fees.

JUDGMENT OF ABDUL HADI, J.

The first point to be decided in this appeal which arose out of an agreement made between the appellant, on the one part,

and the three respondents together with three other persons, on the other part, is whether or not the respondents are entitled, without joining the other three persons forming with them the second party, to claim their shares of the stipulated damages in case of a breach.

The second point argued by the appellant's counsel was as to whether it was the appellant or the respondents who committed the breach.

As regards the first point I am of the opinion that the respondents alone, without joining the other three persons, cannot claim their shares in the damages as the appellant undertook to carry out certain things to all persons forming the second party to the agreement. Further, the notarial notice sent to the appellant was sent by the three respondents only and not by the other three persons. In the circumstances the appellant is not liable to pay damages for non-fulfillment of his undertakings made to the second party on the claim of some of that party.

As regards the second point I concur with the judgment of the learned Acting Chief Justice and hold that the respondents not having confirmed the map in the Land Registry prevented the appellant from fulfilling his undertakings.

The appeal should be allowed, the judgment set aside and respondents' claim dismissed with costs to include £P. 2 advocate's fees.

Delivered the 16th day of January, 1937.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 67/36.

BEFORE:

The Chief Justice (Trusted, C. J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Establishment Rocca, Tassy and De Roux — APPELLANT.

v.

Israel C. Schatsky — RESPONDENT.

Sale of goods — Action for price of goods not delivered — Damages for breach of contract — Lapse of long period after making of contract — Mutual abandonment of contract.

By a contract dated the 4th day of June, 1928, the appellants agreed to sell to the respondent a quantity of vegetaline to be delivered to the respondents in monthly shipments. On the first day of June, 1934, only part of the goods having been delivered the appellants notified the respondent by notarial notice to signify their intention of taking the balance of the goods and threatened legal action in the event of failure to so signify. The respondent not having replied to the notarial notice the appellants took action in the District Court for the price of the goods.

HELD: that the price of the goods could not be recovered; the proper action being for damages for breach of contract, but that, having regard to the unreasonably long period which had elapsed since the contract, the parties must be deemed to have abandoned it.

Appeal from the judgment of the District Court of Jaffa, dated the 20th February, 1936.

Gorodissky — for appellant.
S. Gratch — for respondent.

JUDGMENT.

This is an appeal from the District Court of Jaffa.

It arises out of a commercial contract, dated the 4th of June, 1928, whereunder the plaintiffs in the action, who are the present appellants, agreed to sell to the defendants (respondents) a quantity of vegetaline, F. O. B. Marseilles. The contract provided: "The orders are to be delivered, unless a contrary stipulation exists, by monthly quantities approximately equal", but there was an express provision that delivery should be at the request of the client (buyer).

There seems some doubt as to what deliveries were made under the contract and the District Court made no finding as to this, but by a notarial notice dated 1st June, 1934, the sellers notified the buyers as follows:

> "Therefore, the firm hereby warn you that you should within one week notify the firm directly or through their agent Mr. M. L. Gorodissky, Advocate, of your intention to take from the said firm the balance of the goods ordered by you on the 4th June, 1928, failing which the firm will institute an action against you in which case you shall have to pay, besides the cost of the goods, also in respect of all damages caused to the said firm by you, with costs and advocate's fees."

In reply to this notice the buyers did not state that there was no binding contract or that deliveries were to be monthly, as was suggested by their advocate in argument before us, neither did they reply that, owing to the lapse of time the contract must be deemed to have been abandoned. In fact, they did not reply at all and their advocate, in answer to a question by me, stated that it was sometimes considered safer not to reply. I can only say that in my opinion that is an unsatisfactory attitude for a business man to adopt in connection with a business transaction.

Having received no reply to the notarial notice, the sellers brought their action seeking to recover the price of the goods.

The District Court held that the price could not be recovered and that, if the sellers had a claim, it was for damages for breach of contract, but it held that, having regard to the unreasonably long period which has elapsed since the contract, the parties must be deemed to have abandoned the contract, and in consequence, gave judgment for the defendant.

In my view the District Court acted upon a right principle (see Pearl Mill Company Ltd. v. Ivy Tannery Company Ltd.*, on page 28 of Vol. 120 of the L.T.R.) and this appeal should be dismissed with costs and advocate's fees LP.3.—

Delivered the 23rd day of April, 1937.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 80/36.

BEFORE:

The Senior Puisne Judge (Manning, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Yonina Shlank — APPELLANT.

v.

Mahmoud Muhammad el Bahloul — RESPONDENT.

Contract for sale of oranges alleged to be money lending transaction — Usurious interest — Admissibility of evidence of parties and of strangers — Application and interpretation of Usurious Loans Ordinance — "Defendant" in Article 80, Ottoman Code of Civil Procedure construed in loose sense of person resisting claim — Meaning of "sanad" — Sec. 12, Law of Evidence Ordinance, 1924 — Sec. 6, Evidence Ordinance — Evidence of system admissible in civil cases on same principles as in criminal law.

Appellant and respondent made a written contract by which respondent was to deliver oranges to appellant and appellant paid monies to respondent on account of the purchase price. Respondent having failed to deliver the oranges appellant sued for the return of the monies advanced and for damages for breach. Respondent pleaded that the contract was in reality a loan of money to him by appellant at usurious interest. The District Court heard witnesses as to the nature of the transaction and having held that it was in effect a money lending one at usurious interest and that the money lent should be repaid and the claim for damages dismissed the appellant appealed to the Court of Appeal. Appellant argued

* E. & E. Dig. Vol. 12, p. 351.

on appeal that the court below erred in hearing witnesses to show that the contract was in effect a money lending transaction, since under the law of Palestine only parties to the action may be called against a written document.

HELD: that although Article 80 of the Ottoman Code of Civil Procedure renders inadmissible the oral evidence of witnesses called to contradict an instrument in writing, yet under the Usurious Loans Ordinance where any transaction is alleged to be a money-lending one, a Court is entitled to disregard the form and to hear the evidence of witnesses as to the realities of the case, even if the moneylender bases his claim on an instrument in writing. It is implicit in the Usurious Loans Ordinance that when a transaction is not in form one of moneylending, but is alleged to be so, the party so alleging should be allowed to call witnesses other than the opposite party to support his allegation, even if the other party is relying on a document in writing.

HELD ALSO: that although evidence of system is generally considered in relation to criminal law yet it may be admitted in civil cases on the same principles and for the same reasons.

Appeal from the judgment of the District Court, Jaffa, dated 12th day of April, 1936.

Levitsky — for appellant.
Respondent in person.

JUDGMENT.

On the 26th November, 1933, the appellant and the respondent entered into a written contract by which the respondent agreed to deliver to the appellant 800 boxes of oranges at a price of 110 mils per box. At the time the contract was made the respondent received from the appellant a sum of LP.60 and it is alleged that he received at various later dates sums which amounted in all to LP.23. The respondent failed to deliver the oranges and the appellant sued him in the District Court of Jaffa for LP. 83 money advanced and for damages for breach of contract.

In his statement of defence the respondent pleaded that though the transaction was in form a contract for the sale of oranges, yet it was in reality a loan of money to him by the appellant, and a loan at usurious interest. He said that the LP.60 advanced was a loan, and that he had to pay LP.4 per month as

interest. The further LP.23 alleged to have been advanced were not advanced at all, they were sums due for interest which he failed to pay. He also appears to have pleaded that he had repaid the amount of LP.60 advanced, though I cannot find this categorically stated in his written defence.

There were thus two issues before the District Court, firstly, whether the respondent had repaid the LP.60, and secondly whether the contract was a fictitious one to cover a loan at usurious interest. The Court tried these issues separately, and on the first one came to the conclusion that it was not satisfied that the LP. 60 had been repaid.

The Court seems to have been somewhat confused as regards the second issue. It ruled first that the Usurious Loans Ordinance was not applicable to contracts. Then it ruled that the respondent himself might give evidence and call the appellant as a witness. And later it ruled that the respondent might call witnesses on the issue, in spite of the appellant's objection. The respondent called his witnesses and the Court decided that the transaction was a money lending one at usurious interest. It consequently rejected the appellant's claim for damages but gave judgment in her favour for the sum advanced with interest at the legal rate.

The appellant has appealed. One curious thing about the proceedings in the Court below was that neither of the parties gave any evidence and Mr. Levitsky, who argued the appeal on behalf of the appellant, complained that his client's evidence had not been heard. There is nothing however to indicate that the appellant desired to give evidence and she has no justifiable complaint on that score.

Mr. Levitsky does not deny that the Court below had jurisdiction to sift the nature of the agreement between the parties, even though its form was that a contract for the sale of oranges. He urges, however, that the Court below erred in allowing witnesses to be called by the respondent to show that the contract of sale was in reality a money lending transaction.

He agrees that the respondent might himself give evidence and might call the appellant as a witness, but says that the present state of the law in Palestine does not allow any other witnesses to be called.

The first provision to be considered is Section 3 of the Usurious Loans Ordinance, No. 20 of 1934. This is as follows:

"In any proceedings for the recovery of money lent and in any proceedings under sub-section (2) of section 2 of this Ordinance, a court may receive any evidence whether parol or written by any person in regard to the rate of interest charged notwithstanding any provision of the law relating to the admissibility of evidence or the competency of witnesses."

It will be noticed that the exception made is only with regard to the rate of interest charged. The section recognises that the local law restricts the admission of parol evidence in certain cases, but makes an exception with regard to the admissibility of such evidence as to the rate of interest. But it makes no exception as regards the admissibility of oral evidence to show the nature of the transaction. The section does not afford any assistance in deciding the issue at present before us.

The relevant provision of the Ottoman law is Article 80 of the Ottoman Code of Civil Procedure, This is as follows:—

"Claims based upon a contract, agreement, partnership, lease or debt, which by law or custom are reduced to writing and which exceed 1,000 piastres in value must be proved by a sanad.

"Every claim disputing liability under a sanad shall be proved by a sanad, or by the admission or account books of the defendant, even if the amount in question does not exceed 1,000 piastres."

Mr. Levitsky cited an authority as to the effect of this article, viz, the case of Rein v. Flint*, reported on page 133 of Mr. Hooper's Civil Law of Palestine and Trans-Jordan, Vol. II. In that case the Court said "The general rule under the Civil Procedure Code, Article 80, is clear: namely that an agreement varying an agreement in writing must be proved by evidence in writing or by the admission of the defendant or his account books. In the absence of written evidence, therefore, we have to see whether there was an admission by the appellant." The Court then considered the evidence and found there had been an admission by the appellant, who happened to be the plaintiff in the case. I am informed by my brethren, however, that the word "defendant" in Article 80 is not to be construed strictly, and that it has always

* C. of J. Vol. 3, p. 801.

been construed in the loose sense of a person resisting a claim, whether that person be the plaintiff or defendant in the action.

The word "sanad" means an instrument in writing, and the effect of the last part of Article 80 was therefore as stated in the Rein case (supra), that if a person wished to resist a claim based on a written instrument, he had to rely either on another written instrument, or on an admission by the opposite party. He was precluded from calling oral evidence to contradict the terms of the sanad.

Certain changes were made by legislation and the only one necessary to consider is section 12 of the Law of Evidence Ordinance, No. 13 of 1924 which was the law in force when the present case was being tried. That section now appears as sections 13 and 14 of the Evidence Ordinance (Vol. 1, Laws of Palestine, page 673). It reads as follows:

> "12. Subject to the provisions of this Ordinance, any person may be summoned to give evidence which is admissible and relevant to the case, subject to the discretion of the court to refuse to issue a summons which may be unnecessary or which may appear to be demanded for some other purpose than the elucidation of the truth.
>
> In a civil case, either party may give evidence on his own behalf or be summoned to give evidence for the other party."

The effect of the first part of the section was to allow persons to give evidence which is admissible and relevant to the case. Article 80 of the Ottoman Code of Civil Procedure renders inadmissible the oral evidence of witnesses called to contradict an instrument in writing, and consequently the section does not help the respondent.

I have set out the law relating directly to the right of a party to call witnesses in a case such as the present, where that party desires to prove that a document which purports to be a contract for the sale of oranges is not such a contract at all, but is merely a cloak to cover a loan of money at usurious interest. The law is in favour of Mr. Levitsky's contention that witnesses should not be heard. It is a strong point in his favour that section 3 of the Usurious Loans Ordinance (set out above) makes an exception as to evidence as to the rate of interest but makes no exception as to evidence concerning the actual nature of the tran-

saction. But, in spite of this, I am unable to accept the proposition that in a case such as this the defendant is precluded from calling oral evidence to show the real nature of the transaction. One has to consider the object of the Usurious Loans Ordinance. The first part of section 2 deals with proceedings for the recovery of money lent and allows a Court to reopen all accounts between the parties and to give consequent relief to the person sued. Then sub-section 3 enacts as follows:

> "(3) The foregoing provisions of this section shall apply to any transaction which whatever the form may be is substantially one of money lending."

No Court could make use of this sub-section in favour of an oppressed debtor, where the claim is founded on an instrument in writing, unless that debtor was allowed to call evidence to show the real nature of the transaction. He may, of course, give evidence himself, but he should not be obliged to rely on this alone if other witnesses in his favour are available. If a money-lender is clever enough to have a document executed which conceals the fact that the transaction was in reality a loan, he stands in a secure position if Mr. Levitsky's contention is correct. It is not likely that the borrower will be able to produce any documents in his favour or that there will have been any admission by the moneylender. The whole object of the Ordinance would be defective and Courts would be fettered in their inquiries into the real nature of transactions. Sub-section 3 (supra) can only mean that where any transaction is alleged to be a moneylending one, a Court is entitled to disregard the form and to hear the evidence of witnesses as to the realities of the case, even if the moneylender bases his claim on an instrument in writing.

In my opinion, it is implicit in the Usurious Loans Ordinance that when a transaction is not in form one of moneylending, but is alleged to be so, the party so alleging should be allowed to call witnesses other than the opposite party to support his allegation, even if the opposite party is relying on a document in writing.

Mr. Levitsky's next ground of appeal is that the Court below wrongly admitted evidence on this issue. Three witnesses, who knew nothing whatever about this particular transaction gave evidence to the effect that on previous occasions they had borrowed money from the appellant and that on each occasion the transaction took the form of a contract for the sale of oranges. When the loan was repaid the contract was torn up. A fourth witness

said he knew the plaintiff and that it was her practice to lend money at interest and to conceal the nature of the transaction by negotiating with the debtor a contract for the sale of oranges. This witness also knew nothing of the transaction between the parties in this case. The only other witness was a person who said that the appellant had admitted to him that the contract was a contract of security. There can be no doubt as to the admissibility of the evidence of this last witness, but there is a legislative enactment in Palestine, section 6 of the Evidence Ordinance, which forbids a Court to give judgment on the evidence of a single witness. The result would be that, if the evidence of system was wrongly admitted, the Court below erred in deciding the issue in favour of the respondent.

Evidence of system is generally considered in relation to criminal law, but I do not see why it should not be admitted in civil cases on the same principles and for the same reason. In the present case the appellant seeks damages for breach of contract. The contract is there in writing, admitted by the respondent. The breach is also admitted, but the respondent's defence is that the contract was a bogus one to cover a loan at usurious interest. The appellant sticks out for the genuineness of the contract, i. e. she makes herself out as a trader in oranges, innocent of any intention to defeat the effect of the law relating to loans at usurious interest. Evidence of system is allowed to rebut allegations of accident, mistake or an innocent condition of mind; and in my opinion it was rightly received by the Court below in the present case to rebut the allegation that the transaction was an ordinary one relating to the sale of oranges. If the Court below believed it, as it evidently did, it was entitled to rely on it as corroborating the evidence of the witness who testified that the appellant had admitted to him that the contract was a contract of security.

There were no further grounds of appeal and in my opinion, for the reasons already given, the appeal should be dismissed with costs.

Delivered the 20th day of May, 1937.

CO-OPERATIVE SOCIETY.

In the District Court of Haifa.

C.D.C.Ha. No. 75/33.

BEFORE:

The President (Sherwell, J.) and Daoudi, J.

IN THE CASE OF:

Abraham Ben Zeev — PLAINTIFF.

v.

Hadar Hacarmel Haifa Co-Operative Society, Ltd. — DEFENDANT.

Injunction by member against co-operative society — Members of co-operative society bound by its rules and entitled to equal treatment — Discrimination between members of co-operative society.

By a decision of the managing committee of a co-operative society which sold water to its members the society gave a rebate on water supplied to those of its members who regularly paid to the society a levy called "house tax". The rules of the society did not provide for such rebate nor did they give the society power to discriminate between certain classes of members. The plaintiff, a member of the society, refused to pay the "house tax" and claimed that the society should supply him with water at the same rate per cubic metre as it supplied water to other members who paid the "house tax". Plaintiff having applied to the District Court for an injunction to restrain the society from levying the "house tax",

HELD: (a) That all the members were entitled to equal treatment and that plaintiff was therefore entitled to receive water upon terms not less favourable than those upon which the society supplied water to any other member. (b) That the rules of a co-operative society was the contract between it and its members and that decisions of the managing committee were binding only in so far as they accorded with those rules.

Goitein — for plaintiff.
Horowitz — for Defendant.

JUDGMENT.

We are of opinion that

(a) The rules of a co-operative society form the contract between it and its members and all persons claiming through them are bound by the rules;

(b) in the absence of any provision in the rules to the contrary, all members of a co-operative society are entitled to equal treatment;

(c) the decisions of the managing committee of a Co-operative Society are only binding in so far as they are in accordance with the rules.

Applying those principles to the present case, we find that

(i) the rules of the defendant society give it no express power to levy contributions from its members although such power may be inferred from the objects of the society provided that it is exercised solely for the purposes of such objects as are set out in the Rules;

(ii) it is immaterial whether what has been referred to as the "house tax" is or is not valid levy. If it be valid, the defendant Society can enforce it by action in the courts against any member who refuses to pay it;

(iii) the rules of the defendant society give it no power to discriminate between its members, neither do they give to its committee power to make any such discrimination;

(iv) the members of the defendant society are entitled to equal treatment in regard to supply of water, and neither the society nor its committee has power to grant a rebate to one class of members, and refuse it to another.

There will be judgment for the plaintiff with a declaration in his favour that he is entitled to receive water from the defendant society upon terms not less favourable than those upon which it is supplied to any other member. The defendant society will pay the costs of the action including the fee of the plaintiff's advocate which is fixed at £P. 10.

Judgment given in the presence of the parties; subject to a right of appeal.

Delivered the 7th day of March, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 92/33.

BEFORE:

The Senior Puisne Judge (Corrie, J.) Baker, J. and Khayat, J.

IN THE CASE OF:

David Shapira — APPELLANT.

v.

Moshe Moldavsky et al — RESPONDENTS.

Action by co-operative society for damages for breach of contract— Damages claimed personally by representatives of society — Amendment by plaintiff of statement of claim — Article 1650, Mejelle.

A co-operative society, through the three respondents who were members of the society made a contract to sell land to the appellant, the contract containing a provision for damages for breach. An action for damages was taken in the District Court by the society, the statement of claim being signed by the three respondents "as representatives of the co-operative society". The appellant pleaded that the respondents were not authorized to sue on behalf of the society whereupon respondents amended their claim and claimed damages on their own behalf. The District Court having allowed the amendment of the claim and having given judgment for the respondents personally, the appellant appealed:

HELD: Allowing the appeal, that for a plaintiff who had claimed as a representative to amend his claim and claim on his own behalf was contrary to the provisions of Article 1650 of the Mejelle.

Ephrati — for appellant.
Kadury — for respondents.

Appeal from the judgment of the District Court of Jaffa (C.D.C.Ja. No. 382/30) dated the 5th day of November, 1930.

JUDGMENT.

The action which gives rise to this appeal arises out of a contract dated 10th of May, 1925, made between the appellant, David Shapira and others of the first part, and the respondents, Moshe Moldavsky, Joshua Shahor, and Abraham Ratsky representatives of the Co-operative Society Eichud, of the second part; whereby the parties of the first part agreed to sell to the parties of the second part the lands therein specified.

By their Statement of Claim the respondents therein described as "representatives of the Co-operative Society Eichud," claimed damages for breach of this agreement.

In the District Court, the appellant raised the question whether the respondents were authorised to sue on behalf of the Society; and the respondents thereupon amended their claim and claimed damages on their own behalf; and judgment was given in their favour.

We hold that this judgment cannot stand. For a plaintiff who has claimed as a representative to amend his claim and claim on his own behalf, is clearly contrary to the provisions of Article 1650 of the Mejelle.

The appeal must be allowed, the judgment of the District Court set aside and the respondents' claim dismissed, with costs here and below.

Delivered the 12th day of April, 1935.

In the District Court of Jaffa sitting as a Court of Appeal.

C.A.D.C.Ja. No. 135/35.

BEFORE:

The President (Copland, J.) Shehade, J. and Mani, J.

IN THE CASE OF:

Joseph Shneiderman — APPELLANT.

v.

Haspaka Co-operative Society Ltd. — RESPONDENT.

Co-operative society — Admissibility of oral evidence to prove membership in co-operative society.

The respondent society sued the appellant for money due on promissory notes and on an open account which the society claimed was in consideration of membership in the society. Appellant admitted on examination that he had participated at meetings of the society, that his name appeared on the register of members and that he had paid fees but pleaded that he was not a member since he had never signed an application in accordance with the rules of the society. The magistrate after hearing oral evidence as to membership decided that appellant was in fact a member. On appeal,

HELD: That the magistrate was wrong in hearing oral evidence as to whether appellant was a member since no person may be considered a member of a co-operative society unless he has joined in the original application for registration or has been duly admitted to membership.

Dickstein — for appellant.
Brevdo — for respondent.

Appeal from the judgment of the Magistrate's Court of Tel-Aviv dated the 21st day of January, 1935, whereby appellant was ordered to pay to respondent the sum of £P. 33.864 mils with 3/4 of the costs.

JUGDMENT.

In our opinion no person can be considered as a member of a co-operative society unless he has joined in the application for the registration of the said society or he has been duly admitted to membership after registration in accordance with the rules and regulations.

The Magistrate was wrong in deciding that the appellant was a member of the respondent society on hearing oral evidence alone.

The judgment of the court below is, therefore, set aside and the case remitted for completion.

Delivered the 31st day of March, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 152/35.

BEFORE:

The Senior Puisne Judge, (Manning, J.) and Abdul Hadi, J.

IN THE CASE OF:

Jacob Brook
Moshe Ratnovsky.
Mordekhai Dolgin
(in their capacity as representatives of the Shechunath Hazrifim Maccabee Co-operative Society, Ltd.) APPELLANTS.

v.

Said and Khalil Hallou RESPONDENTS.

Rent due by co-operative society — Members of society named as defendants to action against society — Members not personally liable — Co-operative society a corporate body and must be sued in its own name — Section 21, Co-operative Societies Ordinance.

Three persons who were members of a co-operative society were sued for the rent due from the society, they being cited as representatives of the society.

HELD: That a co-operative society is a corporate body and should have been itself sued in its corporate name, and that the parties who represent it cannot be sued.

Appeal from the judgment of the District Court of Haifa, dated the 18th June, 1935.

JUDGMENT.

The respondents sued the appellants for rent due by a co-operative society, citing the appellants as representatives of the society. Their statement of claim and all the arguments in the court below and on the hearing of this appeal made it clear that the party responsible for the rent, if any, was the co-operative society.

By Section 21 of the Co-operative Societies Ordinance such a society is a body corporate. As such it must be sued in its corporate name and the parties who represent it cannot be sued.

This objection was taken in the Court below but was apparently decided against the appellants, against whom judgment was given for £P. 100. The point has again been raised before us. We think the objection is a fatal one. It is clear that the society itself should have been made the defendant and that the persons actually made defendants could not be sued.

The appeal is allowed. The judgment of the Court below is set aside with costs here and below. Costs here to include £P. 3 advocate's fees.

Delivered the 19th day of November, 1936.

In the High Court of Justice.

H. C. No. 35/36.

BEFORE:

The Chief Justice (McDonnell, C. J.) and Khayat, J.

IN THE CASE OF:

The Ahuza Sir Herbert Samuel Co-operative Society Ltd. — PETITIONER.

v.

The Registrar of Co-operative Societies — RESPONDENT.

Annual general meeting of co-operative society—Necessity of licence of District Commissioner for convening of non-political meeting — Sec. 34 (2), Police Ordinance, 1926 — Powers of committee of management to postpone adjourned meeting of society — No duty on Registrar of Co-operative Societies to accept copy of minutes — Secs. 14, 15 and 18, Co-operative Societies Ordinance, 1933 — Sec. 2 (c), Co-operative Societies (Forms and Returns) Regulations, 1934.

The managing committee of a co-operative society postponed an adjourned annual general meeting of the society because the consent of the police to the meeting could not be obtained. A group of members of the society published a notice in the press that the meeting would be held as convened since consent of the police was not required by law. This group of members actually held the meeting, removing the old committee and electing a new one and drawing up minutes which were submitted to the Registrar of Co-operative Societies (the respondent) for registration. The respondent replied that he was not prepared to regard the gathering as an annual general meeting of the Society whereupon an application was made to the High Court for an order nisi calling upon the respondent to show cause why he should not be ordered to accept the said minutes and recognize the meeting as lawful. An order nisi having been granted,

HELD: Upon the return date, discharging the order nisi, (a) that Section 34(2) of the Police Ordinance, 1926, as amended,

which regulates the licensing of meetings applies to meetings for political purposes only. (b) That the adjournment of the adjourned annual general meeting was validly made since Section 18 of the Co-operative Societies Regulations, 1934, which gives the committee power to exercise all the powers of the registered society except those reserved by its rules for a general meeting, must be held to give it power to postpone an adjourned meeting. (c) The proper course for the petitioners, if they desired an early meeting was to present a request to the committee from the number of members specified in the rules of the society in which event the committee would have been compelled to call such meeting. (d) While Sec. 2 (c) of the Co-operative Societies (Forms and Returns) Regulations, 1934, casts a duty upon the committee to forward to the Registrar the minutes of the annual general meeting, it does not appear to cast any duty upon the Registrar.

Smoira and Hilb — for petitioner.
Kantrovitch, J. G. A. — for respondent.

ORDER.

We are satisfied that the Committee was under a misconception, which appears to have been shared by Mr. Cohen, the Acting Superintendent of Police, as to a licence from the District Commissioner being required under Section 34 (2) of the Police Ordinance, 1926, as amended by Section 2 of No. 2 of 1934. This clearly applies to meetings of fifty or more persons for political purposes only.

We hold, however, that Section 18 of the Co-operative Societies Regulations, 1934, which gives the Committee power to exercise all the powers of the registered society except those reserved by its rules for a general meeting, must be held to give it power to postpone an adjourned meeting and we are not satisfied that because according to Fullers Law of Friendly Societies, 4th Edition, p. 310, Smith v. Paringa Mines, Ltd., (1906) 2 Ch. p. 193, has relevance to Section 19 of the Industrial Association Act, 1923, it therefore follows that it governs matters under our Co-operative Societies Ordinance, no section of which tallying verbatim with Section 19 of the Industrial Association Act, 1923, having been pointed out to us.

The petitioners took the law into their own hands and held what they wish to have recognised as an annual general meeting;

the proper course which they should have followed if they desired a meeting to take place early, on the Committee having postponed the adjourned meeting, was to present a request to the Committee from the number of members specified in the rules of the Society in which event the Committee would have been compelled to call such meeting.

For these reasons and also because while Section 2 (c) of the Co-operative Societies (Forms & Returns) Regulations, 1934, casts a duty upon the Committee to forward to the Registrar the minutes of the annual general meeting, it does not appear to cast any duty upon the Registrar, even if he has the minutes forwarded to him by the properly authorised Committee which was not the fact in the present case, we hold that the order nisi must be discharged with costs to include £P.2 advocate's fee.

Made the 31st day of July, 1936.

COURTS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 95/34.

BEFORE:

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

IN THE CASE OF:

Musa Ibrahim Hasboun — APPELLANT.

v.

Farah Yusef el Kassis — RESPONDENT.

Defendant resident abroad temporarily resident in Palestine — Jurisdiction of courts over such defendant.

The respondent, who had immovable property in Palestine but resided permanently in America came to Palestine to defend an action brought against him by the appellant. While in Palestine he was summoned to appear in the District Court in connection with the present action. Respondent pleaded that since he was not permanently resident here but was merely present for a temporary purpose the court had no jurisdiction to hear the action against him. The District Court accepted the plea and dismissed the action. Upon appeal,

HELD: Allowing the appeal, that the court was wrong in refusing to hear the action since the temporary residence was sufficient to vest it with jurisdiction.

Abcarius and Hanania — for appellant.
Moghannem and Amon — for respondent.

Appeal from the judgment of the District Court of Jerusalem dated the 16th day of May, 1934 (C.D.C.Ja. No. 110/32).

JUDGMENT.

On the facts before the lower Court which are not denied by respondent, we are satisfied that respondent has at the present

time a temporary residence at Bethlehem and the lower Court was wrong in deciding they had no jurisdiction.

The judgment of the lower Court must be quashed and the case returned to them to enter into the merits and give judgment.

Respondent to pay the costs of the appeal with advocate's fees assessed at £P.2.

Delivered the 15th day of April, 1935.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 16/35.

BEFORE:

The Chief Justice (McDonnell, C.J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Said Basila Farah — APPELLANT.

v.

Mikhail Farah — RESPONDENT.

Injunction to restrain interference with land — Variation in constitution of Land Court — Matter going to root of proceedings.

An action in the Land Court for an injunction to restrain interference with land was heard in part by the President of the Land Court sitting with one judge. After several sittings and until the end of the case a different judge sat with the President, but the evidence previously recorded was not re-heard.

HELD: That the failure of the newly constituted court to re-hear the evidence was a matter going to the root of the proceedings and invalidating them.

Faragallah — for appellant.
Respondent in person.

Appeal from the judgment of the Land Court of Nablus (L.C. Na. No. 20/33) dated the 27th day of December, 1934.

JUDGMENT.

The proceedings in the Land Court on the 22nd February, 1934, and 14th March, 1934, were before a Court constituted by De Freitas, J. and Ali Hasna, J. On the 17th May, 1934, and onwards the Court was composed of De Freitas, J. and Mohammad Yousef El Khaldi, J.

Evidence was heard on the 14th March, 1934, which was not heard again before the newly constituted court. This goes to the root of the proceedings and invalidates them: the appeal is therefore allowed, the judgment of the Land Court is set aside and the case remitted to the Land Court for rehearing.

Costs to follow the event.

Delivered the 29th day of January, 1936.

In the High Court of Justice.

H.C. No. 50/35.

BEFORE:

The Senior Puisne Judge (Corrie, J.) and Baker, J.

IN THE CASE OF:

Muhammad Ahmad Laban — PETITIONER.

v.

The Director of Lands and Others — RESPONDENT.

Attachment of immovable property ordered by District Court improperly constituted — Duties of Land Registry authorities — Section 11 (1), Courts Ordinance, as amended.

In an action involving the sum of £P. 5000 the District Court, composed of two Palestinian judges issued an order to the Land Registrar to effect an attachment on the property of the petitioner. The petitioner applied to the Director of Lands to order the cancellation of the attachment which, he said, was null

since under Sec. 11 (1) of the Courts Ordinance, 1924, as amended by the Courts (Amendment) Ordinance, 1935, the court which issued the order was improperly constituted, a British judge being required to act as President of the Court. The respondent having refused to comply with the request in the application, the petitioner applied to the High Court.

HELD: Refusing to issue an order nisi that it is not the duty of the Land Registry authorities to enquire into the composition of the District Court by which the order of attachment was made.

Eliash — for petitioners.
No appearance for respondents.

ORDER.

We do not think that it is the duty of the Land Registry authorities to inquire into the composition of the District Court by which the order of attachment was made.

No order will issue.

Delivered the 10th day of May, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 74/35.

BEFORE:

The Chief Justice (McDonnell, C.J.), Corrie, J. and Frumkin, J.

IN THE CASE OF:

Zalman Goldberger et al — APPELLANTS.

v.

Shmuel Z. Spitzer et al — RESPONDENTS.

Injunction: o restrain interference with charitable trust — Section 29 (2), Charitable Trusts Ordinance — Variation in constitution of District Court — Waiver of right to recall witness before newly constituted court — Matter going to root of proceedings.

The respondents, who claimed that they were the lawful trustees of a certain charitable trust applied to the District Court under Section 29 (2) of the Charitable Trusts Ordinance, 1924—1925, for an injunction restraining the appellants from interfering with the management of the trust. An interim order was granted and when the action came on for hearing it was heard by a court constituted differently to the court which gave the interim order. Before the case was finally disposed of the constitution of the court was again altered and in neither instance of alteration did the court re-hear the evidence previously recorded. The District Court having found that the respondents were in fact the lawful trustees issued an order restraining the appellants from interfering. Upon appeal, the appellants relied on Farah v. Farah, L.A. No. 16/35 [1]) and argued that the proceedings were invalidated by the change in the constitution of the court. The respondent contended that it was the duty of the appellants to move the court for a re-hearing of such evidence, and since they had failed to do so they should be held to have waived their rights to object to the constitution of the court.

HELD: In the absence of anything upon the record to show any waiver of the right to a rehearing of the evidence upon a

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[1]) See ante p. 206.

variation in the constitution of the court such a variation is a matter going to the root of the proceedings and invalidating them.

Goitein — for appellants.
Auster — for respondents.

Appeal from the judgment of the District Court of Jerusalem (C.D.C.Jm. No. 85/34) dated the 3rd day of April, 1934).

JUDGMENT.

In the absence of anything upon the record to show any waiver of the right to recall the witness in question and cross-examine him, we hold that this is a case which is governed by the judgment in L.A. 16/35[1]) in which evidence having been heard by a court constituted by certain judges was not re-heard by the court when constituted by other judges: and this was held to go to the root of the proceedings and to invalidate them.

We must, therefore, set aside the judgment of the District Court and remit the case for rehearing.

Costs to follow the event.

Delivered the 30th day of June, 1936.

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[1]) See ante p. 206.

CRIMINAL LAW.

In the District Court of Jaffa sitting as a Court of Criminal Appeal.

CR.A.D.C.Ja. No. 96/32.

BEFORE:

The President (Copland, J.), Mani, J. and Nammar, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

v.

Shlomo Dzigansky — RESPONDENT.

On the 27th May, 1928, the accused, an employee in the Post Office stole a packet of precious stones from the mails. In May, 1931, he was arrested in connection with another theft of LP.7000. and in the course of a statement to the police confessed to the committal of the previous theft. In June, 1932, the accused was prosecuted before the Chief Magistrate for having in his possession on the 13th and 14th of May, 1931, property suspected of being stolen contrary to Section 7 of the Criminal Law Amendment Ordinance (No. 2) of 1927. The learned Magistrate held that the evidence disclosed a case of larceny which was a greater offence than that charged and that the charge of unlawful possession was absorbed in it. He accepted the plea of prescription to the charge of larceny under Articles 481 and 482 of the Ottoman Code of Criminal Procedure and acquitted the accused. Upon appeal by the Attorney-General,

HELD: that a Magistrate is bound by the charge which is before him, and if the facts adduced are sufficient to prove the charge, the Magistrate is not entitled to say that the evidence before him* established a different charge and that the Attorney-General should proceed on that charge.

Appeal from the judgment of the British Magistrate's Court, Tel-Aviv, dated 27th June, 1932, dismissing a charge of being in possession of movable property suspected of being stolen property

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* See also Fakhouri v. Attorney-General, CR.A. No. 97/37, Palestine Post Sept. 22, 1937.

contrary to Section 7 of the Criminal Law Amendment Ordinance (No. 2) 1927, preferred against the respondent.

JUDGMENT.

This is an appeal from a decision given by the British Magistrate sitting in Tel-Aviv, wherein he acquitted the respondent of a charge under Section 7 of the Criminal Law Amendment Ordinance (No. 2) 1927.

The facts of the case are perfectly clear beyond any shadow of doubt. The respondent used to be a postal clerk employed in the Post Office, Jaffa, and admits that in May, 1928, he had taken a packet containing emeralds in course of transmission through the Post, the value of which is about £P. 10,000. We agree as to the findings of fact made by the Magistrate so far as the details are concerned.

The Magistrate, who in the course of the proceedings, seems to have been in doubt as to whether he was sitting as a Magistrate or Examining Magistrate, states that the evidence before him discloses a case of larceny, and as this offence of larceny became prescribed having been committed more than three years before the charge was brought, he had no jurisdiction to try the case.

The only charge against the respondent which had been laid before the Magistrate was a charge under Section 7 of the Criminal Law Amendment Ordinance (No. 2) 1927, which states "Any person who has in his possession any movable property which is reasonably suspected of being stolen property shall, unless he establishes to the satisfaction of the Court that he acquired the possession lawfully, be liable on conviction to imprisonment not exceeding six months or to a fine not exceeding fifty pounds."

Now, the decisive point in this case is this: Has the Magistrate the power to compel the prosecution to proceed with any charge which he thinks fit but which the prosecution does not wish to bring, or in other words, has the Magistrate power to compel the Attorney-General to charge a person with a particular offence which he (the Magistrate) thinks should be brought. To give an example: A man who is stabbed by another is ill for a period of one month. He then recovers but two months later he dies from the effects of the wounds. For various reasons, perhaps the difficulty in proving a case of murder, the Attorney-General thinks fit to charge the accused of simple wounding under Article 178.

Has the Magistrate any power to refuse to try the case and order that the charge should be made under Article 174? We do not think that he has any such power.

In my opinion a Magistrate when sitting in a Magistrate's Court is bound by the charge which is before him, and if the facts adduced are sufficient to prove the charge, the Magistrate is not entitled to say that the evidence before him established a different charge and that the Attorney-General should proceed on that charge.

In this case the facts are clear. The respondent was in possession of these emeralds. They were not only reasonably suspected of being stolen, but admittedly they were stolen because the respondent himself stated that they were stolen. The facts necessary to establish a charge under Section 7 of the Criminal Law Amendment Ordinance (No. 2) 1927, were, therefore, present. It is also true that the facts support another charge but neither the Magistrate nor we are concerned with this.

We therefore hold that the Magistrate was wrong in his appreciation of the law. We quash the Magistrate's judgment and enter a conviction against the respondent on the original charge under Section 7 of the Criminal Law Amendment Ordinance (No. 2) 1927.

As regard the sentence, in the circumstances of the case, knowing that the accused is undergoing a long term of imprisonment, any sentence which we can pass must be a nominal one, and we have therefore decided to pass a sentence of three months imprisonment to run concurrently with the rest of the sentence which the accused is at present serving.

Delivered the 12th day of October, 1932.

In the District Court of Jaffa sitting as a Court of Appeal.

CR.A.D.C.Ja. No. 12/34.

BEFORE:

The President (Copland, J.), Mani, J. and Shehadeh, J.

IN THE CASE of:

Shlomo Zlotopolsky and Others — APPELLANTS.

v.

The Attorney-General — RESPONDENT.

Unlawful assembly — Refusal to disperse when ordered by police — Power of Attorney-General to charge lesser offence if he thinks fit—Section 24, Criminal Law (Seditious Offences) Ordinance, 1929.

The appellants who were convicted by the Chief Magistrate for taking part in an unlawful assembly, appealed to the District Court on the ground, inter alia, that the Magistrate, having found that the disturbance amounted to a riot, had no power to deal with the case, but should have committed the appellants for trial before the District Court.

HELD: That it is an inherent power of the Attorney-General to charge a lesser offence if he thinks fit and he cannot be compelled by a magistrate to lay a higher charge which the facts disclose.

HELD ALSO: That where a magistrate differentiates between various accused in the matter of punishment, it would be of assistance to the Court of Appeal if he would indicate his reasons for the differentiation.

JUDGMENT.

The appellants have all been convicted by the Chief Magistrate of taking part in an unlawful assembly contrary to Section 24 of the Criminal Law (Seditious Offences) Ordinance, 1929, and sentenced to various punishments ranging from probation to six months hard labour.

On appeal it is argued in the first place that this was not an unlawful assembly. It is said that the Police had no power to order the dispersal, since permission had not been asked for the procession. In other words a procession which violates certain conditions under which it has been authorised is unlawful and may be dispersed, whilst a procession for which no permission whether subject to conditions or not has been given or demanded is not unlawful and can never be interfered with.

The absurdity of this argument is apparent. The Chief Magistrate was right in holding that the procession was unlawful. As to the moment at which it became unlawful it certainly was so from the moment when it was ordered to disperse and began resisting the Police — it was probably unlawful from a very much earlier moment — it is not however necessary to go into this for the purposes of the present case.

It is further said that a procession is not an assembly. I fail to appreciate the argument — a procession is an assembly or gathering of persons which is moving, but a crowd whether moving or stationary is still an assembly. There is no doubt in my mind after reading the evidence that it was an unruly and disorderly crowd, and the Police, whose duty it is to maintain order in the streets, were fully justified in calling upon it to disperse, and to effect that dispersal.

Another argument is that the Magistrate, having found that the disturbance amounted to a riot, had no power to deal with the case, but should have committed the appellants for trial before the District Court. It is however an inherent power of the Attorney-General to charge a lesser offence if he thinks fit, and he cannot be compelled by a Magistrate to lay a higher charge which the facts may disclose. This has been so held by this Court in its appellate capacity in the case of the Attorney-General v. Djigansky.*

From the evidence, the appellants might easily have been charged with riot — many of them might equally well have been charged under Article 114 of the Ottoman Penal Code with assaulting the Police. The Attorney-General has not seen fit so to charge them, and that is a matter entirely within his discretion.

As to the merits, I have carefully analysed the evidence against each of the appellants and there is in every case ample evidence to support the convictions. It is suggested in the case of

* See next preceding judgment.

some of the appellants that they were there in the crowd accidentally. There is however evidence that all the appellants were taking an active part either by inciting, stone throwing or assaulting the Police. That being so, we see no reason to interfere with the convictions.

Now to turn to the question of the appropriate sentences. Here I must confess that I have had considerable difficulty in appreciating the motives which have animated the Chief Magistrate in differentiating between the various appellants in the matter of punishment. In some cases I have frankly found it impossible. I am therefore compelled to take each case on its merits and assess what is appropriate. In any future cases it would considerably assist this Court if the magistrates would indicate their reasons for differentiating where such reasons are not self-evident.

I divide the appellants into three main classes — those who were the leaders, those who are proved to have assaulted individual members of the Police Force, and those whose activities, so far as they are on record, were confined to throwing stones and behaving in a disorderly manner.

In the first class I place Nos. 2 and 3, Benzion Shoshani Rosenberg and Joseph Galili Horowitz. The first of these two was carrying the banner, leading the crowd and assaulted 3 individual Police Officers, Weissenger, Excell and Berger. The second seems to have been the principal leader — he incited the crowd against the Police, was throwing stones and behaving in a violent manner. Rosenberg was sentenced to 5 months and Horowitz to 6 months by the Chief Magistrate. They will each of them serve a sentence of 3 calendar months with hard labour.

In the second category there come Nos. 1, 4, 5, 6, 8, 14 and 15, Shlomo Zlotopolsky, Izhac Perkol, Menahem Likverman, Zvi Feinberg, Eliezer Lieberman, Benjamin Portugaly, and Joel Caspy. Zlotopolsky committed a violent assault on Constable Excell in conjunction with Feinberg and others. Perkol took charge of the banner at one time and was also stoneing and acting as a leader, though a somewhat minor one. Likverman was inciting the crowd and throwing stones and assaulted Police Inspector Goffer. Lieberman's case is the same as Likverman, only he assaulted Mr. Schiff in addition to Mr. Goffer. Portugaly was stone-throwing and committed a violent assault on Constable Law Smith, whilst Caspy was conspicuous in stone throwing and acting violently generally. The Chief Magistrate's sentences were as follows:

Zlotopolsky 2 months, Perkol 4 months, Likverman 3 months, Feinberg 2 1/2 months, Liberman 4 months, Portugaly 6 months and Caspy 6 months. To my mind they are all on the same level, and all are guilty of practically similar offences. Each of them with the exception of Caspy will go to prison for 2 calendar months with hard labour. Caspy, on account of the fact that he is under 18, having attained the age of 17 in August 1933, will do one calendar month with hard labour.

In the last category we have Nos. 7, 10, 11, 12 and 13, Arieh Kaplansky, Dov Shneider, Shabatai Mizrachy, Shemuel Tabashnik, and David Linsky. The Chief Magistrate sentenced them respectively to 2 months, 2 months, 1 1/2 months, probation for one year, and 4 months. Again it is difficult to see the reason for these varying sentences, for in each of these cases the evidence is that they were stone throwing or inciting. None would appear to have been guilty of any actual physical act of assault on an individual policeman. The sentences of imprisonment on Kaplansky, Shneider, Mizrachy and Linsky are quashed, and fines of £P. 3 and costs or in default one month's imprisonment are substituted. Tabashnik's sentence of probation for one year is confirmed, but the surety is reduced to one of £P. 10.

In each case we direct that none of the appellants shall be released on penal labour.

In the District Court of Jerusalem.

M.D.C.Jm. No. 31/36.

BEFORE:

The President (Plunkett, J.).

IN THE CASE OF:

The Attorney-General

v.

Hassan Sidki Dajani
Saleh Abdu ACCUSED.

Publication of seditious document — Sec. 9 (b) and (c), Criminal Law (Seditious Offences) Ordinances, 1929-1932 — Section 3, Criminal Law Amendment Ordinance (No. 2), 1927.

The accused were prosecuted for having published a document containing matter with seditious intention, and, in particular, a paragraph advocating that Government officials should go on strike and also the non-payment of taxes.

HELD: That the document was calculated to encourage others to public disobedience and therefore seditious.

For the Attorney-General — Inspector Abdul Samad.
For the accused — Abcarius, Atallah & Cattan.

JUDGMENT.

The charge before this Court upon which the accused are being tried, is one of sedition: publishing documents with seditious intent contrary to Section 9 (b) and (c) of the Seditious Offences Ordinance, 1929, and Amendment of 1932 and Section 3 of the Criminal Law Amendment Ordinance (No. 2), 1927.

A second count under the Unlawful Instigation Ordinance, 1933, was withdrawn by the prosecution before the hearing of the case. It was contended by the defence at the conclusion of the case that there is no offence except a possible charge contrary to the Unlawful Instigation Ordinance, 1933, and that according to this Ordinance, there must be a notice published by the High

Commissioner and that no such notice had been published on or before the 2nd May, the date upon which the document PII was seized. Apparently the notice relative to the Unlawful Instigation Ordinance, 1933, was not published until the 5th May, (Gazette Extraordinary No. 590), and consequently the alternative charge two has rightly been withdrawn by the prosecution. I cannot agree, however, with the belated suggestion by the defence that there is consequently no offence contrary to the first count in the charge.

I hold that the first count in the charge is properly framed in respect of the document PII. It now remains to be decided whether or not according to the construction of this document and the evidence produced, either of the accused or both of them are guilty of an offence contrary to the Seditious Offences Ordinance, 1929.

Evidence has been led by the prosecution and not contradicted by the defence that the document PII was seized in the offices of accused No. One, Hassan Sidki Dajani, from a file headed "The Car Strike Committee, Jerusalem".

That some 2000 copies of this document were printed at his instigation by the Commercial Press, partly on the 2nd and remainder on the 3rd May. The Secretary of the Supreme Arab Committee, Auni Bey Abdul Hadi, admits the receipt of a copy of PII which was, he says, read over formally to this committee but was not discussed.

It is further contended that PII is a seditious document within the meaning of the Seditious Offences Ordinance, 1929, and amendment No. 42 of 1932, in that the document as a whole is seditious, reference is made to several paragraphs and in particular to the paragraph advocating Government officials to strike and the non-payment of taxes. That the payment of taxes is by law established under the Collection of Taxes Ordinance, No. 26 of 1929, and further that there is an incitement to Government officials to strike which in itself is illegal and unlawful.

The defence maintain that there is no 'alteration' contemplated and therefore no offence and if taxes are not paid there is a civil remedy. There is nothing in the proposal in PII per se which is seditious. No evidence that this document has in any way excited any member of the public. Reference to Roscoe's Criminal Evidence XV, Edit., page 807. Further, that many similar publications were made prior to May 2nd and various newspapers are produced in

support of this statement. That PII, is not a "Manifesto". It is a proposal from one committee to another. There is nothing seditious in calling upon the Government officials to strike. As regards Accused No. Two nothing has been proved against him.

Accused No. Two. Saleh Abdu has not denied his signature. In fact further, counsel for the defence admitted in Court that both accused signed the document PII.

As regards publication, apart from the admission of receipts of copy of PII, by the Secretary of the Arab Supreme Committee, the document itself admits publication in the middle of the paragraph which, for convenience, I have numbered 2 of the translation of PII. "We now publish the memo which we have submitted to the Arab Supreme Committee."

Were this document merely an expression of opinion there might be something to be said for the argument put forward by the defence but it is not. It is written in clear language, calculated to advocate others to public disobedience. Para 5 "The High Committee of the Car Strike in Jerusalem ask you.... to move the.... (1) To declare the necessity of Government officials going on strike. (2) To declare to the nation the necessity of abstaining from paying taxes, etc." finishing in para 4 with a veiled threat if their wishes are not carried out.

It cannot therefore be considered that this document is other than seditious.

Accused are found guilty of publishing this document PII which is a seditious document and published with a seditious intent contrary to Section 9 (b) and (c) of the Seditious Offences Ordinance, 1929, with amendment thereof of 1932 and Section 3 of the Criminal Law Amendment Ordinance, (No. 2), 1927.

It seems clear that certain publications containing similar proposals were made prior to the publication of this particular document and this to some extent, as far as the effect upon the minds of the public is concerned, should be taken into consideration.

Accused are sentenced each to a fine of £P.25 or six months imprisonment with hard labour.

Delivered this 18th day of May, 1936.

CRIMINAL PROCEDURE.

In the Supreme Court sitting as a Court of Appeal.

A.A. No. 2/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Baker, J., Khaldi, J., and Khayat, J.

IN THE CASE OF:

Mohammad El Ghazawi
Salah Abu Akel — APPELLANTS.

v.

The Attorney-General — RESPONDENT.

Appeal from conviction for murder — Signature by unauthorized person of certificate of laboratory test and analysis — Such certificate wrongly admitted as evidence — Statement of accused as evidence against co-accused — Amendment of information — Opportunity to defendant to call further evidence — Miscarriage of justice not occasioned by error in procedure — Proof of age by X-Ray examination — Death sentence not passed on young offender — Article 170, Ottoman Penal Code — Section 3, Criminal Law Amendment Ordinance, (No. 2), 1927 — Section 7, Criminal Procedure (Evidence) Ordinance, 1927 — Sections 29, 35, 37, 62, 68 (a), Trial Upon Information Ordinance, 1924 — Section 3, Young Offenders Ordinance, 1922.

In a prosecution for murder a certificate made in reliance on Section 7, Criminal Procedure (Evidence) Ordinance, 1927, by the Medical Officer of the Central Laboratories setting out an analysis of blood found on a pair of shoes was received in evidence without the Officer being called as a witness. The Court also considered the varying confessions of one accused as evidence against the other accused. The accused, having been sentenced to death by the Court of Criminal Assize, appealed to the Court of Appeal. Upon appeal,

HELD: (1) That the certificate was not a certificate purporting to be issued by and under the hand of the officer for the time-

being in charge of the Government Laboratory as required by Section 7 (1) of the Criminal Procedure (Evidence) Ordinance, 1927, and hence was not admissible under that section. Since, however, the defence made no objection at the trial to the production of the certificate in evidence, the Court of Appeal called the Officer before it as a witness to substantiate the facts alleged in the certificate and to give the defence an opportunity to cross-examine him. (2) That no statement made by an accused person previous to the trial or before a Magistrate or at the trial may be used as evidence against another accused person except when made on oath pursuant to Section 37 of the Trial Upon Information Ordinance, 1924.

HELD ALSO: That when, after hearing the evidence, the court forms the opinion that the facts proved against the accused brought them within the scope of another article of law, the proper procedure is for the court, before giving judgment, to amend the information by virtue of Section 29 of the Trial Upon Information Ordinance, 1924, and to afford the defence the opportunity of calling further evidence, recalling any witnesses for further cross-examination or making any submission to the court.

HELD ALSO: That where the trial court commits an error in procedure, which, however, occasions no miscarriage of justice such error is not sufficient ground to substantiate an appeal under Section 62 of the Trial Upon Information Ordinance, 1924.

For the first appellant — Asfour.
For the second appellant — Abcarius and El Madi.
For the Attorney-General — Ghussein.

Appeal from the judgment of the Court of Criminal Assize sitting at Haifa (A.Ha. No. 6/33).

JUDGMENT.

The Appellants, Muhammad Abdallah El Ghazawi and Salah Abdul Karim Abu Akel, have been convicted by the Court of Criminal Assize under Article 170 of the Ottoman Penal Code and Section 3 of the Criminal Law Amendment Ordinance (No. 2), 1927, of the premeditated killing of Mustafa Mahmud El Ghazawi.

The first question arising out of this appeal relates to the evidence tendered by the prosecution to prove that certain articles, namely, clothing of the accused, Muhammad, a pair of shoes found

in the house of the accused, Salah, and a stick were stained with human blood.

At the commencement of the trial, the prosecution in reliance upon Section 7 of the Criminal Procedure (Evidence) Ordinance, 1927, asked the Court to accept a certificate by the Medical Officer of the Central Laboratories without requiring him to be called as a witness, and this was allowed by the Court.

It is extremely unfortunate that the prosecution, in making this application, did not direct the attention of the Court to the fact that Dr. Said Dabbagh, the officer by whom the certificate was given, signed the report as "Medical Officer, Central Laboratories" and not as Officer in charge of the Laboratories, a position which he did not in fact hold. It follows that the certificate in question was not "a certificate purporting to be issued by and under the hand of the officer for the time being in charge of the Government Laboratory," as required by Subsection (1) of Section 7, and hence was not admissible evidence under that section.

Again it is most unfortunate that the prosecution, while giving notice of the certificate to the accused, Muhammad, failed to notify the accused, Salah, that they proposed to use it without calling Dr. Dabbagh.

Neither of these objections, however, to the admission of the certificate in evidence was taken by the defence at the trial, and, under the circumstances, this Court has decided that the proper course was to exercise the power conferred upon it by Section 68 (a) of the Trial Upon Information Ordinance, 1924, and to hear the evidence of Dr. Dabbagh. Accordingly, Dr. Dabbagh has given evidence in the Court substantiating the facts alleged in his certificate, and the defence have had an opportunity of cross-examining him.

As regards the accused, Muhammad, there is ample evidence that he took part in killing Mustafa, and that this was done with premeditation.

As regards the accused, Salah, the defence have raised the point that the Court of Criminal Assize, in its judgment, said:

> "The varying confessions of the first accused (Muhammad), while admitting his presence within earshot of the crime, are also evidence against the second accused (Salah),"

and that this is clearly contrary to the last paragraph of Section 35 of the Trial Upon Information Ordinance, 1924, which provides

that "no statement made by an accused person at any time before a Magistrate or at the trial may be used as evidence against any other accused person except when made on oath in pursuance of Section 37."

The Section makes no express reference to statements made by an accused person previous to the trial, but it is clear that on the principle laid down by the Section, these cannot be used in evidence against any other accused person. It follow that the Court of Criminal Assize was in error in referring to the varying confessions of the accused, Muhammad, as being evidence against the accused, Salah.

At the trial, however, the accused, Muhammad, went into the witness box and made a statement on oath in accordance with Section 37 of The Trial Upon Information Ordinance, 1924, and in that statement incriminated Salah.

With that statement before it, corroborated as to certain particulars by the evidence of Balkis and Ayesha, together with evidence of motive and of the finding in Salah's house of a pair of shoes stained with human blood of which no explanation has been given, we hold that the Court had evidence before it on which it could find the accused, Salah, guilty of having taken part in the premeditated killing of Mustafa Mahmud El-Ghazawi.

There remains the question of the provisions of the law which are applicable. The accused were charged under Article 170 of the Penal Code. At the commencement of the trial, the defence took the objection that two persons could not be charged under Article 170 with killing one person. The Court overruled this objection and refused the application made by the prosecution that the information should be amended by adding a reference to Section 3 of the Criminal law (Amendment) Ordinance (No. 2) 1927. At the close of the trial however, the two accused were found guilty under Article 170 and Section 3.

We hold that when, after hearing the evidence, the Court formed the opinion that the facts proved against the accused brought them within the scope of Section 3, the proper procedure was for the Court, before giving judgment, to amend the information by virtue of Section 29 of the Trial Upon Information Ordinance, 1924, and to afford the defence the opportunity of calling further evidence, recalling any witnesses for further cross-examination or making any submission to the Court.

It has not, however, been suggested to this Court that the defence had any further evidence to tender; and having heard the arguments put forward on behalf of the appellants, we hold that the course adopted by the Court of Criminal Assize, though an error in procedure, occasioned no miscarriage of justice; hence in accordance with the proviso to Sec. 62 of the Trial Upon Information Ordinance, 1924, we dismiss the appeal upon this point.

The Court of Criminal Assize has made no fiinding as to the age of the accused, Muhammad, and from the fact that the Court ordered that he should undergo an X-ray examination, it is to be inferred that the Court was doubtful whether he had completed his 18th year. This Court, therefore, directs that evidence as to the age of this accused be tendered.

[ED. NOTE: The Court here heard medical testimony as to age.]

JUDGMENT.

In view of the medical evidence this Court is not prepared to find that the accused Muhammad Abdullah El Ghazawi has completed his 18th year.

In accordance therefore with the provisions of Section 3 of the Young Offenders Ordinance, 1922, the sentence of death passed upon the accused Muhammad by the Court of Criminal Assize is set aside, and the accused is sentenced to serve a term of 20 years' imprisonment to run from the date of his arrest.

As regard the accused Salah Abdul Karim Abu Agel, the judgment and sentence of death passed upon him are confirmed.

Delivered the 14th May, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 7/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Subhi el Mowakkat
Adhan el Mowakkat — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Bond for good behaviour of convicted person — Consideration for bond — Order of court to be altered only by court.

The District Court having found one I, guilty of assault ordered him to pay a fine of £P. 25 or in default to be imprisoned for three months, and in addition, to enter into a bond for £P.200 with one security to keep the peace for a period of three years. The bond was not signed by the prisoner but two of his relatives entered into the following bond:

> "In accordance with the judgment of the District Court in Crime No. 127/31 dated 14th January, 1932, we, the undersigned, guarantee that for three years the said Itshak Mowakkat shall not commit any offence failing which we undertake to pay to the Treasnry of the Palestine Government the sum of £P.200 without any objection."

In June, 1933, the said I having been convicted for assault the appellants were sued in the District Court and ordered to pay the sum of £P.200. Upon appeal the appellants submitted, inter alia, (a) that there was no consideration for the bond since under the order of the District Court I himself should have signed the bond and given an undertaking to keep the peace, (b) that there was no authority in law for the taking of such a bond.

HELD: Allowing the appeal (1) that the bond was not in accordance with law since it was not made in conformity with the Prevention of Crimes Ordinance, nor with the terms of the judgment of the District Court, (2) that there was no consideration

for the execution of the bond there being no proof that I was released from his obligation under the judgment to enter into a bond since such release could only be effected by a court order accepting the appellants' bond in place of I's bond.

Haddad — for appellant.
Ghussein — for respondent.

Appeal from the judgment of the District Court of Jerusalem (C.D.C. Jm. No. 316/33) dated the 18th day of November, 1933.

JUDGMENT.

The bond which the respondent seeks to have enforced against the Appellants was not made in conformity with the Prevention of Crime Ordinance, 1920, Section 1, or the Prevention of Crime Ordinance, 1929, Section 3, or with the terms of the judgment of the District Court of the 14th of January, 1932.

It is argued by the respondent that there was consideration for the execution of this bond in the fact that the accused Ishaq Suliman Muwakkat was released from the obligation of giving security in accordance with the terms of the District Court's judgment. There is, however, nothing to show that Ishaq was released from such obligation and it is clear that such release could only be effected by an order of the Court accepting the bond given by the appellants in place of that ordered to be given under the judgment of the 14th of February, 1932. No such order is before us.

We hold, therefore, that there was no consideration for the bond given by the appellants and that it is unenforceable.

The appeal must be allowed and the judgment of the District Court set aside.

Delivered the 20th day of February, 1934.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 9/34.

BEFORE:

The Chief Justice (McDonnell, C. J.), Khaldi, J. and Khayat, J.

IN THE CASE OF:

Max David Kreiner — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Forgery of signature on cheque — Articles 155 and 233, Ottoman Penal Code — Evidence of Bank Manager as to handwriting — Sufficiency of corroboration of denial of signature of maker of cheque — Testimony of witnesses present in court while other witnesses gave evidence.

In a prosecution before the District Court for forgery of a cheque, the complainant denied that the signature on the cheque was hers and this denial was corroborated by the evidence of the manager of the bank on which the cheque was drawn, who, although not a handwriting expert, compared the signature on the cheque with the complainant's signature and declared that the signature on the cheque was forged. In an appeal from the conviction of the District Court the appellant submitted (a) that the evidence of the bank manager as to forgery was not sufficient corroboration of the complainant's denial of her signature and that therefore the forgery was not proved, (b) that the court had committed an irregularity of procedure by allowing the testimony of witnesses who had been present in court and heard other witnesses give evidence. Upon the hearing of the appeal,

HELD: Dismissing the appeal, (1) that a bank manager's evidence as to handwriting was good corroboration of the complainant's denial of signature of a cheque, (2) that there is no rule of law that witnesses must be kept outside the court before they are called although it is often desirable.

Gorodissky and Feinberg — for the appellant.
Ghussein — for the respondent.

Appeal from the judgment of the District Court of Jaffa (M.D.C. Ja. No. 151/34) dated the 10th day of May, 1934.

JUDGMENT

The Court below had sufficient evidence before it to prove the forgery. A bank manager's evidence of handwriting is as good corroboration of the complainant's evidence as could be desired.

There is no rule of law that witnesses must be kept outside the Court before they are called though naturally it is often desirable. There was therefore no reason why the Court should not call or recall them in this case.

The sentence is by no means too severe for a fraud of this nature.

The appeal is dismissed and the conviction and sentence confirmed.

Delivered the 9th day of July, 1934.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 13/34

BEFORE:

The Chief Justice (McDonnell, C. J.), Khaldi, J. and Khayat, J.

IN THE CASE OF:

Mustafa Ja'arouni — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Failure of trial court to set out findings of fact — Power of trial court on remittal — Admission of new evidence on remittal — See 69 (c), Trial Upon Information Ordinance, 1924.

Upon an appeal from a conviction for wilful murder the Court of Appeal remitted the case to the trial court to give a fresh judgment, and to place on record in the President's notes the findings of fact on which the conviction was based. Upon the re-

hearing before the trial court appellant desired to call new evidence and upon the trial court refusing to hear such evidence he appealed. Upon appeal,

HELD: Dismissing the appeal that under Sec. 69 (c), Trial Upon Information Ordinance, 1924, there is no right in the court of trial to hear further evidence unless there has been an express direction in that respect by the Court of Appeal. Where the conviction is quashed and the case remitted to the trial court for a new trial sans phrase, the trial court in its discretion may allow new evidence, but where there is an express direction that the case is remitted to give a fresh judgment it may be concluded that it is remitted for that purpose and no other.

Appeal from the judgment of the District Court of Nablus (CR.C.D.C. Na. No. 52/33) on remittal from the judgment of the Court of Appeal dated the 25th day of September, 1933.

Goitein — for appellant.
Ghussein — for respondent.

JUDGMENT.

In this case, in which the appellant was convicted by the District Court of Nablus and sentenced to fifteen years imprisonment for wilful murder, the Court of Appeal on the 25th September, 1933, stated in its judgment [1]), "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 [2]), the Court 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."

Upon the rehearing, counsel for the accused asked that further witnesses be called for the defence. The Court declined to allow further evidence and stated that it was bound by the directions given by the Court of Appeal.

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[1]) C. of J. Vol. 2, p. 639.
[2]) C. of J. Vol. 2, p. 630.

Upon appealing from that decision, the appellant submits that when a case is remitted for a new trial, unless in the judgment remitting the case the appellant is forbidden to call new evidence, he may call it and may recall witnesses who had already been heard.

The matter is governed by Section 69 (c) of the Trial Upon Information Ordinance, 1924, which lays down that "In determining an appeal the Court of Appeal may:

> Quash the conviction and remit the case to the Court below for a new trial with such directions as may be necessary. In that case the Court of Criminal Assize or District Court shall not be bound to hear again the evidence already taken, but may use the notes of the former trial and hear such further evidence as may be necessary unless otherwise directed by the Court of Appeal."

The crucial words are that the court of trial, on the case being remitted for a new trial, may hear such further evidence as may be necessary, unless otherwise directed by the Court of Appeal.

I cannot agree that this imports a right to the court of trial to hear further evidence unless there has been an express direction by the Court of Appeal that it shall not hear such further evidence. If, in fact, the conviction had been quashed and the case remitted to the court below for a new trial sans phrase, I should agree that the court below in its discretion might allow further evidence, but when, as in this case, there is an express direction that the case is remitted to the District Court to give a fresh judgment, we must conclude that it is remitted for that purpose and no other, and the fact that there is a direction only to give a fresh judgment imports a direction that the court shall not hear further evidence.

For this reason I am of opinion that the appeal must be dismissed, and the circumstances of the case offering no grounds for a variation of the punishment, the sentence is affirmed.

Delivered the 8th day of June, 1934.

In the Supreme Court sitting as a Court of Appeal

CR.A. No. 40/34

BEFORE:

The Chief Justice (McDonnell, C.J.), Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Mass'ud Khalil Mansur et al — APPELLANTS.

v.

The Attorney-General — RESPONDENT.

Conviction for rape — Failure of court to address allocutus to accused — Omission not causing miscarriage of justice — Secs. 33(1), 46, 64(1), Trial Upon Information Ordinance, 1924.

The accused, who pleaded guilty to a charge of rape appealed from the conviction on the ground that no allocutus had been addressed to them and that the sentence of five years was excessive.

HELD: That since the omission of the allocutus occasioned no miscarriage of justice the appeal may be dismissed pursuant to the proviso to Sec. 64(1) of the Trial Upon Information Ordinance, 1924. The sentence of five years for rape was not excessive except in the case of one appellant whose moral guilt was less.

Appeal from the judgment of the District Court of Jaffa (CR.C.D.C. Ja No. 225/34) dated the 30th day of June, 1934.

Goitein — for appellants.
Ghussein — for respondent.

JUDGMENT.

The first point of the appellants' counsel is that there is no record of an allocutus being addressed to the accused, who all pleaded guilty, in conformity with Sections 33(1) and 44 of the Trial Upon Information Ordinance, 1924. But we are of opinion that in this case the proviso to Section 64(1) can be applied, more especially as the three accused were represented at the trial, since we consider that through the omission of the allocutus no miscarriage of justice actually occurred.

The members of the Court are familiar with the custom among fellahin of killing in revenge for deflowering of a woman who is related to the murderer, but not one of the members has ever heard of the alleged custom of revenging one's sister's rape by the rape of a female relation of the ravisher, let alone a brutal ravishment as in this case by two men of a little girl of eight.

We consider the sentence of the first and second accused, Mass'ud and Deeb, by no means excessive. The third, Abed, stood by and kept watch. He is legally equally guilty, but as his moral guilt is less, we take that into consideration.

The appeals are all dismissed.

The convictions are in all cases confirmed, the sentences against Mass'ud and Deeb are confirmed, that against Abed is reduced to five years penal servitude.

Delivered the 26th day of September, 1934.

In the Supreme Court sitting as a Court of Appeal.

A.A. of 1935.

BEFORE:

The Acting Chief Justice (Corrie, J.), Cressall, J., Khaldi, J., Frumkin, J. and Abdul Hadi, J.

IN THE CASE OF:

Ghhaleb Hassan el As'ad
and four others — APPELLANTS.

v.

The Attorney-General — RESPONDENT.

Theft of oranges from grove — Killing to secure flight a probable consequence of the prosecution of unlawful purpose — Paragraph of article of Ottoman Penal Code need not be set out in information or judgment — Articles 174 and 222, Ottoman Penal Code — Sections 3 and 4, Criminal Law (Amendment) Ordinance, (No. 2), 1927 — Recommendation for mercy.

Five persons were interrupted by a ghaffir while stealing oranges at right, and to facilitate their escape one of them shot and killed the ghaffir. Upon an information charging all five with the offence of murder to secure flight after committing another offence they were convicted under Articles 222 (a) and 174 of the Ottoman Penal Code and Section 4 of the Criminal Law Amendment Ordinance, (No. 2), 1927 and sentenced to death. Upon appeal from this conviction the prisoners contended (a) that the conviction should be quashed since the paragraphs of the article under which they were convicted were not specified in the information or the judgment (b) that one of the appellants had pleaded guilty only to the charge of theft but not to the charge of murder.

HELD: Confirming the sentence (a) That the conviction for theft under Article 222 (a) of the Ottoman Penal Code should be quashed since there was no charge of theft in the information but that since the appellants had a common intention to commit a theft they were all guilty of the murder which was a probable consequence of the prosecution of their unlawful purpose. (b) That there is no legal necessity to specify in the information or in the

judgment the paragraph of the Article of the Ottoman Penal Code which is applicable. (c) That the one appellant's plea which was as follows: "I am guilty of the offence of stealing and I was present when the shot was fired" was a plea of guilty sufficient for a conviction for murder.

Appeal from the judgment of the Court of Criminal Assize sitting at Acre (A.Ha. No. 3/35) dated the 25th day of June, 1935.

Cattan and Hawa — for appellants.
Ghussein — for respondent.

JUDGMENT.

The appellants were charged under the third paragraph of Article 174 and Article 222 of the Ottoman Penal Code and Sections 3 and 4 of the Criminal Law Amendment Ordinance (No. 2), 1927. They have been convicted under Articles 222 (a) and 174 of the Penal Code and Section 4 of Criminal Law Amendment Ordinance (No. 2), 1927, the Court having in the course of its judgment stated that it was satisfied that the accused had committed an offence contrary to the second paragraph of Article 174 and Section 4.

We are asked to hold that this conviction is bad upon the face of it.

The offence, however, of which the appellants have been convicted, is the same as that with which they were charged, namely, killing to secure their flight after committing another offence.

Moreover, Article 174 of the Ottoman Penal Code is not divided into numbered paragraphs, and the Turkish text is not subdivided into paragraphs at all. There is thus no legal necessity to specify in the information or the judgment the paragraph of the Ordinance which is applicable. We hold, therefore, that there is no substance in this objection.

The appellant, Ali Salem Ibrahim, has confessed that, armed with a rifle, he went with the other appellants to an orange grove to steal and did steal oranges; and that when the watchman Ibrahim Muhammad Sidawi came upon them he fired a rifle at him. The medical evidence is that the shot was fired from a distance of from one to three metres. The bullet struck the watchman above the 9th rib in the right side and killed him. With this evidence before it, the Court of Criminal Assize could find this appellant guilty, under Article 174, of wilfully

killing to secure his flight after committing the offence of theft, and in the case of this appellant no reference to Sec. 4 of the Criminal Law Amendment Ordinance (No. 2), 1927, is necessary; and the judgment must be modified accordingly.

With regard to the appellants, Ghaleb Said Hassan el As'ad, Hassan Muhammad El Findi and Hassan Saleh Muhammad, the Court could find upon their own confessions and the medical evidence:

(1) A common intention to prosecute an unlawful purpose—namely to steal from the orange grove, in conjunction with Ali Saleh Ibrahim, he being armed with a rifle;

(2) That the watchman was shot at and killed by Ali Saleh Ibrahim to secure their flight;

(3) That such killing was a probable consequence of the common unlawful purpose;

(4) That they were present when the watchman was killed.

It follows from such finding that these three appellants are guilty in law of an offence under Article 174 of the Penal Code and Section 4 of Criminal Law Amendment Ordinance (No. 2), 1927, and their conviction thereunder must be confirmed.

On behalf of the appellant, Muhammad Ali Abu Hasnah, it has been argued that although he is recorded as having pleaded guilty and the judgment contains a reference to such a plea, in fact his plea of guilty only extended to the offence of theft; and that he was treated throughout the trial as having pleaded not guilty to killing and was convicted not upon his plea but upon the evidence.

It would appear, however, that the conviction was based upon the plea. In addition to pleading guilty, the appellant when called upon to plead said "I am guilty of the offence of stealing and I was present when the shot was fired", and this was sufficient basis for a conviction. It is true that this appellant was given an opportunity to cross-examine witnesses and to give evidence, but this was actually an irregularity of procedure and certainly did not prejudice the appellant. It follows that the conviction of this appellant under Article 174 and Section 4 must be confirmed.

There remains the question of Article 222 of the Penal Code under which all appellants have been convicted. No charge of theft, however, was preferred against them in the information, and the

conviction under Article 222 must therefore be quashed. The sentences of death passed upon all the appellants are confirmed.

The Court of Criminal Assize has made a recommendation that the High Commissioner should be advised that his prerogative of mercy should be exercised in respect of all the appellants.

In the case of Ali Saleh Ibrahim, however, the judgment of the Court implies a finding that he fired with intent to kill, and it is difficult to find any mitigating circumstance. In this case, therefore, we are unable to concur in the recommendation for mercy.

The other appellants stand in a different position. While the findings of fact made with regard to them render them guilty in law of an offence involving sentence of death, it is not inconsistent with such findings to hold that these appellants never at any time actually intended that any person should be killed, although, as the Court has held, such killing was a probable consequence of the prosecution of their unlawful purpose.

We infer that such was the view taken by the court of trial; and in the case of these appellants, therefore, we concur in the recommendation.

Delivered the 11th day of July, 1935.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 1/35.

BEFORE:

The Acting Senior Puisne Judge (Baker, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

v.

Ibrahim Abu Takrouri — RESPONDENT.

Contravention of Road Transport Ordinance — Sections 15, 16, Road Transport Ordinance, 1929 — Appeal from judgment of District Court in appellate capacity — Scope and application of Trial Upon Information Ordinance, 1924 — Sections 2, 64, Trial Upon Information Ordinance, 1924 — Section 4, Magistrates' Courts Jurisdiction Ordinance, 1924.

The accused, who was convicted by a magistrate under the Road Transport Ordinance, 1929, appealed to the District Court which altered the sentence. The Attorney-General, acting under Section 64 of the Trial Upon Information Ordinance, 1924, appealed to the Court of Appeal.

HELD: That the provisions of the Trial Upon Information Ordinance, 1924, apply only to investigation and trial of offences before a Court of Criminal Assize or a District Court and do not enable the Attorney-General to appeal from judgments of the District Court in its appellate capacity. Such appeals are governed by the provisions of the Magistrates' Courts Jurisdiction Ordinance, 1924.

Appeal from the judgment of the District Court of Jerusalem dated the 24th day of January, 1935.

Ghussein — for appellant.
Respondent in person.

JUDGMENT.

Respondent was convicted by the Magistrate under Section 15 (1) (c) of the Road Transport Ordinance, 1929, and his driving licence was suspended for one year. Respondent appealed to the District Court against the said sentence and the District Court amended the same imposing a fine of £P. 2 in lieu of the suspension of his driving licence. Against this judgment an appeal has been lodged by the Attorney-General purporting to be lodged by virtue of Article 64 of the Trial Upon Information Ordinance 1924, which prescribes the following:

> "The Attorney-General may appeal from a judgment on any of the following grounds:
>
> (a) That evidence was wrongly admitted or excluded.
> (b) That the law was wrongly applied to the facts.
> (c) That the punishment awarded was insufficient.
>
> Notice of appeal by the Attorney-General shall be lodged in the District Court or in the Court of Appeal within two months of the date of judgment."

The provisions of the Trial Upon Information Ordinance, 1924, however, apply only to the investigation and trial of all offences within the jurisdiction of a Court of Criminal Assize or of a District Court (Section 2).

Provision for appeals from the decision of a District Court sitting as an appellate Court is contained in Section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1924, and prescribes that:

> "The decision of the District 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 sitting as a Court of Appeal on a point of law.
>
> Application for leave to appeal must be made within ten days of the delivery of the judgment if in presence of appellant or of notification if delivered in his absence..... and if leave to appeal be granted the ordinary procedure on appeal shall be followed."

There is no provision enabling the Attorney-General to appeal from an appellate judgment of the District Court other than by complying with the above provisions.

Application for leave to appeal against the judgment of the District Court of the 24th January, 1935, sitting in its appellate capacity, was made on the 4th February, 1935, and granted on the 5th February. On the 9th March (more than thirty days after leave had been granted), the present appeal was lodged and the said appeal specifically states that appeal is made under Section 64 (1) (b) of the Trial Upon Information Ordinance, 1924-1925.

We are of opinion that the beforesaid provisions of the Trial Upon Information Ordinance, 1924, do not enable the Attorney-General to appeal from judgments of the District Court in its appellate capacity, but that the before-mentioned provisions of the Magistrates' Courts Jurisdiction Ordinance, 1924, must be complied with.

Accordingly the appeal must be dismissed.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 9/35

BEFORE:

The Acting Chief Justice (Corrie, J.), Baker, J. and Abdul Hadi, J.

IN THE CASE OF:

Mohammad el Hindi — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Conviction for misdemeanour under Road Transport Ordinance, 1929 — Right of appeal from judgment of magistrate — Section 3(1), Magistrates' Courts Jurisdiction Ordinance, 1924, as amended by Sec. 3, Magistrates' Courts Jurisdiction (Amendment) Ordinance, 1930.

The accused who was convicted for a contravention of the Road Transport Ordinance, 1929 and sentenced to a fine of £P. 5 or one month's imprisonment, appealed to the District Court which dismissed the appeal on the ground that under Sec. 3 (1) of the Magistrates' Courts Jurisdiction Ordinance, 1924, as amended in 1930, no right of appeal lay except by leave since the sentence exceeded 15 day's imprisonment. Sec. 3 (1) as amended reads as follows:

"The convicted person shall have the right to appeal from a judgment of the Magistrate's Court to the District Court if the penalty imposed is a fine exceeding £P.10 or imprisonment exceeding 15 days."

Leave to appeal to the Court of Appeal having been granted:

HELD: That a fine of £P. 5 or imprisonment for one month, is a penalty exceeding the limit prescribed by Sec. 3(1) of the Magistrates' Courts Jurisdiction Ordinance, 1924, as amended, and it is thus appealable as of right.

Appeal from the judgment of the District Court of Haifa (M.A.D.C. Ha. No. 33/35) dated the 28th day of February, 1935.

No appearance for appellant.
Ghussein — for respondent.

JUDGMENT.

The Court holds by a majority that the penalty imposed,— a fine of £P. 5 or imprisonment for one month, is a penalty exceeding the limit prescribed by the Magistrates' Courts Jurisdiction Ordinance, 1924, Section 3 (1), as amended by Section 3 of the Magistrates' Courts Jurisdiction (Amendment) Ordinance, 1930, and it is thus appealable as of right.

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

No order is made as to costs.

Delivered the 3rd day of August, 1935.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 10/35

BEFORE:

The Acting Chief Justice (Corrie, J.), Baker, J. and Abdul Hadi, J.

IN THE CASE OF:

Taher Mahmud Arab et al — APPELLANTS.

v.

The Attorney-General — RESPONDENT.

Conviction by magistrate for alteration of boundary marks — Art. 252, Ottoman Penal Code — Opposition to judgment of conviction given by default — Reasonable cause for failure to appear to be shown — Art. 49, Ottoman Magistrates' Law, 1913 — Rule 14, Magistrates' Courts Procedure Rules of Court, 1918, (now numbered as Rule 11, — see page 2372, Laws of Palestine) — Art. 171, Ottoman Code of Criminal Procedure.

Four persons were charged before a magistrate under Article 252 of the Ottoman Penal Code with altering boundary marks of immovable property. Upon their failing to appear at the hearing the magistrate convicted them in their absence and sentenced each of them to four months' imprisonment. The accused made opposition to the judgment. The magistrate dismissed the opposition on the ground that reasonable cause for failure to appear had not been shown and the District Court to which the dismissal was appealed upheld the decision of the magistrate. Leave to appeal to the Court of Appeal was obtained on the following point of law:

> "Whether or not a conviction and sentence by default become automatically null and void in accordance with Article 171 of the Ottoman Code of Criminal Procedure upon lodgement of an opposition to the said judgment, provided only that such opposition is lodged within the legal period prescribed and, in brief, that this is the intention and meaning of Section 57 of the Ottoman Magistrates' Law."

HELD: That in view of the amendment to Article 49 of the Ottoman Magistrates' Law which provides that the defaulting party may succeed in his opposition only if he satisfies the

magistrate that he was prevented by some reasonable cause from appearing at the hearing, the appeal should be dismissed*.

Appeal from the judgment of the District Court of Haifa (M.A. D.C. Ha. No. 122/34) dated the 28th day of January, 1935.

Auni Abdul Hadi — for first appellant.
Ghussein — for respondent.

JUDGMENT.

The appellants are asking this Court to hold that the District Court was wrong in holding that where a magistrate's court convicted a person in his absence, an opposition by the person so convicted is to be dismissed unless he can show cause for his failure to appear at the trial.

In view of the amendment to Article 49 of the Ottoman Magistrates' Law, effected by Section 14 of the Magistrates' Courts Procedure Rules of Court, published in the Gazette No. 3, dated July 4th, 1918, the appeal is dismissed.

Delivered the 3rd day of August, 1935.

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* Ed. Note: — The right to make opposition to judgments by default given by magistrates in contravention and misdemeanour cases is now regulated by the Summary Offences (Procedure) Ordinance, 1935, as amended by the Summary Offences (Procedure) (Amendment) Ordinance, 1936.

In the Supreme Court sitting as a Court of Appeal.

M. A. No. 14/35

BEFORE:

The Chief Justice (McDonnell, C. J.), Corrie, J. and Khayat, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

v.

Mahmoud Said el Kassas — RESPONDENT.

Appeal from conviction for theft — Right of Attorney-General to appeal against inadequacy of sentence — Power of District Court to increase sentence imposed by magistrate — Sec. 5, Magistrates' Courts Jurisdiction Ordinance, 1935 — Art. 183, Ottoman Code of Criminal Procedure — Art. 46, Ottoman Magistrates' Law.

In an appeal by the Attorney-General to the District Court from a conviction by a magistrate the District Court held that the Attorney-General could appeal on the three grounds enumerated in Art. 46 of the Ottoman Magistrates' Law as amended in 1918, but these grounds did not include the power to appeal from an inadequate sentence and neither did Sec. 5 of the Magistrates' Courts Jurisdiction Ordinance give such power. It held also that the District Court did not have the power to increase a sentence imposed by a magistrate. Upon appeal by the Attorney-General to the Court of Appeal from this decision,

HELD: Allowing the appeal that sentence is part of the judgment in a criminal case and that the power of the Attorney-General under Sec. 5 (2) of the Magistrates' Courts Jurisdiction Ordinance, 1935, to appeal from a judgment in a criminal case includes the power to appeal against inadequacy of sentence,

HELD ALSO: (1) That the District Court has the power to increase a sentence imposed by a magistrate. (2) That a convicted person who has a right to appeal from a judgment of a magistrate has a right to appeal against the sentence.

Appeal from the judgment of the District Court in its appellate capacity (M.A.D.C. Jm. No. 52/35 dated the 30th September, 1935).

Musa el Alami — for appellant.
Respondent in person.

JUDGMENT OF THE DISTRICT COURT

(Cressall, J. and Atallah, J.)

In this appeal the Attorney-General asks that the judgment of the Jerusalem Magistrate imposing a sentence of four months' imprisonment on the respondent for an offence contrary to Art. 230 of the Ottoman Penal Code be set aside on the ground that the punishment awarded was not sufficient, and moves the Court to impose 'a more adequate sentence'.

At the outset of the hearing the Court informed the representative of the appellant they were of the opinion that there was no provision in the law governing appeals from Magistrates' Courts to the District Court which empowered the appellate court to increase a sentence which had been lawfully imposed by the lower court and were, therefore, disposed to hold that the appeal could not be entertained.

In view of the importance of the principle involved, it was agreed that the hearing should be adjourned in order to enable the Junior Government Advocate to consider the question more fully.

On the resumption, Mr. Fawzi Ghussein directed the Court's attention to Baz's Commentaries on Art. 183 of the Ottoman Code of Criminal Procedure, and submitted that although there was no specific enactment under the Turkish Magistrates' Law or the subsequent post war legislation which empowered the District Court as a Court of Appeal to increase a sentence imposed by a magistrate, it had, nevertheless, been the general practice of appellate courts in Turkish times to exercise this power.

The question, however, is not what happened in the past but the state of the law of the country as it stands to-day.

Now it is a well-established principle that the liberty of the subject cannot be interfered with or restricted except by the statutory authority of the Legislature. Accordingly, the State empowers courts of law to punish those who are convicted of criminal offences by imposing sentences of imprisonment and such persons

are usually given the right by the law-making authority to appeal against their conviction and/or sentence, to a higher court. This right is secured in Palestine by virtue of Section 5 of the Magistrates' Courts Jurisdiction Ordinance, 1935. Under the same section the Attorney-General is empowered to appeal against any judgment delivered by a magistrate and this has been interpreted to mean the power to ask the District Court in its appellate capacity to increase a sentence imposed by a Magistrate's Court. We propose, therefore, to trace the history of a litigant's right to appeal and to establish, if possible, from the somewhat ambiguous state of the criminal law of procedure in the country, what is the correct position of affairs.

It is obvious that so far as the right to appeal is concerned, the Attorney-General is entitled to do so, for he has been given this power by Section 5 of the Magistrates' Courts Jurisdiction Ordinance, 1935, and it follows, as a natural corollary, that the right must include the right to appeal against an acquittal. Does it, however, include the right to ask for an increased sentence, and even if it does, is the appellate court empowered to do so?

Now, before the enactment of the Ottoman Magistrates' Law of 1913, there was in force the Ottoman Code of Criminal Procedure which regulated the practice and procedure of the criminal courts then in existence, including those which tried contraventions (kabahat) and those which dealt with misdemeanours (junhat), the latter being termed 'Correctional Courts'.

When, however, the Magistrates' Law of 1913 was introduced, there was inserted a provision (vide Art. 96) which enacted that those articles of the Code of Criminal Procedure which were inconsistent and incompatible, or expressly or impliedly contradictory to the provisions of the new law, should not be observed in the Magistrates' Courts.

Now by the provisions of Art. 57 of the Ottoman Magistrates' Law it was expressly stated that the procedure in criminal cases before magistrates was to be the same as in civil cases, and this we are satisfied, included the procedure and practice regulating appeals to the Court of Cassation or to the Court of Appeal.

It, therefore, follows that prior to the Occupation, appeals from magistrates were governed by the procedure laid down in the Ottoman Magistrates' Law of 1913 and not by the provisions of the Code of Criminal Procedure which had been superseded and repealed by Arts. 57 and 96 of the Ottoman Magistrates' Law.

After the British Occupation the courts established under the Law of 1913 were legalised by the Proclamation Establishing Courts dated 24th June, 1918, Sec. 3 of this Proclamation providing as follows: —

> "Magistrates' Courts shall be established in each kaza as may be required. As regards matter, these Courts shall have the jurisdiction assigned to them by the Ottoman Magistrates' Law of 1913 as amended."

By Section 7 of the same Proclamation, however, the right of cassation was abolished, and in place of this right there is now the right of appeal to the District Court (vide Sec. 5 of the Magistrates' Courts Jurisdiction Ordinance, 1935).

On July 4th, 1918, Rules of Courts were enacted which made many material alterations in the provisions of the 1913 Law regarding the practice and procedure in appeals from Magistrates' Courts. For example, Rule 13 provided that the following provisions were to be substituted for Article 46 of the Law: —

> "If it is held that the Magistrate had no jurisdiction the Court of First Instance shall name the tribunal proper to try the case. If the judgment was based on wrong grounds, the Court of First Instance shall decide the case itself. If there was a serious error in procedure, the Court of First Instance may either decide the case itself or refer it back to the Magistrate for re-hearing."

Again, by Rule 12, the last paragraph of Art. 43 of the Law was amended as follows: —

> "The Magistrate or the Chief Clerk shall inform the applicant (appellant) that he must state the grounds of his appeal otherwise the application will not be entertained, and that he will not be allowed to urge any other grounds at the appeal."

And finally by Rule 16, Articles 65, 66, 67, 69 and 70 of the Law were repealed and it was provided that the provisions of Rule 13 shall in future apply to criminal as well as to civil appeals.

From the foregoing it appears to us that the procedure governing appeals from the magistrates' courts as originally laid down in the Code of Criminal Procedure was superseded by the Magistrates' Law of 1913 and the subsequent amendments thereto, and we have, therefore, reached the conclusion that the only sta-

tutory powers conferred on the District Court in its appellate capacity are those that are enumerated in Article 46 of the Magistrates' Law as amended by Rule 13 of the 1918 Rules of Court (supra).

This authority however, does not include the power to increase a sentence awarded by the lower Court and for this reason it appears to us that unless and until such a power is conferred on the appellate court by the Legislature, we have no jurisdiction to entertain the present appeal since it must be assumed that had the legislature intended to confer this authority on the District Court, it would have said so in specific terms as it has done in the case of appeals from District Courts to the Supreme Court; (Vide Section 69 (b) of the Trial Upon Information Ordinance). We are supported in this view by the fact that in Cyprus the Court of Appeal has been specifically authorised by Section 39 of the Criminal Law and Procedure Amendment Law, 1886, to increase a sentence appealed from and, furthermore, in England, while the Court of Criminal Appeal has been given statutory power to increase sentences on appeal, the Court of Quarter Sessions has not, and cannot exercise this power.

It has been argued by the learned Junior Government Advocate that inasmuch as the Attorney-General has been given the right to appeal from any judgment of a magistrate's court, it must be assumed that the appellate court has the right to increase the sentence imposed. We cannot, however, agree with this contention, for it is well settled law that the powers of an appellate court are not a matter for assumption but of specific legislative sanction. In other words, appeal courts being creatures of statute, are bound by the provisions of the statute creating them.

The position as we see it is as follows:

Notwithstanding the fact that the Attorney-General has been given the right to appeal from any judgment of a magistrate's court, the fact remains that this right must be exercised in conformity with the statutory powers conferred on the appellate courts by the Legislature. The appeal when made, therefore, must be based on the three grounds enumerated in Section 46 of the Magistrates' Law as amended by Rule 13 of the 1918 Rules of Court. These grounds are: —

(a) That the court below had no jurisdiction;

(b) That the judgment of the court below was based on wrong grounds, and

(c) That there was a serious error of procedure in the court below.

In the present appeal the appellant has not suggested that any of the above conditions are present in the judgment appealed from, and it is difficult to see how the court can entertain any other ground.

We have, therefore, come to the conclusion that whatever may have been the intention of the draughtsman of Section 5 of the Magistrates' Courts Jurisdiction Ordinance, 1935, the fact remains that in appeals from judgments of Magistrates' Courts the Attorney-General has not been given the right to appeal on the ground of inadequacy of sentence, nor has the District Court been empowered by the legislature to increase a sentence imposed by a Magistrate's Court.

For these reasons, the appeal is dismissed but we make no order as to costs.

Delivered the 30th day of September, 1934.

JUDGMENT OF THE CHIEF JUSTICE.

Leave to appeal was granted on three grounds:—

1. Whether Sec. 5 (2) of the Magistrates' Courts Jurisdiction Ordinance, 1935, giving the Attorney-General the right to appeal from any judgment of the Magistrate's Court in a criminal case does not thereby empower him to appeal on the ground of inadequacy of sentence.

The answer to this appears to us to be quite clearly in the affirmative. Section 5 (2) of the Magistrates' Courts Jurisdiction Ordinance, 1935, gives the Attorney-General or his representative the right to appeal from any judgment of a Magistrate's Court in a criminal case to a District Court consisting of two judges, the presiding judge being the President or a Relieving President. Contrast this with Sec. 5 (1) which does not give the convicted person a right to appeal in any case but only where the fine or the imprisonment exceed a certain limit. As was held by this Court in H.C. 62/34, the sentence is part of the judgment. Hence an appeal by the Attorney-General against sentence can lie.

The second ground on which leave to appeal is given is:—

2. Whether, notwithstanding Art. 46 of the Magistrates' Law of 1913, as amended by Rule 13 of the Rules of Court

1918, the District Court is not empowered to increase the sentence.

The answer to this is as follows: —

The right of the Crown to appeal from any judgment of a Magistrate's Court is governed and has for eleven years been governed by Ordinances of Palestine. Section 3, para. 2, of the Magistrates' Courts Jurisdiction Ordinance, 1924, provided that "the Public Prosecutor shall have the right to appeal from any judgment of a Magistrate's Court in a criminal case."

A change of title, though not a change of sense, was embodied in the amending Section 3 of the Magistrates' Courts Jurisdiction (Amendment) Ordinance, 1930, which repealed and replaced Section 3 of the principal Ordinance by enacting that "the Attorney-General or his representative shall have the right to appeal from any judgment of the Magistrate's Court in a criminal case to the District Court"; and as we have seen above this has been repeated *totidem verbis* in Section 5 (2) of the Magistrates' Courts Jurisdiction Ordinance, 1935, with this addition that the constitution of the District Court which hears such appeals is there laid down.

We therefore answer the second question in the affirmative. To do otherwise would limit appeals by the Attorney-General under Sec. 5 (2) to appeals from acquittals by a Magistrate's Court and would in many instances render nugatory the expressed unlimited right of appeal from any judgment which the sub-section confers upon the Attorney-General or his representative.

The third ground of appeal is: —

> 3. Whether the right of the convicted person to appeal under Sec. 5 (1) of the Magistrates' Courts Jurisdiction Ordinance, 1935, does not include his right to appeal on the ground that the sentence is excessive; and whether the District Court, if empowered to vary such sentence, is not thus empowered to increase it.

The answer to this is as follows: —

By a parity of reasoning to that which we have applied to the interpretation of Sec. 5 (2), a convicted person, the quantum of whose penalty, whether of fine or of imprisonment, entitles him to appeal from a Magistrate's judgment is thereby entitled to appeal against the sentence which forms part of that judgment, and inasmuch as the District Court is, when an appeal is being

heard, seised of the case, we hold that it is empowered, even without express provision such as is contained in Sec. 69 (b) of the Trial Upon Information Ordinance, 1924, to increase as well as to reduce the sentence in exactly the same way as it can do so under Section 5 (2) where, as we have said in answer to the second ground of appeal, the Court has power to increase a sentence on an appeal by the Crown even though, in that sub-section also, no express power to that effect is conferred.

The judgment of the District Court, sitting as a Court of Appeal is, therefore, set aside and the case is remitted to the District Court to complete the case accordingly.

KHAYAT, J. — I concur.

JUDGMENT OF MR. JUSTICE CORRIE.

Section 5 (2) of the Magistrates' Courts Jurisdiction Ordinance, 1935, gives the Attorney-General or his representative the right to appeal from any judgment of the Magistrate's Court in a criminal case to the District Court consisting of two judges, the presiding judge being the President or a Relieving President, without restricting in any way the grounds upon which such appeal may be made.

This provision clearly confers upon the District Court so constituted jurisdiction to hear any such appeal by the Attorney-General or his representative and this includes jurisdiction to hear an appeal against a judgment convicting the accused on the ground that the sentence, which forms part of the judgment, is inadequate.

This, in my view, disposes of the question.

It would be unreasonable to hold that while the Attorney-General or his representative had the right to appeal the Court lacked jurisdiction to hear the appeal and give judgment thereon.

Delivered the 9th day of December, 1935.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 16/35.

BEFORE:

The Acting Senior Puisne Judge (Baker, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Kamal Yousef As'ad — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Appeal from conviction for receiving stolen property — New evidence available after trial — Order for re-trial made by Court of Appeal — Section 72 (1) (c), Criminal Procedure (Trial Upon Information) Ordinance.

On an appeal by a convicted person the Court of Appeal was satisfied that subsequent to the trial evidence had come to light in favour of the accused which, if it had been procurable and possible to present to the trial court might have put an entirely different complexion upon the case and caused the trial court to have come to a different opinion.

HELD: That under such circumstances the case should be returned for retrial and that all the evidence should be re-heard together with such further evidence as the accused desired to produce.

Appeal from the judgment of the District Court of Nablus (CR.D.C.Na. No. 12/35), dated the 28th February, 1935.

Cattan — for appellant.
Ghussein — for respondent.

JUDGMENT.

In this appeal the Prosecution has informed us that since the trial evidence has come to light in favour of accused and which, if it had been procurable and possible to present to the trial court, might have put an entirely different complexion upon

the case and caused the trial court to have come to a different opinion.

This evidence is now available for the accused, and in view thereof, the judgment of the Lower Court is quashed and the case returned for re-trial. All the evidence must be re-heard and any further evidence the accused now desires to produce.

Delivered the 15th day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 20/35.

BEFORE:

The Acting Senior Puisne Judge (Baker, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Yousef el Fares — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Contradictory statements of complainant—Statement made at time of or shortly after offence—Material evidence in corroboration of other evidence—Article 174, Ottoman Penal Code — Section 9, Criminal Law Amendment Ordinance, (No. 2), 1927 — Sections 5 and 6, Law of Evidence Amendment Ordinance, 1924.

Shortly after an attack upon him the complainant made a statement to the effect that his assailant was a person other than the accused and two hours later he made another statement naming the accused as his assailant. In a prosecution under Article 174 of the Ottoman Penal Code and Section 9 of the Criminal Law Amendment Ordinance (No. 2) of 1927 the District Court accepted the second statement in corroboration of the complainant's evidence and rejected the first. There was no other material evidence in corroboration. Upon appeal from the conviction to the Court of Appeal,

HELD: That the rule laid down in CR.A. No. 30/27* that a statement made at the time when, or shortly before an offence is alleged to have been committed, if admissible under Section 6, Law of Evidence Amendment Ordinance, 1924, can be taken to be material evidence in corroboration of other evidence, is not in the absence of clear evidence of mistake or duress, capable of extension to a second statement at variance with a first statement.

Appeal from the judgment of the District Court of Haifa (CR.C.D.C.Ha. No. 24/35) dated the 6th day of March, 1935.

Catafago — for appellant.
Ghussein — for respondent.

JUDGMENT.

This Court has previously held that 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, can be taken to be material evidence in corroboration of other evidence as required by Section 5 of the same Ordinance. (See Abdel Rahman Ibn Daoud el Rahal v. Attorney-General, Criminal Appeal No. 30, of 1927).*

In the present case, we have no material evidence in corroboration of complainant's evidence other than two statements made by him, one made shortly after the offence and the other two hours subsequently.

In the first statement, complainant mentions a person other than appellant to be his assailant. In the second statement he mentions the appellant and it is this second statement that the Trial Court must have held to be material evidence to support their conviction.

We are of opinion that the abovementioned rule laid down in Criminal Appeal No. 30 of 1927, in the absence of clear evidence of mistake or duress, is not capable of extension to a second statement at variance with a first statement, and accordingly hold that in the present appeal the second statement cannot be considered to be material evidence in corroboration of other evidence as required by Section 5 of the Law of Evidence Amendment Ordinance, 1924; and we are of opinion that the judgment of

* C. of J. Vol. 2 p. 546; P.L.R. p. 150.

the lower Court must be quashed and the accused acquitted and released.

Delivered the 15th day of June, 1935.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 21/35.

BEFORE:

The Acting Chief Justice (Corrie, J.), Baker, J. and Khaldi, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

v.

Muhammad Ahmad Dweis — RESPONDENT.

Act of sodomy committed on child of ten — Section 9, Criminal Law Amendment Ordinance (No. 1), 1927 — Section 5, Law of Evidence Amendment Ordinance — Statement made shortly after offence committed — Material corroboration of evidence of single witness — Duty of court to examine witness on material point where prosecution and defence fail to do so.

Immediately after an act of sodomy had been committed on a child of ten years of age, the child made a statement to his mother about the act. In a prosecution before the District Court under Section 9 of the Criminal Law Amendment Ordinance (No. 1), 1927, the evidence of the mother was held to be insufficient corroboration of the evidence of the child, the District Court being of the opinion that the evidence of the mother and the child was in fact the evidence of one witness, and the accused was acquitted. Upon appeal by the Attorney-General,

HELD: Remitting the case to the District Court for completion that the evidence of the mother that the child made an immediate complaint to her against the accused, if believed, is sufficient corroboration of the evidence of the child,

HELD ALSO: That where in a case of this kind the mother is not examined either by the prosecution or the defence as to whether she examined the child's body at the time the complaint was made to her, the court should itself examine her on that point.

Appeal from the judgment of the District Court of Jaffa (CR.C.D.C.Ja. No. 429/34) dated the 2nd day of January, 1935.

Ghussein — for appellant.
Daoud Dajani — for respondent.

JUDGMENT.

We hold that the rule laid down by this Court in Abdel Rahman Daoud el Rahal v. Attorney-General, Criminal Appeal 30/27[1]), governs this case.

It follows that the evidence of the complainant's mother that the complainant made an immediate complaint to her against the respondent, if believed, is sufficient corroboration of the complainant's evidence.

The judgment must, therefore, be set aside and the case remitted for completion.

We have a further observation to add. It is noteworthy that the complainant's mother was not asked whether upon receiving his complaint she made any examination of his body.

In a case of this nature and in view of the evidence of the complainant, evidence of this kind is of great value; and if neither prosecution nor defence think fit to examine the witness on this point, we are of opinion that it is desirable that the Court should do so.

Delivered the 29th day of June, 1935.

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[1]) C. of J. Vol. 2 p. 546; P.L.R. p. 150.

In the District Court of Jerusalem sitting as a Court of Appeal.

M.A.D.C.Jm. No. 50/35.

BEFORE:

Cressall, J. and Atallah, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

v.

Anton Hanna Hanania — RESPONDENT.

Abuse of confidence — Article 236, Ottoman Penal Code — Case discontinued by Prosecution after plea of "Not Guilty" — Duty of magistrate — Duty of prosecution to prove charge — Autrefois acquit.

In a prosecution for abuse of confidence under Article 236, Ottoman Penal Code, the accused pleaded "not guilty" after which the prosecuting police officer stated that the Prosecution did not wish to continue the case, whereupon the magistrate acquitted the accused. Upon appeal to the District Court from the acquittal,

HELD: Dismissing the appeal that once the accused had pleaded to the charge it was the duty of the prosecution to produce evidence to support the accusation and since the prosecution had not done so the accused was entitled to a dismissal of the case on the ground that the charge had not been proved.

HELD ALSO: That a magistrate's sole duty is to see that substantial justice is done between accuser and accused. It is no part of his duty to advise the prosecution as to how to prove the charge.

Appeal from the judgment of the Magistrate's Court of Bethlehem dated the 26th July, 1935, acquitting the accused.

Ghussein — for appellant.
Cattan — for respondent.

JUDGMENT.

This is an appeal by the Attorney-General under the provisions of section 5 of the Magistrates' Courts Jurisdiction Ordinance, 1935, against the judgment of the Magistrate's Court, Bethlehem, dated the 26th July, 1935, whereby the respondent was acquitted of a charge of abuse of confidence, contrary to Article 236 of the Ottoman Penal Code.

From the record of the proceedings in the lower Court it appears that the respondent first appeared before the magistrate on the 17th May, 1935. On that day the charge was read to him and he pleaded "Not Guilty," whereupon the case was adjourned on the request of the police to enable the Junior Government Advocate to appear and prosecute.

The hearing was subsequently postponed on several occasions, and eventually, on 26th July, 1935, the prosecuting police officer stated: "The prosecution does not wish to prosecute the case any longer. The complainant has the right to institute a criminal charge and personally prosecute." On this, the magistrate gave judgment acquitting the respondent.

The appeal is now made on the ground that the magistrate had no right to acquit, as it is evident from the statement of the police officer that the intention of the prosecution was that the case should not be finally closed but that the complainant should be given an opportunity to carry it through to its final stage.

Furthermore, the appellant submits that before proceeding to judgment on the case, the magistrate should have informed the Prosecution that they should decide either to proceed with the case themselves or to state definitely that they did not propose to call any evidence, and it is suggested that had such a warning been given, the police officer concerned would have brought the necessary witnesses to prove the charge.

The Junior Government Advocate who appeared for the appellant at the hearing of the appeal, in answer to a question by the Court, agreed that the whole purpose of the appeal was to enable another charge to be brought against the respondent by a private complainant without being faced with the plea of 'autrefois acquit' by the respondent. In other words, he has admitted that the object of the appeal is to obtain a favourable ruling from this Court in order to off-set a possible defence to a subsequent charge.

In his reply counsel for respondent has pointed out that once an accused person has pleaded to the charge, his trial has started, and the Court thereupon assumes the power to deal with the case. In the present case the respondent was accused of an offence to which he pleaded "Not Guilty" and consequently from that moment, the magistrate was "seised" of the case. The fact that the prosecution, at a subsequent hearing, offered no evidence on the charge as laid entitled the defendant to ask for an acquittal on the ground that the charge had not been proved. He submits, therefore, that the magistrate's judgment was perfectly in order and asks that the appeal be dismissed.

As, in our opinion, the question to be decided is purely one of procedure, it may not be out of place to establish once and for all what the juridical functions of magistrates are. They may briefly be summarised as follows:

(a) A magistrate's duty is to try cases which are brought before him for adjudication.

(b) He is neither a legal adviser to the prosecution nor an advocate for the defence. His sole duty is to see that substantial justice is done as between the accuser and the accused.

(c) When, therefore, a charge is laid before a magistrate, it is the duty of the prosecution to adduce evidence in support of the offence alleged and it is no part of the magistrate's duty to advise a prosecuting Inspector of Police as to what he should or should not do to prove his case.

(d) If after an accused has pleaded to the charge, no evidence is led against him to support the accusation, it is the duty of the magistrate to acquit him on the ground that the charge has not been proved.

In the appeal before us the appellant submits that the appeal should be allowed because the magistrate did not warn the prosecutor of the consequences of his declining to offer any evidence against an accused who had pleaded "Not Guilty" to a criminal offence.

This submission, in our view, is untenable. It is in fact tantamount to saying that a prosecutor is entitled to expect and receive from the Bench preferential treatment and advice to the detriment of an accused person.

In our view, the magistrate, in dismissing the charge, adopted the only course open to him in the circumstances and in so doing

followed that well-established principle of jurisprudence in criminal law which entitles an accused person to claim a dismissal of his case on the ground that the charge against him has not been proved.

For these reasons we hold that the appeal must fail, but we desire to say that our judgment should not be construed as upholding or rejecting a defence of "autrefois acquit" should this plea be raised in any subsequent prosecution of the respondent in connection with the circumstances which gave rise to the case now under review. Such a plea, if and when raised, is a matter for the court of trial to determine and is not, in any case, before us in the present proceedings.

The appeal is accordingly dismissed with costs and advocate's fees of £P. 1.

Delivered the 30th day of September, 1935.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 64/35.

BEFORE:

The Chief Justice (McDonnell, C.J.), Baker, J. and Khaldi, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

v.

Wasif Zaki Ameereh — RESPONDENT.

Sodomy — Criminal procedure — "Fresh complaint" made by child immediately after act — Such complaint elicited by beating — Corroboration of evidence — Sec. 5, Law of Evidence (Amendment) Ordinance, 1935.

The complainant, a boy of five years of age came home with dirty clothes and blood on his drawers, and made a statement to his mother incriminating the accused. At the trial of the accused for sodomy under Section 3 (c) of the Criminal Law

Amendment Ordinance, (No. 1) 1927, it appeared that the statement was made after the child had been beaten by his mother.

HELD: Discharging the accused that the statement to the mother was not a "fresh complaint" which could be received as corroboration of the evidence of the complainant.

Appeal from the judgment of the District Court of Nablus (CR.D.C. Na. No. 71/35) dated the 31st October, 1935.

Ghussein — for appellant.
Goitein — for respondent.

JUDGMENT.

In this case, the complainant, a boy of five, came home to his mother's house crying, with dirty clothes, with blood on his drawers, and he made a statement to his mother incriminating the accused, who is now the respondent.

The Court held that there was not material corroboration of the boy's statement, following Abdul Rahim Jamil el Haj Saleh v. The Attorney-General, Criminal Assize Appeal No. 9/28,* P.L.R. p. 281, R. v. Baskerville (1916) 2 K.B. p. 658.

We do not think the first cited case, which deals with two repetitions by different persons of what a deceased person says, is of relevance to this case which relates to the corroboration of a witness heard by the court. R. v. Baskerville relates to corroboration of the evidence of accomplices. There, the boys debauched were of the age of criminal responsibility and were hence accomplices in the unnatural offence.

Here, there is no question of that, as the complainant is only five years of age, but the principles of English law relating to the corroboration of accomplices were rightly cited as relevant to the law relating to the corroboration of a single witness which is required by the law of Palestine and is, as one may say, doubly required, when that witness is of tender years and unsworn as is the case here.

The finding of the District Court is that there is no material corroboration of the complainant's statement. From this we must conclude that in spite of the cross-examination of the complainant, the Court believed his evidence.

* C. of J. Vol. 2, 446.

Now, of the fact that an unnatural offence had been committed upon the complainant there is corroboration in the medical evidence and the presence of blood upon the boy's drawers, but when we go further, and ask for corroboration in the sense of "confirmation of the identity of the accused in relation to the crime," a confirmation "to fix the guilt on the particular person charged," to quote from the judgment of Lord Reading in R. v. Baskerville (1916) 2 K. B. at pp. 665 and 666, we are faced only with the evidence of the mother of the little boy's "fresh complaint," when he came home crying.

After giving evidence of this complaint against respondent in evidence in chief, in cross-examination she says "I beat the boy when he did not answer me. I did not say to him "It is Wasif who did it". He told me Wasif on his own. I told my husband who went to the police. It was after I beat him that he mentioned the boy Wasif."

From this, it is clear that in answer to the mother's first question there was nothing to fix the guilt on the respondent Wasif.

In R. v. Osborne (1905) 1 K.B. 551 at p. 561 which is the leading case on fresh complaint," Ridley J. in delivering the judgment of the Court for Crown Cases Reserved says "We are not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It applies only where there is a complaint not elicited by questions of a leading and inducing and intimidating character."

Can it be said that when a merely intimidating question rules out the complaint, a question followed by a beating does not?

We cannot hold that when a mere question elicited no answer the answer produced by a subsequent beating is admissible.

For these reasons, although on grounds based upon different authority, we uphold the judgment of the District Court and dismiss the appeal.

The respondent is therefore discharged.

Delivered the 13th day of February, 1936.

In the District Court of Jaffa sitting as a Court of Appeal.

CR.A.D.C.Ja. No. 3/36.

BEFORE:

The President (Copland, J.) and Mani, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

v.

Itzhak Zlotolov — RESPONDENT.

Slot machine used for purposes of gambling — Liability of occupier of premises — Proof of possession of premises — Section 2, Gaming Ordinance, 1935.

The owner of a cafe allowed to be placed in his yard for the use of the public a machine commonly known as a "fruit machine" into which a single piastre was inserted by a player, and upon the pulling of the handle the player had a chance of winning as much as twenty piastres. For each piastre inserted which did not result in a win of money the machine returned a piece of chewing gum or a packet of mints. In a prosecution under Section 2 of the Gaming Ordinance, 1935,

HELD: That the machine was used for unlawful gambling, it being immaterial that the machine was not owned by accused since its presence on the premises was an invitation to gamble.

Appeal from the judgment of the Magistrates' Court, Tel-Aviv, dated the first of December, 1935.

Ghussein — for appellant.
Goitein — for respondent.

JUDGMENT.

This is an appeal by the Attorney-General against an acquittal by the Tel Aviv Magistrate's Court of the respondent, the proprietor of the Migdalor Cafe in Tel-Aviv, who was charged with keeping a common gaming house, contrary to Section 2 (1) of the Gaming Ordinance, 1935.

The relevant Sections of this Ordinance are as follows:—

Sec. 2 (1):— "Any person being the owner or occupier, or having the use of, any house, room or place, who shall open, keep or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner or occupier of any house, room or place, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room or place opened, kept or used for the purpose aforesaid, is said to keep a common gaming house."

Sec. 2 (2):— "In this section "unlawful gaming" includes every game of cards which is not a game of skill, and any game the chances of which are not alike favourable to all the players, including the banker or other person or persons by whom the game is managed or against whom the other players stake, play or bet."

The Magistrate found that the machine commonly known as a "fruit machine" which was the foundation of this charge, was not a machine for unlawful gaming, neither was it proved that the premises in which this machine was found belonged to the respondent, and therefore acquitted him. Hence this appeal, which is brought really to determine whether or not the fruit machine is a machine or device for unlawful gaming. I will therefore deal with this point first.

Now, in cases of this species, in the words of the Lord Justice General in a Scottish case, Barnes v. Strathearn (1929 Sc. J. Times 37 at p. 40) which was a case regarding an alleged lottery: "There is no limit to the ingenuity of the devisers of projects such as this, and there is, accordingly, no end to the variety of schemes which may constitute a lottery." Exactly the same, mutatis mutandis, may be said of machines or devices for unlawful gaming.

It may well be, as Mr. Goitein in his able argument has said, that there is no reported case dealing with machines of this particular type, but the principle of the matter is familiar.

To quote Lord Hewart C. J. in Director of Public Prosecutione v. Philipps & another (152 L.T. Rep. 190 at p. 191) "What the Court has to do is to disengage, if it can, the reality of the

transaction from the appearance which for good reason it is made to assume."

And what was the reality of the transaction in this case, when a person inserted a coin in this machine, and pulled the handle or knob? In my opinion it was not a commercial transaction at all. The object of the owner of the machine and the object of the operator were not concerned with purchase of chewing-gum or mints. They were concerned with the chance which the operator might procure of obtaining in return for his 10-mil coin a much larger sum of money, which it is said might amount to 200 mils by the operation of a piece of mechanism over the working of which, after it had been set in motion by him, he had no more control than he had over the waves of the sea.

It could not be contended that to present a piece of chewing gum to each person who staked in a game of roulette would make roulette legal, — it is obvious here that the introduction of chewing gum is solely in the hope of giving a cloak of legality to a transaction, which, in its absence would undoubtedly be unlawful gaming. In my view, it is plain that the right given to the operator was in truth the chance of obtaining, not merely a piece of chewing gum, but a monetary prize, which might amount to twenty times the value of the coin inserted by him, and it is perfectly plain that it did not lie in his hands to do anything to determine the question whether he would receive this sum or any lesser sum or any sum at all. The matter is entirely in the realm of chance: however one looks at this undoubtedly ingenious machine, it is impossible to find anything in the nature of a genuine commercial transaction.

I need not elaborate the matter. I think that the machine has the word "gambling" written all over it, and that it is, in the words of the Ordinance, "a device, machine or thing used or apparently used or intended to be used for the purpose of unlawful gaming."

To deal now with the other points raised in this appeal. It is said that the respondent is not the owner of the machine, but that it belongs to a company. To my mind this is immaterial. It is an offence to keep or use a house, room or place for the purpose of unlawful gaming, and it is equally an offence for an owner or occupier knowingly and wilfully to permit the premises to be used for the same purpose.

If an owner or occupier permits another person to place such a machine on his premises for the purpose of unlawful gaming, he is guilty of an offence under the Ordinance.

The presence of the machine on premises is in itself an invitation to frequenters of the premises to gamble. It may well be that the owner or occupier uses the premises for a more serious and more important purpose, but a purpose is none the less a purpose, if it is subsidiary or incidental to, or of a small extent compared with the main purpose. The Ordinance does not state that the premises must be used solely, or mainly, for the purpose of unlawful gaming, but merely says for the purpose of unlawful gaming.

I come now to the last question — namely, is the respondent the owner or occupier of the premises on which this machine was found? Ownership or occupation is a question which should be capable of easy proof. The production of a tabu extract, a lease, a licence to use the premises as a cafe, which in fact they are, all or any of these would prove this particular point beyond all argument. None of these documents, however, have been produced by the Police before the Magistrate, and the only evidence on this point is oral., The witness, Constable Katz, stated: "I believe that the place in which the machine stood belongs to the cafe." Constable Cook says: "It is possible that the place in which the machine was situated belongs to the cafe." The witness Shamay gives more definite evidence; he said: "I know the Migdalor Cafe which I visit frequently. It consists of a closed part and an open part. The open part is used in fine weather and is an inseparable part of the cafe. I was once sitting in the yard and was served by the Migdalor Cafe." In cross-examination he stated that the yard and garden are one. There is further evidence that there were two machines in this yard, and that on proceeding from the cafe to the lavatory, one passed by the machines. The machine was found in the yard. Apparently no evidence on this point was tendered by the respondent. The Magistrate came to the conclusion that it was not proved that the respondent was the owner or occupier of the yard, in which the machine was standing. We are asked to say that this conclusion is wrong. It is difficult to upset a finding of fact, unless there was not sufficient evidence to support it, or the finding is contrary to the weight of evidence, or is perverse.

Mr. Goitein, at the conclusion of his argument, engagingly

suggested to us, that if the finding was perverse, then at any rate it was not so perverse as to necessitate its being upset. The question before us is, whether, in view of the evidence on this point, which was entirely uncontradicted, the finding of the Magistrate is so unreasonable and contrary to the evidence that it cannot stand.

I am of opinion that it is so unreasonable. It is not suggested by the Magistrate that he disbelieved the evidence. If he had said so, then this Court could not have interfered. There is sufficient evidence, amply sufficient evidence, to shew that this yard was under the control and in the occupation of the respondents, and the finding, that it was not, is contrary to the evidence, which was entirely uncontroverted, and must therefore be set aside.

I am clearly of opinion that this appeal must be allowed, and the judgment of the Magistrate quashed.

The respondent is convicted under Section 2 of the Gaming Ordinance, 1935, in that being the owner or occupier of a place known as the Migdalor Cafe, he did knowingly and wilfully permit the same to be opened and used for the purpose of unlawful gaming.

The respondent will pay a fine of £P. 20 and the machine will be forfeited.

Delivered the 6th day of February, 1936.

In the Supreme Court sitting as a Court of Appeal.

A.A. No. 6/36.

BEFORE:

The Acting Chief Justice (Manning, J.), Evans, J. and Khayat, J.

IN THE CASE OF:

Ali Ibrahim El Nouri — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Conviction under Emergency Regulations, 1936, for discharge of firearm — Regulations under Order-in-Council repealed on repeal of Order-in-Council — Effect on subsidiary legislation not saved on repeal of main legislation — Application of provisions of Interpretation Ordinance, 1929, to interpretation of Order-in-Council — Admissibility of deposition of absent witness — Effect of admission of inadmissible evidence — Article IV, Palestine (Defence) Order-in-Council, 1931 — Regulation 8 A, 22, Emergency Regulations, 1936 — Articles I, II and V, Palestine Martial Law (Defence) Order-in-Council, 1936 — Sections 4 (2) and 5, Interpretation Ordinance, 1929 — Sections 5 and 9 Law of Evidence Amendment Ordinance, 1924.

The appellant was convicted by the Court of Criminal Assize for having on August 21, 1936, discharged a firearm at a member of His Majesty's Military forces contrary to the provisions of Regulation 8 A (a) of the Emergency Regulations, 1936, which were made under Art. IV of the Palestine (Defence) Order-in-Council, 1931. On Sept. 30, 1936, a new Art. IV was by Order-in-Council, substituted for the old but no saving clause was provided for the continuing in force of the regulations made under the old Art. IV. The trial of the appellant took place on Oct. 26, 1936, and the appellant pleaded that on that day the Emergency Regulations were non-existant. Upon appeal from the conviction to the Court of Appeal,

HELD: (Khayat, J. dissenting), (a) That while there was no provision in the Interpretation Ordinance, 1929, making it applicable to the interpretation of an Order-in-Council, or regulations under an Order-in-Council yet the Ordinance was expressly made

applicable by Article 22 of the Emergency Regulations and it may be applied to the Regulations as if they were regulations made under an Ordinance instead of under an Order-in-Council. The effect of Sec. 5 of the Interpretation Ordinance, 1929, was that the repeal of Art. IV did not affect punishments incurred before the date of the repeal and legal proceedings in respect of such punishments could be instituted as if there had been no repeal, (b) That under Sec. 34 of the Trial Upon Information Ordinance, 1924, the depositions of absent witnesses cannot be admitted as evidence until the various matters set out therein are strictly proved in the ordinary way by oral evidence.

Appeal from the judgment of the Court of Criminal Assize (A.Ha. No. 24/36) sitting at Haifa dated the 26th October, 1936.

Hassan Hawa — for appellant.
Musa Alami — for respondent.

JUDGMENT OF THE ACTING CHIEF JUSTICE.

The appellant was convicted on the 20th October last for having discharged a firearm at a member of His Majesty's Military Forces with the intention of assisting the enemy. The local provision under which he was charged and convicted was regulation 8 A (a) of the Emergency Regulations, 1936. These Regulations were made by the High Commissioner in exercise of the power vested in him by Article IV of the Palestine (Defence) Order-in-Council, 1931. This Order-in-Council came into operation in Palestine on the 19th April, 1936. Article II prescribed that it "shall continue in operation therein until the High Commissioner shall by proclamation declare that it has ceased to be in operation".

No such proclamation was made by the High Commissioner, but on the 30th September, 1936, another Order-in-Council was brought into operation by the High Commissioner. It was called the Palestine Martial Law (Defence) Order-in-Council, 1936. The preamable was at follows:—

> "Whereas by the Palestine (Defence) Order-in-Council, 1931, (hereinafter referred to as the Principal Order) provision was made for securing the public safety and defence of Palestine in time of emergency:
>
> "And whereas it is expedient to amend the principal order in the manner following:"

In what follows I shall refer to the two Orders as the 1931 Order and the 1936 Order. Article I of the 1936 Order says it is to be construed as one with the 1931 Order. Article II begins as follows: "The following Article is hereby substituted for Article IV of the principal Order:". Then follows a new Article IV vesting in the High Commissioner power to make regulations. It is therefore quite clear that from the moment the order of 1936 was proclaimed, that is the 30th September 1936, the Old Article IV had disappeared. This is the Article, as I have said, under which the Emergency Regulations were made, and it was under one of these Regulations that the appellant was convicted.

The trial of the appellant began on the 26th October and ended on the same day. Hassan Eff. Hawa, who argued the appeal on his behalf, says that Article IV of the 1931 Order having been repealed on the 30th September, no regulations existed on the 26th October, 1936, under which the appellant could have been tried or convicted. Musa Alami, who appeared for the Crown, was unable to point to any saving clause, but thought that the point was covered by Article V (2) of the 1936 Order. This reads as follows:—

> "(2) Article VB as set out in the preceding paragraph shall apply to all regulations under the principal Order whether made before or after the date upon which this Order comes into operation:".

The Article VB referred to was inserted in the 1931 Order by Art. V (1) of the 1936 Order. It reads as follows:—

> "VB Regulations made under this Order shall have effect as if enacted in this Order and where any regulations made by the High Commissioner or by any person to whom he shall have delegated power to make regulations under this Order purport to have been made under this Order, they shall be deemed to have been lawfully so made and their validity shall not be called in question in any Court of Law or in any other manner whatsoever, and all regulations which purport to have been made by the High Commissioner or by a person to whom he has delegated power to make regulations under this Order shall be presumed, unless the contrary is shown, to have been made by the High Commissioner or by such person as the case may be."

This Article came into force on the 30th September and refers to the 1931 Order as it stood on that date. On that date

the old Article IV had disappeared — a new Article IV had taken its place. The words "Regulations made under this Order" can refer only to regulations made under the new Article IV, and the effect of the Article is that all such regulations shall be deemed to form part of the Order itself; that is, there can be no question of ultra vires.

I turn next to consider the meaning of Article V (2) of the 1936 Order. It provides that Article VB shall apply to regulations made under the 1931 Order before the 30th September as well as to those made after that date, that is to regulations made under the old Article IV as well as under the new Article IV. The effect of Article V B has been already explained, its purpose is to ensure that no regulation shall be held to be ultra vires. Article V (2) of the 1936 Order therefore prescribes that no regulation made under the old Article IV can be held to be ultra vires. Article V (2) came into force only on the 30th September and it might be said that, if the regulations under the old Article IV were not meant to persist, it was otiose to enact that their validity should not be challenged. It seems to me however that the sole object of Article V (2) was to ensure that anything already done under these regulations should not be challenged in a Court of Law on the ground that any regulation was ultra vires. The regulations contained a large number of provisions with reference to taking possession of buildings, food and vehicles; to the arrest and detention of persons; to the imposition of collective fines, and to other matters interfering with the usual liberty of the subject. Before the 30th September the validity of any regulation under which any act purported to have been done might have been questioned in a Court of Law, on and after the 30th September this became impossible. To give an example, if a collective fine had been imposed on a village under the relevant regulation, the validity of the regulation could be questioned in a Court of Law at any time before the 30th September. But if the matter did not reach the Court before that date, then no such question could be raised. The object of Article V (2) of the 1936 Order was a validating one. Persons affected by certain acts may have regarded and may still regard the relevant regulation as being of doubtful validity, but after September 29th this line of attack is no longer open. This to my mind is the plain meaning of Article V (2), and it cannot be construed into meaning that the regulations made under the old Article IV are still in force.

I had some difficulty with the words in Article VB, "shall

have effect as if enacted in this Order," and have considered whether Article V (2) could possibly mean that regulations made before September 30th are to have effect now as if enacted in the Order. But these words have a recognised meaning in the drafting of legislation, they mean simply that any regulations made are to be regarded as if they formed part of the Order-in-Council itself, and that consequently their validity cannot be questioned as if they were legislation of a subordinate character. They merely express in concise form the effect of the remaining words of the Article.

If it was the intention of His Majesty in Council to preserve the regulations made under the old Article IV it could have been done by a very simple clause to the effect that until regulations were made under Article IV as substituted, the previous regulations should remain in force. This was not done. On the authority of Watson v. Winch, (1916) 1 K. B. 688, the previous regulations were repealed as soon as the 1936 Order came into force.

There is another point which was not referred to in the argument before us. Regulation 22 of the Emergency Regulations enacts that the Interpretation Ordinance, 1929, shall apply to the regulations. Section 2 of the Interpretation Ordinance says that that Ordinance shall apply to all regulations, but there are no words in its provisions dealing with the interpretation of an Order-in-Council or of regulations made under an Order-in-Council. In the case of Rushdi Shawa and Others v. Assistant District Commissioner, Gaza, (High Court Case No. 67 of 1936*), McDonnell, C. J., commented on this and said that regulation 22 of the Emergency Regulations was entirely superfluous and unavailing. I must respectfully say that I do not agree with this, I think some meaning must be given to Regulation 22, and I think the natural meaning is that the Interpretation Ordinance is to apply to these regulations as if they were regulations made under an Ordinance, instead of under an Order-in-Council.

Sec. 4 (2) of the Interpretation Ordinance is as follows:—

> "(2) When an Ordinance or part of an Ordinance is repealed and other provisions substituted therefor, all regulations, proclamations, orders and notices issued or made in virtue thereof shall be deemed to be repealed also, unless expressly saved by the Ordinance by which such repeal is made."

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* Post.

This clinches the matter in favour of the argument advanced by Hassan Eff. Hawa. It is not necessary to search through the 1936 Order to see if there is any implied suggestion in any of its Articles that the regulations are to remain in force, they have to be expressly saved.

My interpretation of regulation 22 leads to another matter, and this renders the success of Hassan Eff. Hawa's argument of no avail to the appellant. The effect of Section 5 of the Interpretation Ordinance is that the repeal of the Emergency Regulations by Article II of the 1936 Order on September 30th cannot affect any punishment incurred in respect of any offence against the Regulations committed before that date and that any legal proceedings in respect of such punishment may be instituted as if there had been no repeal. In the case at present under appeal the offence occurred on August 21st and consequently the fact that the Regulations were repealed on September 30th cannot assist the appellant in any way.

The second ground of appeal is that evidence was wrongly admitted at the trial. The evidence objected to was that the depositions of two witnesses named Rycroft and Weignall, who had given evidence at the preliminary investigation were read in court contrary to the provisions of Section 34 of the Trial Upon Information Ordinance. Section 34 of the Trial Upon Information Ordinance, 1924, is as follows:—

> "34. If a witness who has given evidence at the preliminary examination on oath cannot be produced at the trial because of his death, infirmity or sickness, or absence from Palestine, his deposition may with the leave of the Court be read at the trial as evidence in the case, on the 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 27 hereof, and that he had an opportunity of cross-examining the witness."

It will be seen that before the depositions could be read it had first to be proved that the witnesses were absent from Palestine and that the accused was present and had an opportunity of cross-examining the witnesses when the depositions were taken. There was evidence before the Court below that two persons named Rycroft and Weignall had embarked in a troopship at Port

Said on 13th October. There was, however, no evidence whatever that these were the two witnesses who had given evidence at the preliminary investigation, and this cannot be assumed from the fact that their names were the same. The depositions showed that they belonged to the same regiment as the witnesses, but this is not evidence until the depositions are read, and the meaning of the Section is that certain things have to be proved before the depositions are read. Again there was no proof that the accused had been present and had had an opportunity of cross-examining the witnesses. Musa Alami said this was apparent from the depositions, but again these facts have to be proved before the depositions are read. If it was intended that the Magistrate's signature should imply these matters the Section would have said so. My interpretation of the Section is that the various matters set out have to be strictly proved, and proved in the ordinary way by oral evidence and when this has been done the deposition may be read if it is signed by the Magistrate. In other words the deposition is not admitted in evidence until the necessary proof has been given, and until it is admitted it is not evidence of anything contained therein.

I agree with Hassan Eff. Hawa that these depositions were wrongly admitted in evidence. But this does not assist the appellant. Section 9 the Law of Evidence Amendment Ordinance, 1924, is as follows:—

> "9. When evidence which is not admissible in proof of a criminal charge has been admitted by error or inadvertance, such evidence shall not be used in proof of the charge nor shall any judgment be based thereon. Nevertheless the fact that such evidence has been heard by the Court shall not be held to invalidate the judgment, unless in the opinion of the Court the accused would not have been convicted if such evidence had not been given or there was no other sufficient evidence to support the conviction apart from that evidence."

In this case, as will presently be seen, there was "other sufficient evidence to support the conviction apart from the evidence wrongly admitted," and consequently the conviction cannot be interfered with on this ground.

The third ground of appeal is that the evidence was not sufficient to justify the conviction of the appellant. As to this there was the evidence of the witness Price that the appellant had

discharged a rifle at him and then placed the rifle against a wall before running away. Price saw Cpl. Hughes catch the appellant, and then he and Hughes went and took possession of the rifle. They handed the rifle to Sgt. Matthews of the Police who examined it and found it had been recently fired. It had an empty case in the breech and two rounds in the magazine.

I think the evidence of Price was sufficiently corroborated. Some criticism has been made of the fact that the Court has, in its written judgment, confused the names of witnesses, but I do not regard this as ground for upsetting the conviction.

It is further said that there was no proof of an intention to assist the enemy. There was evidence that on the 20th August the police and troops were fired on and that the attackers retreated to Ara village. It was on the next day when the troops were searching the village that the appellant fired at Price. The word "enemy" includes all armed rebels and there was ample material for any Court to conclude that there was an intention to assist the enemy.

There is a further appeal against the sentence of death which was passed on the appellant. The discretion as to sentence was essentially a matter for the Court below and in my opinion this Court should not interfere with it.

None of the grounds of appeal can avail to upset the conviction. The appeal should be dismissed and the conviction and sentence affirmed.

Delivered the 23rd January, 1937.

JUDGMENT OF EVANS, J.

This is an appeal from the Court of Criminal Assize sitting at Haifa. The appellant was charged with two offences: Discharging a firearm at members of His Majesty's Military Forces with the intention of assisting the enemy contrary to Regulation 8A (a) of the Emergency Regulations 1936, and being in possession of firearms and ammunition contrary to Regulation 8 A (i) of the same Regulations. One plea is recorded and apparently refers to the first count as the appellant was found guilty of the offence charged therein, the second count was struck out, and the appellant sentenced to death.

On appeal counsel for appellant disregarded the grounds

of appeal filed and relied on four grounds. In the first place he argued that the Regulations under which the appellant was convicted had been repealed. Secondly he contended that the depositions of Privates Joseph Rycroft and Robert Weignall had been wrongly admitted. His third point was that there were no facts recorded in evidence to support certain findings in the judgment at length, and his fourth that there was not sufficient evidence to support the conviction. He also argued that the sentence was excessive.

The Regulation under which the appellant was convicted is recited in the information as enacted in the Emergency (Amendment) Regulations (No. 5) 1936. In fact it was mainly enacted in the Emergency (Amendment) Regulations (No. 4) 1936, which were published in the Palestine Gazette on 12th June, 1936, and came into force on that day. There is only one Regulation 8A (a) and the offence seems sufficiently defined. Emergency (Amendment) Regulations (No. 4) and (No. 5) 1936, were made by the High Commissioner under powers conferred on him by Article IV of the Palestine (Defence) Order-in-Council, 1931, which was proclaimed and came into force on the 19th April, 1936. On the 26th September, 1936, His Majesty in Council made a further Order entitled the Palestine Martial Law (Defence) Order-in-Council. Article 1 (2) of this Order provides that it is to come into force on its being proclaimed. It was proclaimed on the 30th September, 1936. Article II of this Order substitutes a new Article IV for the Article IV of the principal Order-in-Council. On the 30th September, 1936, therefore, this old Article IV was repealed and as from the time of that repeal the new Article IV has stood in its place. The original Article IV was a provision conferring rule making powers, and those powers had been exercised to make the Regulations under which the appellant was convicted on the 26th October, 1936.

The appellant cited the case of Watson v. Winch, (1916), 1 K. B. 688 to show that the repeal of an enactment creating powers of subordinate legislation repeals the subordinate legislation made thereunder. There appears to be no distinction in principle between a statute as in the case cited and an Order-in-Council as in that case. The two judges who gave reasons for their decisions in that case, Lord Reading, C. J., and Sankey, J., both relied on two grounds, which are briefly stated by Sankey J. as follows:

> "First because otherwise there might be two inconsistent codes relating to the same matter"... "Secondly because the usual practice is to insert in the later statute a section expressly

preserving made by-laws if it is intended that they shall remain in force."

Lord Reading treated the latter as the more important ground. He quoted Surtees v. Ellison (1829), 9 B. & C. 750:

> "It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed. That is the general rule, and we must not destroy that, by indulging in conjectures as to the intention of the legislature."

And went on to say:—

> "Apart from the provisions of the Interpretation Act 1889, it would follow that any law made under a repealed statute ceases to have any validity unless the repealing act contains some provision preserving the validity of the by-law notwithstanding the repeal."

Lord Reading described the second point as one "not of such general application" and treated it as in part falling under the rule as to inconsistent subsequent legislation.

What is treated by Lord Reading as the major reason clearly applies to this case, and the Crown do not suggest that there is in the later Order-in-Council any provisions expressly saving the Regulations made under the repealed Article IV. The new Article IV does not differ from the old merely in detail as in the variation of the first paragraph and the addition of para. (h), but goes on by the alteration of the paragraph succeeding (h) and by paragraphs (2), (3) and (4) to make provision for the establishment of a completely new set of criminal courts without supervision and from whom there was to be no appeal. The courts to try offences prescribed by Regulations made under the original Article IV are laid down in Regulations 3 and 8A. The danger of inconsistent codes referred to by Sankey J. is obvious. Moreover the consideration of these provisions makes it appear probable that the legislator intended a complete supercession of the old Regulations, and the title of the later Order-in-Council supports the view that a new martial law was to be established forthwith.

That it is still the common practice of English draftsmen to insert saving provisions in such cases could not be better exemplified than at present. In 1936 five pieces of consolidating legislation, without major variation such as those just referred to, were passed. I refer to the Old Age Pensions Act, National Health Insurance

Act, Public Health Act, Public Health (London) Act and the Housing Act in which Sections 14, 228, 346, 307 and 189 respectively will show the careful provision made to save subordinate legislation.

As I understood the Government Advocate, he relied to some extent on the wording of Article V of the Palestine Martial Law (Defence) Order-in-Council, and argued that because it says "are hereby inserted" the Order including the new Article IV must be read as having retrospective force. There is a presumption against giving retrospective force to legislation and such force will not be given in the absence of express provision to that effect. There is nothing in this contention.

This Article V inserts as from 29th September Articles VA and VB in the principal Order. There is nothing retrospective in either of these, and this absence was apparent to and intended by the legislator who went on to make the only express retrospective provision in the Order in Sub-Section (2) which reads:—

> "Art. VB as set out in the preceding paragraph shall apply to all regulations under the principal Order whether made before or after the date upon which this Order comes into operation."

The Article VB referred to reads as follows:—

> "VB. Regulations made under this Order shall have effect as if enacted in this Order and where any regulations made by the High Commissioner or by any person to whom he shall have delegated power to make regulations under this Order purport to have been made under this Order they shall be deemed to have been lawfully so made and their validity shall not be called in question in any Court of Law or in any manner whatsoever, and all regulations which purport to have been made by the High Commissioner or by a person to whom he has delegated power to make regulations under this Order shall be presumed, unless the contrary be shown, to have been made by the High Commissioner or by such a person as aforesaid as the case may be."

The Crown contends that this provision has the effect of saving the Regulations made, by preventing the Court from inquiring into their repeal. On the face of them these provisions are not saving provisions at all and say nothing as to the continued existence of the subordinate legislation. The meaning of the first

provision of Article V B has been considered in R. v. Minister of Health (Ex. p. Yaffe) (1930), 2 K.B. 98; (1931) A.C. 494. The remainder of Article V B does not add materially to this.

In effect Article V B prohibits the Courts from considering the validity of the subordinate legislation, the circumstance of its enactment and the manner in which the powers conferred have been exercised. In other words, it is directed against the doctrine of ultra vires. A consideration of the decisions under the Emergency Regulations confirms this opinion. Article V B does not forbid the Courts to read and construe the Order-in-Council under which the Regulations are made. On the other hand it states that the Regulations are to be read as part of the Order-in-Council and the Court must read and construe all in order to enforce the Regulations. In construing the Order-in-Council they must apply the ordinary rules of interpretation, and if these rules lead to the conclusion that the Regulations have been repealed they can only find that they are no longer in force. The Court could not enquire into the validity of the Order-in-Council but they can and must enquire into whether or not it has been repealed expressly or impliedly in accordance with the known rules of interpretation. The Regulations cannot be on a higher plane than the Order itself. In my opinion the Emergency Regulations were repealed by the Order-in-Council on the 30th September, 1936.

The offence of which the appellant was found guilty was committed on the 21st August last. At that date the Regulation under which he was convicted was still in force. He was tried and convicted on the 26th October, 1936, after the Regulations were repealed. The general rule, as quoted above, is that a repealed statute must be considered (except as to transactions passed and closed) as if it had never existed. No prosecution could be brought under it after its repeal. The Crown argued that the Order-in-Council must be interpreted in accordance with the Interpretation Act 1889, and that by Sec. 38 (2) the appellant was properly convicted. The Palestine Martial Law (Defence) Order-in-Council recites that it is made under the Foreign Jurisdiction Act 1890. I can find nothing in the Interpretation Act showing that it applies generally to Orders-in-Council prerogative or statutory. On the other hand when its provisions are to apply to Orders-in-Council it expressly says so as in Sections 31 and 36 (2). Section 31 was not called in aid but it provides that expressions in statutory Orders-in-Council shall have the same meaning as in the Act under which

they are made. The argument then seems to amount to saying that the word "Substituted" (and consequent repeal) shall have the same effect as "substituted" would have had in the Foreign Jurisdiction Act 1890, had it been used therein when construed in accordance with the Interpretation Act 1889. This is not what the Act says.

It remains to consider two points not raised by the Government Advocate. Article V (2) of the later Order-in-Council deals with Regulations under the principal Order whether made before or after the date upon which the later Order comes into operation. The expression "under the principal Order" is equivalent to "under the repealed Article IV", since Regulations under the Order can only be made under this article. Effect must be given, if possible, to every expression in an instrument. Can effect only be given to the word "before" by understanding it as an implied saving of the Emergency Regulations? This would indeed be a slender reason for implying a saving provision. As I understand the rules of interpretation by necessary implication the justification for the assumption made as to such implied meaning is to be found in the necessity for making it, and if therefore the word "before" can be given any application without assuming an intention to save the regulations that intention must not be assumed. The principal Order consists of two main Articles, IV and V. The former confers powers of legislating, and the latter confers powers to do administratively acts which would otherwise be violations of private person's rights of personal liberty or of property. The principal regulations under Article IV are undated but were published on 19th April, 1936, and largely concern themselves with bestowing on junior officers powers differing in degree rather than in kind from those conferred by Article V of the Order-in-Council. Whether this was in accordance with the wishes of the superior legislating authority, we are debarred from considering, but we must consider the effect of those regulations actual and theoretical. Under these regulations administrative orders can be and have been made in large numbers. The justification for the otherwise unlawful acts performed in carrying out such orders is to be found in the Orders and Regulations under which they were done. These acts might be challenged at any time within the period of prescription. Article V (2) would then take effect to prevent the validity of the regulations being canvassed. This reading of "before" is confirmed by the proviso to the Article V (2) which following on the provisions as to administrative orders saves

judgments and judicial orders based on the ordinary rules as to ultra vires.

The second point which falls to be considered is the effect of Regulation 22 of the principal regulations. At first sight it would appear impossible that a provision should take effect to extend the life of the subordinate enactment in which it is found for any purpose after the total repeal of the enabling enactment. Any such saving would naturally be looked for in the repealing instrument. I understand Regulation 22 to mean that the Interpretation Ordinance, 1929, shall apply as a whole to the regulations as if they were an Ordinance. As on the 30th September, 1936, the regulations made were affirmed and the Courts prohibited from canvassing the propriety of any of their provisions by the Order-in-Council which also repealed them, there seems to be nothing inconsistent in saying that that repeal takes effect in accordance with the Interpretation Ordinance, the continued effect of the regulations depending on the Order and the Ordinance. Section 5 of the Ordinance is similar to Section 38 (2) of the Act, and I think that the appellant was rightly convicted after the repeal of the regulations.

The appellant admitted on his second point that the evidence of Captain Riggs was good evidence to prove that the witnesses Rycroft and Weignall were out of the country, but contended that it should be corroborated in accordance with Section 5 of the Law of Evidence Amendment Ordinance. The appellant was not convicted on the evidence of Captain Riggs nor was his evidence such as would inculpate the accused, but was on a purely collateral matter of whether depositions could be given in evidence. In my opinion no corroboration was necessary.

The third and fourth grounds of appeal in substance merge into one. Under the former he complained of certain passages in the judgment attached to the proceeding which ascribed to Private Price statements that the rifle belonged to the appellant, and that the witness smelt the rifle and found it recently used and to Cpl. Hughes a statement that he heard shots and saw an Arab running, and which speak in paragraphs 5 and 6 of "they saw." The appeal is considered on the Judge's notes of the evidence, and not on a transcript of the proceedings. The findings are substantially supported by the notes. The gravamen of the complaint is that Price's evidence lacks corroboration. It is true that he alone saw the accused fire, but he goes on to describe how the accused

ran away and was caught by Cpl. Hughes, how in running he hid his rifle, and how Price and others went in search and found the rifle which when smelt by the Sergeant in charge, smelt as if it had been recently fired. His evidence implicating the accused must be read as a whole, and so read seems to be amply corroborated.

In my opinion, therefore, although the Emergency Regulations have been repealed, the appellant was rightly convicted, and the appeal should be dismissed. The sentence is not exceptional and should stand.

JUDGMENT OF KHAYAT, J.

The most important objection taken by the appellant's advocate is that Section 8A (a) of the Emergency Regulations, 1936, under which the accused was convicted and sentenced to death, was made under Article IV of the Palestine (Defence) Order-in-Council, 1931, and that that Article has been substituted by Article II of the Palestine Martial Law (Defence) Order-in-Council, 1936, which was published on the 30th September, 1936. He argued that since his client was convicted and sentenced on the 26th October, 1936, i.e. after Article II of the Martial Law (Defence) Order-in-Council, 1936, came into force, the said Emergency Regulations were no more in force. He therefore applies for the conviction and sentence to be quashed and his client released.

The Government Advocate argued, in reply, that Article V (b) of the Palestine Martial Law (Defence) Order-in-Council, 1936, prevents the Courts from dealing with the validity of the Regulations made under that Order and that the second paragraph of the same Articles provides that these provisions shall apply to all regulations made under the principal Order of 1931.

The point to be decided is whether or not Article IV of the Palestine (Defence) Order-in-Council, 1931, under which the Emergency Regulations were made was still in force, although it had been substituted by Article II of the Palestine Martial Law (Defence) Order-in-Council, 1936. In other words, were the Regulations made prior to the 30th September, 1936, effective after that date. The provisions of the second paragraph of Article V of the 1936 Order-in-Council which prevent the Courts from dealing with the validity of the regulations previously made cannot be considered as authorising the application of these regulations without any clear provision to the contrary.

It cannot be argued that Regulation 22 of the Emergency Regulations, 1936, which makes the Interpretation Ordinance, 1929, applicable to these Regulations, is still in force when Article IV of the Palestine (Defence) Order-in-Council, 1931, has been repealed and substituted by Art. II of the Palestine Martial Law (Defence) Order-in-Council, 1936.

For the above reasons, I am of the opinion that Article IV of the Palestine (Defence) Order-in-Council, 1931, and the Regulations made thereunder are no more in force and that the conviction and sentence should be set aside, and the appellant acquitted.

Delivered the 23rd day of January, 1937.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 10/36.

BEFORE:

The Senior Puisne Judge (Manning, J.), Plunkett, J. and Khayat, J.

IN THE CASE OF:

Haim Abu Sham — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Prosecution under Art. 38, Town Planning Ordinances, 1921—1929, for erecting building without permit—Appeal by Attorney-General from acquittal on the ground of new evidence having been revealed—Power of District Court to remit criminal proceedings to magistrate to hear new evidence — Rule 10, Magistrates' Courts (Procedure) Rules, Laws of Palestine, Vol. 3, p. 2371.

The Attorney-General appealed from the acquittal of the appellant on a charge of erecting a building contrary to Section 38 of the Town Planning Ordinance (Cap. 142), alleging in his appeal that since the trial new evidence had come to light leading to establish the guilt of the accused. The District Court allowed the appeal and remitted the case to the magistrate for re-hearing. Leave to appeal to the Court of Appeal from his order for remittal having been granted,

HELD: That the discovery of new evidence after the remittal of an accused person is not a ground for ordering a re-hearing. The District Court can refer a case back only where there has been a serious error in procedure.

Appeal from the judgment of the District Court of Haifa, dated the 30th March, 1936, whereby the judgment of the Magistrate's Court, Haifa, dated 14th January, 1936, acquitting the appellants from a charge under Article 38 of the Town Planning Ordinance, 1921—1929, was set aside, and the case remitted for the purpose of hearing new evidence.

JUDGMENT.

On the 14th January, 1936, one Haim Abu Sham was acquitted in the Magistrate's Court, Haifa, on a charge of erecting a building without a permit, contrary to Section 38 of the Town Planning Ordinance. The Attorney-General appealed to the District Court, and on March 30th, 1936, that Court made an order as follows:—

> "The appellant alleges that since the trial new evidence has come to light which leads to establish the guilt of the accused — namely a map drawn by Mr. Atlas, the Surveyor of the Land Registry of Haifa, and a complaint lodged by Mr. Saadia Paz with the District Court, Haifa, on the 1st day of October, 1934.
>
> In the circumstances, the judgment of the Magistrate is set aside, and the case is remitted to him for enquiring into the new evidence referred to by the prosecution."

Sham's counsel applied for leave to appeal against this order, and was granted leave to appeal on the following point of law:

> "Has the District Court, sitting in its appellate capacity, any, and if so what, power to remit criminal proceedings to the Magistrate's Court for the purpose of hearing further or fresh evidence; and if so, in what circumstances and within what limitations?"

The only provision with reference to the powers of the District Court on an appeal from a Magistrate's Court is Rule 8 of the Rules made by the Senior Judicial Officer on the 4th July, 1918, (See Drayton, page 2372). This rule is as follows:—

> "8. The following provisions are substituted for Article 46:

If it is held that the Magistrate had no jurisdiction the District Court shall name the tribunal proper to try the case. If the judgment was based on wrong grounds, the District Court shall decide the case itself. If there was a serious error in procedure, the District Court may either decide the case itself or refer it back to the Magistrate for rehearing."

It will be seen that a District Court can refer a case back only when there has been a serious error in procedure. In the present case it is not alleged that there had been any such error, what is alleged is that new evidence has come to light establishing the guilt of the appellant.

The rule itself answers the question propounded by the District Court. In my opinion the order of the District Court was wrong and the appeal should be allowed.

Delivered the 14th day of November, 1936.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 19/36.

BEFORE:

The Chief Justice (McDonnell, C.J.), Manning, J. and Khayat, J.

IN THE CASE OF:

Ahmad el Tarazi — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Criminal procedure — Three charges brought against one accused upon the same facts — Not more than one sentence to be passed upon same facts — Section 28 (3), Trial Upon Information Ordinance, 1924.

In a trial before the District Court the accused was charged with taking part in an unlawful assembly, with brandishing a dagger and with wounding a police officer, offences which arose out of one set of facts. The accused was found guilty on all charges and sentenced separately on each. Upon appeal,

HELD: That not more than one sentence may be passed upon any person upon the same facts.

Appeal from the judgment of the District Court of Nablus dated the 7th day of May, 1937.

Nasr — for appellant.
Ghussein — for respondent.

JUDGMENT.

Under the proviso to Section 28 (3) of the Trial Upon Information Ordinance, 1924, no more than one sentence shall be passed upon any person upon the same facts.

We are satisfied that the same facts alone were proved in respect of the offences proved.

We, therefore, while confirming the convictions, set aside the provision in the judgment that the sentences should run consecutively making a total period of 7 years' imprisonment and substitute a provision that the sentences should run concurrently making the period of imprisonment one of 3 years.

Delivered the 5th day of August, 1936.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 45/36.

BEFORE:

The Chief Justice (McDonnell, C.J.), Manning, J. and Frumkin, J.

IN THE CASE OF:

Ali Hassan Ahmed Issa — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Possession of unlicensed ammunition — Summary trial by District Court under Courts (Temporary Constitution) (Further Provisions) Ordinance, 1936 — Meaning of "Court of Summary Jurisdiction" — Sufficiency of evidence of possession — Article IV (1) (i), Palestine (Defence) Order-in-Council, 1931 — Regulation 8 A (1), Emergency Regulations, 1936.

The appellant and three others were found sitting in the appellant's melon patch on a mattress under which unlicensed rifle ammunition was found buried in the ground. All four persons were tried summarily by the District Court constituted under the Courts (Temporary Constitution) Ordinance, 1936, for being in possession of ammunition contrary to Regulation 8 A (1) of the Emergency Regulations, 1936, and Section 3 of the Criminal Law (Amendment) Ordinance (No. 2), 1927. The District Court convicted the appellant and sentenced him to five years' imprisonment, the minimum which could be imposed under the Regulation. The appellant appealed on the grounds, inter alia, (1) That his trial, which had taken place summarily before a District Court was a trial before a Court of Summary Jurisdiction within the meaning of Art. IV (1) (i) of the Palestine Defence Order-in-Council, 1932, and consequently, the maximum sentence which the court could impose was six months; (2) There was insufficient evidence of possession warranting a conviction.

HELD: That district courts, although empowered under various Ordinances to conduct summary trials in certain cases, though not in all, cannot be considered, when trying cases summarily, to be included in the technical term, "Courts of Summary Juris-

diction" which is employed in Art. IV (1) (i) of the Palestine Defence Order-in-Council, 1931. The District Court, therefore, had the power to impose a sentence of five years.

Since however, the presence of cartridges in the ground in an open melon patch on which the appellant and others were sleeping on mattresses, was not in the opinion of the court evidence of possession by the appellant, the conviction was quashed.

Moghannam — for appellant.
Musa Alami — for respondent.

Appeal from the judgment of the District Court of Jaffa dated 21st July, 1936.

JUDGMENT.

On the point of law as to whether the trial summarily by a District Court under the provisions of Section 2 of the Courts (Temporary Constitution) (Further Provisions) Ordinance, 1936 (No. 47 of 1936) is a trial before a Court of Summary Jurisdiction or not as contemplated by Article IV (1) (i) of the Palestine (Defence) Order-in-Council. We note that the words Courts of Summary Jurisdiction are printed therein with capital letters, that under Section 13 (II) of the English Interpretation Act, 1889, the expression 'Court of Summary Jurisdiction' shall mean any Justice or Justices of the Peace or other Magistrate by whatever name called to whom jurisdiction is given under the Summary Jurisdiction Act.

Article IV (1) of the Defence Order-in-Council provides for the authorisation of trial in the case of minor offences by Courts of Summary Jurisdiction.

Now under Section 19 of the Criminal Law Amendment Ordinance 1927 (No. 2 of 1927), now repealed and replaced by Section 2 of No. 4 of 1930, certain offences were triable summarily before District Courts. So too under Section 3 of of the Magistrates Courts Jurisdiction Ordinance, 1935, and Section 5 (d) of the Courts (Amendment) Ordinance, 1935, a right to demand a summary trial before a District Court was conceded in certain cases.

We hold, however, that these provisions, and that which we are concerned with, which empowers summary trials to be conducted by such Courts in certain cases, though not in all, do not bring District Courts when trying cases summarily within the

technical term, Courts of Summary Jurisdiction, which is employed in Article IV (1) (i).

With regard to the question of evidence, the presence of cartridges in the ground in an open melon-patch, on which the appellant and others were sleeping on mattresses, is not in our opinion evidence of possession by the appellant of the explosive articles, namely, cartridges, so as to satisfy the provisions of Regulation 8 A (1) of the Emergency Regulations.

For this reason the appeal is allowed and the conviction is quashed.

Delivered the 12th day of August, 1936.

In the High Court of Justice.

H.C. No 67/36.

BEFORE:

The Chief Justice (McDonnell, C.J.) and Manning, J.

IN THE CASE OF:

Rushdi Shawa and Others — PETITIONERS.

v.

The Assistant District Commissioner, Southern District, Gaza,

The District Commissioner, Southern District,

The Attorney-General — RESPONDENTS.

Order made by Assistant District Commissioner for payment by town of fine — Power of District Commissioner to impose fine — Interpretation of statutes — Retroactive operation of statutes not expressed to be retroactive — Rule of "noscitur a sociis" — Application of Interpretation Ordinance, 1929, to interpretation of provisions of an Order-in-Council — Meaning of "District Commissioner", "Ordinance", "forfeiture" — Regulations 19A, 22, Emergency Regulations, 1936 — Article IV, Palestine (Defence) Order-in-Council, 1931 — Subsiduary legislation not to be unreasonable nor in excess of statutory power authorising it — Legislation ultra vires the High Commissioner.

In May, 1936, damage having been done to telegraph poles and other Government property near Gaza, the Assistant District Commissioner, acting under Regulation 19A of the Emergency Regulations, 1936, imposed a collective fine on the town of Gaza. Certain of the inhabitants contested the legality of the fine and obtained an order nisi from the High Court to issue to the respondents to show cause why the order of the Assistant District Commissioner should not be set aside. Upon the return to the rule,

HELD: Making absolute the order nisi that in the construction of statutes, especially when the rights and liabilities of persons are altered thereby, they are not to have a retrospective operation unless it is expressly so stated. Regulation 19A having come into force

subsequent to the dates of the alleged offences and not having been given express retroactive operation the District Commissioner had no authority to impose the fine.

HELD ALSO, by the Chief Justice (a), that the term "District Commissioner" employed in the Emergency Regulations, 1936, did not include Assistant District Commissioner, the provisions of the Interpretation Ordinance, 1929, being inapplicable to the interpretation of an Order-in-Council, (b), that Regulation 19A of the Emergency Regulations, 1936, was ultra vires since it was not within the scope of the authority conferred upon the High Commissioner by the Palestine (Defence) Order-in-Council, 1931, (c) that where in the same statute and in relation to the same subject matter, different words are used, the court must see whether the legislature has not made the alteration intentionally, and with some definite purpose; prima facie such an alteration would be considered as intentional.

Cattan, Atallah — for petitioners.
Lloyd Blood, Kantrovitch — for respondents.

ORDER OF THE CHIEF JUSTICE.

This is a return to a rule nisi against the Assistant District Commissioner, Southern District, Gaza; the District Commissioner, Southern District; and the Attorney-General; to show cause why an Order of the Assistant District Commissioner, Southern District, Gaza, dated the 7th July 1936, imposing a collective punishment on the town of Gaza in respect of damage to telegraph lines, etc., and attempts to damage the railway, should not be set aside.

The operative part of the order in question, (Ex. A.) runs as follows:—

> "The actual cost of the damage done amounts to approximately £P. 800 and it is fair to assume that the intended damage would amount to £P. 200.
>
> I accordingly impose a collective fine of One Thousand Palestine Pounds on Gaza Town, the incidence of which will be detailed in a supplementary order under my hand."

In his reply to a letter, Ex. B., dated the 14th July, 1936, from the petitioners' counsel, the Assistant District Commissioner writes: "The fine was not imposed under the provisions of the Collective Punishments Ordinance 1926"; and the Acting Attorney-

General informs us that it purported to be imposed in virtue of Section 19A of the Emergency Regulations 1936, as enacted by Section 7 of the Emergency (Amendment) Regulations (No. 4) 1936 (Supplement No. 2 to Gazette of 12th June 1936, p. 611). These Regulations, in their turn, purport to be made by the High Commissioner under Article IV (1) of the Palestine (Defence) Order-in-Council 1931, which was brought into operation by the High Commissioner's Proclamation of the 19th April, 1936.

The various offences or acts of damage to property which are set out as the reasons for the imposition of the collective fine in this case are stated in the Assistant District Commissioner's note of the proceedings. (Ex A.) as having taken place on the 16th, the 24th and the 25th May, 1936.

Now the Emergency (Amendment) Regulations (No. 4) 1936, which added Section 19A to the principal Regulations, were gazetted and, by Section 7 (d) of the Interpretation Ordinance 1929, obtained the force of law on the 12th June, 1936. As was said by Fry J. in Hickson v. Darlow (1883), 23 Ch. D. 690 at p. 692: "it is a well known principle of law on the construction of Acts of Parliament, and especially when the rights and liabilities of persons are altered thereby, that they are not to have a retrospective operation unless it is expressly so stated."

The principle here set out applies with equal force to subordinate legislation such as the regulations in question and, since there is nothing giving express retroactive operation to them, it is clear that offences committed or acts done before the amending regulations, which enacted Section 19A came into force, cannot justify an order under that Section.

We come now to the fact that a District Commissioner only is empowered by Section 19A of the Regulations to impose a collective fine.

By Section 3 A of the Interpretation Ordinance 1929, "In every Ordinance, unless there be something repugnant in the subject or context: 'District Commissioner' means.... Assistant District Commissioner of a District....". Now an 'Ordinance' under Section 3 C (1) "means any enactment by the legislature of Palestine, and includes Orders by the High Commissioner-in-Council,.... Orders made under an Ordinance....;"

The instrument with which we are dealing in this case is a regulation made by the High Commissioner under an Order of

His late Majesty-in-Council. This is obviously not an 'Ordinance' within the definition in Section 3 C (1) of the Interpretation Ordinance 1929. It follows, therefore, that the term 'District Commissioner' in the Emergency Regulations, 1936, does not include an Assistant District Commissioner. If the High Commissioner, in making Section 19A of the Regulations, had intended to confer upon Assistant District Commissioners the powers referred to, his only means of doing so would have been — assuming that the Section itself was intra vires — by mentioning therein 'Assistant District Commissioner' as well as District Commissioner.

It may be asked what is the effect of Section 22 of the principal Emergency Regulations, which were gazetted on the 19th April, which says "The Interpretation Ordinance, No. 34 of 1929, shall apply to these Regulations." This cannot be taken to mean that Regulations made by the High Commissioner under an Order of the King-in-Council are Ordinances under the definition in Section 3 C (1) and that therefore under Section 3 A the term 'District Commissioner' means Assistant District Commissioner; for that would involve the assumption, which can have no legal justification, that a definition contained in an Ordinance was being amended by a subordinate legislative instrument, namely a regulation. In fact I am satisfied that Section 22 of the Emergency Regulations is entirely superfluous and unavailing, as its effect is merely to reenact in different terms Section 2 of the Interpretation Ordinance 1929, by which the provisions of that Ordinance apply, *inter alia*, to all Regulations passed, made and published after the commencement of the Ordinance in question.

So too it cannot be said that Article IV (5) of the Palestine (Defence) Order-in-Council 1931, which provides that any provision of any Law of Palestine which may be inconsistent with any Regulation made under that Article shall be suspended and of no effect, must be held to make 'District Commissioner' in the Regulations include an Assistant District Commissioner.

We come now, however, to the still more important point (as to whether Section 19A was *intra vires* the power conferred upon the High Commissioner by Article IV of the Palestine (Defence) Order-in-Council 1931. It is clear that that Order-in-Council does not confer unfettered powers upon the High Commissioner in respect of the regulations which he may make thereunder. Craies on Statute Law, speaking of statutory regulations to which these regulations are comparable, states, on page 261 of the

3rd Edition, a fact which is well-known, namely that the validity of many regulations made under the Defence of the Realm Acts passed in England during the Great War has been considered by the Courts.

Maxwell on Statutes, 7th Edition p. 255, puts the whole matter in these words "Rules and by-laws made under statutory powers enforceable by penalties are construed like other provisions encroaching on the ordinary rights of persons. They must, on pain of invalidity, be not unreasonable, nor in excess of the statutory power authorising them, nor repugnant to that statute or to the general principle of law."

It is not necessary to emphasize the fact that when rules or regulations are made under the powers conferred not by an Ordinance of the territory but by an Order of the King-in-Council, applying to the territory, the same tests are applicable. In this connection I should like to point out that in Chester v. Bateson, (1920) 1 K.B. 829 at p. 837, Avory J., in one of the judgments of the Court, quoted with approval a passage from the dissentient judgment of Lord Shaw of Dunfermline in Rex v. Halliday (1917) A. C. 260 at p. 287, which sets out very clearly the duty of the judiciary vis-a-vis subordinate legislation such as we are concerned with.

The passage in which, be it noted, the word 'mandate' is used not in the technical constitutional sense in which it is used in this territory but merely as a synonym for "authority" runs as follows:—

> "Whether the Government has exceeded its statutory mandate is a question of ultra or intra vires such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government, and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny."

It is our duty therefore to direct an independent scrutiny upon the question whether Section 19A of the Emergency Regulations 1936, is within the scope of the authority conferred upon the High Commissioner by the Palestine (Defence) Order-in-Council 1931.

Under Section 19A of the Emergency Regulations, not merely persons proved to have committed an offence, but every one of the inhabitants of a town, quarter or village, or occupants of a house, in, or in the vicinity of which, an offence has been committed, can be subjected to a fine or be liable to have their live stock, grain or other produce seized and sold if the fine is not paid; provided that the District Commissioner has reason to believe that the inhabitants of the town, quarter or village, or the occupants of the house, committed or connived at the offence or failed to render assistance in the discovery of or connived at the escape of, any offender or suspect, or combined to suppress evidence.

Such fine, it will be observed, can under the Regulations be levied not by any of the Courts prescribed in Article IV (1) and (2) of the Palestine (Defence) Order-in-Council 1931, but by a District Commissioner; and there is laid down no limit whatever to the amount of the fine nor is there any right of appeal provided for from the District Commissioner's decision as there would be if the fine were imposed by a Court and exceeded £P. 10.

It is a canon of interpretation of legislative instruments, that is well known and long established, that if such instruments purport to encroach upon the rights of the subject whether as regards person or property they are subject to a strict construction. In other words, it was spoken of by Bowen L.J., in Hough v. Windus (1884), 12 Q.B.D. p. 224, as "the recognised rule that statutes should be interpreted if possible so as to respect vested rights."

Applying this principle it is clear that the regulation in question could not have been validly made under the first two lines of Article IV (1) of the Palestine (Defence) Order-in-Council (1931), which merely empowers the High Commissioner to make regulations for securing the public safety and the defence of Palestine.

I would here draw especial attention to the fact that the Order-in-Council in Article IV (1), in providing in line 4 that the High Commissioner "in particular may by such Regulations make provisions with regard to all matters coming within the classes of subjects hereinafter enumerated," does not qualify the words "in particular" by the words "but without prejudice to the generality of the foregoing" as is done in line 5 of Article V (5).

The Acting Attorney-General's second line of defence is that he regulations were *intra vires* Article IV (1) (g) which empowers the High Commissioner to make regulations with regard to

all matters coming within "appropriation, control, forfeiture and disposition of property and of the use thereof." I am very doubtful if this refers in any way to a punitive forfeiture of any person's money. The juxtaposition of the words 'control' and 'use' in the same connection, on the '*Noscitur a sociis*' principle, points clearly against such an intention. Further I would point out that, as was said by Lord Tenterden in Rex v. Great Bolton (1828), 8 B. & C. 71 at p. 74, "where the legislature in the same sentence uses different words we must presume that they were used in order to express different ideas." So too Lord Esher M. R. in Brighton Parish Union v. Strand Union (1891), 2 Q. B. 156 at p. 167, said:

> "It is a rule of construction that where in the same Act of Parliament and in relation to the same subject matter, different words are used, the Court must see whether the legislature has not made the alteration intentionally, and with some definite purpose; prima facie such an alteration would be considered intentional."

I quote these judgments in view of the fact that while in Article IV (1) (g) there is used the word 'forfeiture' which the Acting Attorney-General asks us to hold includes the sense of 'fine' — the word actually used in Regulation 19A — seven lines below the word 'forfeiture' in Article IV (1) (g) appears the word 'fine'; and upon the authorities which I have cited it is clear that the use of different words connotes the intention by the legislator to convey different meanings thereby.

But even if the word 'forfeiture' were to include a punitive fine, it is clear from the judgment of Bowen L.J. in Hough v. Windus, which I have already cited, that powers to legislate in terms as wide as those in Section 19A of the Regulations purporting to encroach to an absolutely unlimited extent by way of punitive fine, without any opportunity of appeal, upon the rights of property not only of guilty persons, but of innocent persons as well, are powers which must be given in express terms.

Such express terms cannot by any stretch of the imagination be found in the Palestine (Defence) Order-in-Council 1931.

I am therefore bound to hold this section of the Regulation to be *ultra vires* and for this reason, and for the other reasons already set out, namely that it cannot be held to be retrospective, and that it purports to empower only a District Commissioner and not an Assistant District Commissioner to impose a collective fine,

I hold that the rule nisi must be made absolute and the Order of the Assistant District Commissioner of the 7th July, 1936, must be set aside with costs to include £P. 2 advocate's fee.

Order made the 31st July, 1936.

ORDER OF MR. JUSTICE MANNING.

During the month of May 1936, a considerable amount of damage was done to the property of the Posts and Telegraphs Department and the Public Works Department in and in the vicinity of the town of Gaza. On certain other dates, which are not known to the Court, damage was done to, and an attempt was made to blow up, the railway permanent way; troops were fired on and ambushed; and explosive bombs and shells were used.

Accordingly, on July 7th, 1936, the Assistant District Commissioner, purporting to act under Regulation 19A of the Emergency Regulations 1936, imposed on the inhabitants of Gaza a collective fine of £P. 1,000. A certain number of them contested the legality of this fine, and obtained an order nisi from this Court.

On the 23rd July, the Attorney-General appeared to show cause. He dealt very fully with the objections to the validity of the action of the Assistant District Commissioner. Mr. Cattan replied on behalf of the inhabitants of Gaza — during the course of his reply he drew the attention of the Court to a point that had not been previously mentioned, namely that Regulation 19A came into force on the 12th June and that, so far as was shown by the order of the Assistant District Commissioner, the only known dates for the relevant offences and damage were during the month of May.

The Regulation is of an unusual nature; it punishes, and is meant to punish, innocent persons without giving them any opportunity of being heard. No Court could construe a regulation of this nature as being retrospective. For the Assistant District Commissioner to have any powers under the regulation, the offences, damage or loss must have occurred on or after the 12th June.

On the facts before the Court, the Assistant District Commissioner was not empowered to impose this fine under this regulation. This is good ground for making the order absolute and it is not necessary to deal with the other grounds on which

the action of the Assistant District Commissioner has been challenged.

Order made the 1st August, 1936.

In the High Court of Justice.

H.C. No. 87/36.

BEFORE:

The Senior Puisne Judge (Manning, J.) and Frumkin, J.

IN THE CASE OF:

Michel Mitri — PETITIONER.

v.

The District Commisssioner, Southern District

Officer in Charge, Detention Camp, Sarafend

Inspector-General of Police and Prisons

The Attorney-General — RESPONDENTS.

Detention in prison camp under Emergency Regulations, 1936 — Application for writ of habeas corpus — Power of District Commissioner under Regulation 15 B, Emergency Regulations, 1936 — District Commissioner not obliged to state his grounds to support his orders.

The petitioner, who was detained for three months in a Detention Camp by order of the District Commissioner under Regulation 15 B of the Emergency Regulations, 1936, was, on the termination of the three months ordered to be detained for a further three months, whereupon he applied to the High Court for a writ of habeas corpus on the grounds (a), that the District Commissioner had power to make only one order under the said Regulation, and (b), that the District Commissioner had not given grounds for the detention.

HELD, dismissing the petition for the writ (a), that the Regulation allows detention for a period not exceeding one year and

as to detention for this period more than one order could be made by the District Commissioner, (b), that the District Commissioner's powers under the Regulations are absolute and that he is not obliged to give any grounds when he acts under them.

Aziz Shihadeh — for petitioner.
No appearance for respondents.

ORDER.

This is an application for a writ of habeas corpus.

One, Michel Mitri, it is admitted, is detained in the Detention Camp at Sarafand under an order of a District Commissioner made by virtue of Regulation 15 B of the Emergency Regulations, 1936, for a period of three months from the 1st September 1936. He had been previously detained by virtue of the same Regulation for a period of three months, which expired on September 30, 1936. It is urged by counsel on Mitri's behalf that the District Commissioner may make one order only under Regulation 15 B.

Regulation 15 B allows detention for a period not exceeding one year. If Mitri had already been detained for over a year a point might arise for determination as to whether the District Commissioner had exceeded his powers. But Mitri has already been detained only for a period just over three months, and we think that the District Commissioner has power under the regulations to make more than one order as regards any particular person.

Mitri's counsel raised a second point that no grounds have been given by the District Commissioner for the detention. We are of opinion that the District Commissioner's powers under the regulations are absolute and that he is not obliged to give any grounds when he acts under the regulations.

The application is refused.

Made the 2nd October, 1936.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 109/36.

BEFORE:

The Chief Justice (McDonnell, C.J.), Manning, J. and Khaldi, J.

IN THE CASE OF:

David Hauptmann — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Conviction by Court constituted of President of District Court sitting alone — Court improperly constituted — Procedure to be adopted by Court of Appeal where no 'court below' as contemplated in Section 69 (c), Trial Upon Information Ordinance, 1924— Regulations 3, 8 A (i), Emergency Regulations, 1936—Sections 11, 69 (c), Trial Upon Information Ordinance, 1924—Courts (Temporary Constitution) Ordinance, 1936 — Courts (Temporary Constitution) (Further Provisions) Ordinance, 1936.

The appellant, who was found guilty on summary trial by a District Court consisting of one judge of having in his possession a pistol and ammunition contrary to Regulation 8 A (i) of the Emergency Regulations, 1936, appealed on the grounds (a) that no preliminary enquiry was held as required by Section 11 of the Trial Upon Information Ordinance, 1924, (b) that the court was wrongly constituted, consisting, as it did of a President sitting alone, (c) that Regulation 8 A (i) of the Emergency Regulations, 1936, was ultra vires.

HELD, by a majority of the Court (McDonnell, C.J. dissenting) that the court was improperly constituted, Regulation 3 of the Emergency Regulations, 1936, not having been complied with, since it provided that offences under the Regulations "shall be enquired into and determined by Magistrates' Courts and District Courts, as the case may be, in accordance with the provisions of the Magistrates' Courts Jurisdiction Ordinance, 1935, and the Courts Ordinances, 1924—1935, and the Trial Upon Information Ordinances, 1924—1935, or any amendment thereof respectively" whereas the appellant was in fact tried under the provisions of the Courts

(Temporary Constitution) Ordinance, 1936, and the Courts (Temporary Constitution) (Further Provisions) Ordinance, 1936.

HELD ALSO, unanimously, that Regulation 8 A (i) of the Emergency Regulations, 1936, was intra vires.

HELD ALSO, by a majority of the Court (Khaldi, J. dissenting) that as there was no "court below" as contemplated in Section 69 (c) of the Trial Upon Information Ordinance, 1924, to which the Court of Appeal had power to remit the case for a new trial, the only course open to the Court, after allowing the appeal was to quash the conviction and sentence and to discharge the appellant.

Appeal from a judgment of the District Court of Haifa (CR.C.D.C.Ha. No. 107/36), dated the 14th August, 1936.

Shapiro — for Appellant.
Ghussein — for Respondent.

JUDGMENT OF THE CHIEF JUSTICE.

The chief ground of appeal in this case is that inasmuch as the trial before the District Court of the appellant occurred on the 14th August, 1936, that is to say before there was passed into law Regulation 3 of the Emergency (Amendment) Regulations (No. 10) 1936, dated August 25th 1936, (Supplement No. 2 p. 1031), which added to Regulation 3 of the principal Emergency Regulations (in Supplement No. 2 to the Gazette of the 19th April, 1936, p. 259) a relevant provision, the accused was not tried in accordance with the Emergency Regulations.

Regulation 3 of the principal Regulations runs as follows:—

> "Subject to the provisions of these regulations all offences hereunder shall be enquired into and determined by Magistrates' Courts and District Courts, as the case may be, in accordance with the provisions of the Magistrates' Courts Jurisdiction Ordinance, 1935, and the Courts Ordinances, 1924—35, and the Trial Upon Information Ordinances, 1924—35, or any amendment thereof respectively."

Regulation 3 of the Emergency (Amendment) Regulations (No. 10) 1936, adds to this the following words:—

> "and any Ordinance making provision with regard to procedure or mode of trial in such Courts."

The accused, pursuant to Section 2 of the Courts (Temporary Constitution) (Further Provisions) Ordinance 1936, No. 47/36, was tried summarily by a District Court which, in accordance with Section 3 (a) of the Courts (Temporary Constitution) Ordinance 1936, consisted of the President sitting alone.

The point which we have to decide is whether these Ordinances are amendments of the Courts Ordinances, 1924—35, and the Trial Upon Information Ordinances, 1924—35, as contemplated in Section 3 of the principal Emergency Regulations, 1936.

It is true that neither Ordinance No. 27/36 nor Ordinance No. 47/36 calls itself a Courts (Amendment), or Trial Upon Information (Amendment), Ordinance, but the effect of the latter is that, while leaving the procedure as to cases triable before Courts of Criminal Assize untouched, it amends Section 11 of the Trial Upon Information Ordinance, 1924, by enacting that offences triable by District Courts shall be tried summarily without the interposition of a preliminary enquiry before a Magistrate unless in a particular case the Attorney-General shall otherwise direct.

So too, Ordinance No. 27/36 provides that when the High Commissioner in Council makes an order applying that Ordinance to the trial of criminal cases arising out of any incidents or disturbances as stated in such order, the composition of the District Courts and Courts of Criminal Assize as laid down in the Courts (Amendment) Ordinance, 1935, shall be varied.

In other words, so far as the present case is concerned it amends Section 5 (c) of the Courts (Amendment) Ordinance, 1935, by laying it down that a District Court sitting in its criminal jurisdiction shall consist, not of three judges of whom a President or Relieving President shall be one, but of a President or Relieving President sitting alone.

I am, therefore, of opinion that these Ordinances Nos. 27/36 and 47/36 are amendments of the Courts Ordinances, 1924—1935, and the Trial Upon Information Ordinance, 1924—1935 respectively.

I wish to add this since reference was made in this case to my judgment in Rushdi Shawa and others v. Assistant District Commissioner, Southern District Gaza, and others[1]). In that case the attention of the Court was not directed by the Acting Attorney-General, Mr. Lloyd Blood, to Hudson's Bay Co. v. Maclay (1920),

[1]) H.C. No. 67/36, ante p. 290.

36 T.L.R. 469, cited at p. 533 of Vol. 6 of the Hailsham Edition of Halsbury's Laws of England. It would have made no difference to the judgment of the Court had it been referred to, but it is of importance to bear in mind that the attention of this Court was first drawn to that case by Mr. Lloyd Blood appearing as Solicitor General in Hassan Sidqi Dajani v. Officer in Charge of Detention Camp at Sarafand and others, H. C. No. 74/36[1]), which was heard only a month later.

High Court No. 67/36 was concerned with a collective fine. The present case is concerned with being in possession of a firearm and ammunition, so no question as to the applicability of the words "for securing the public safety and defence of Palestine" can arise in this appeal.

The appeal should therefore, in my opinion, be dismissed and the conviction and sentence should be affirmed.

My learned brothers agree upon a contrary opinion, to the effect that the appeal should be allowed, but differ as to the consequences. My brother Manning is of opinion that the conviction and sentence should be set aside, and my brother Mustafa Bey holds that the case must be remitted in accordance with Section 69 (c) of the Trial Upon Information Ordinance, 1924.

Now Section 69 (c) of this Ordinance provides as follows:

> "In determining an appeal, the Court of Appeal may quash the conviction and remit the case to the Court below for a new trial with such directions as may be necessary....."

Now the "Court below" must mean the tribunal from which this appeal is being heard. My learned brothers forming a majority of this Court, have held that this tribunal consisting of one Judge was not a District Court as contemplated by "the Courts Ordinances, 1924—1935, or any amendment thereof," and that even if it had been it was not properly seised of the case inasmuch as there had been no committal proceedings, and it was purporting to try the case summarily, and not in conformity with "the Trial Upon Information Ordinances, 1924—1935, or any amendment thereof."

I hold that Regulation 3 of the Emergency (Amendment) Regulations (No. 10), 1936, cannot ex post facto invest the tribunal in question with the attributes of a District Court under the

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[1]) Palestine Post, Aug. 30, 1936.

Courts Ordinances, 1924—1935, or any amendment thereof, as contemplated in Regulation 3 of the Emergency Regulations, 1936.

This being so, I hold that as there was, so there still is no "Court below" as contemplated in Section 69 (c) of the Trial Upon Information Ordinance, 1924, to which we have power to remit the case for a new trial, and for this reason I agree with my brother Manning that the only course open to us, after allowing the appeal in accordance with the views of the majority of the Court, is to quash the conviction and sentence and to discharge the appellant.

Delivered the 30th September, 1937.

JUDGMENT OF MR. JUSTICE MANNING.

On the 14th August 1936, the appellant was found guilty by a District Court of having in his possession a pistol and ammunition, contrary to Section 8A (i) of the Emergency Regulations, 1936.

There are three main grounds of appeal, namely:

(a) That no preliminary inquiry was held as required by Section 11 of the Trial Upon Information Ordinance, 1924.

(b) That the Court was wrongly constituted, consisting, as it did, of a President sitting alone.

(c) That Section 8A (i) of the Emergency Regulations is ultra vires:

(a) and (b) may conveniently be considered together. Section 3 of the Emergency Regulations reads as follows:

> "Subject to the provisions of these regulations all offences hereunder shall be enquired into and determined by Magistrates' Courts and District Courts, as the case may be, in accordance with the provisions of the Magistrates' Courts Jurisdiction Ordinance 1935, and the Courts Ordinances 1924—1935 and the Trial Upon Information Ordinances 1924—1935, or any amendment thereof respectively, and any Ordinance making provision with regard to the procedure or mode of trial in such Courts."

It is admitted that there was no preliminary investigation and that the trial took place before a single judge, and that neither the Courts Ordinance nor the Trial Upon Information Ordinance nor

any Ordinance expressly amending either of them justified this procedure. It is clear that the trial took place under the provisions of two Ordinances called respectively the Courts (Temporary Constitution) (Further Provisions) ordinance, Numbers 27 and 47 of 1936. No. 27 is described as "an ordinance to provide for the constitution of certain Courts for the trial of certain offences," and No. 47 as "an ordinance to make provision for the summary trial of certain offences by District Courts." The trial was therefore in accordance with the provisions of Ordinances "making provision with regard to the procedure or mode of trial in such Courts." But these last words of Section 3 of the Emergency Regulations were not enacted until the 25th August 1936, while the trial took place on the 14th August, 1936.

The words used in Section 3 are "shall be enquired into and determined." They are peremptory. On the 14th August a person charged under the Emergency Regulations had to be tried in accordance with the provisions of the Magistrates' Courts Jurisdiction Ordinance, or of the Courts Ordinance, or of the Trial Upon Information Ordinance, or any amendments thereof. He could not be tried in accordance with the provisions of any other Ordinance. But this is what was done. He was tried in accordance with the provisions of Ordinances Nos. 27 and 47 of 1936. This was an irregularity which vitiated the whole proceedings.

Fauzi Ghussein, who argued the appeal on behalf of the respondent, contended the Ordinances Nos. 27 and 47 of 1936, must be regarded as Ordinances amending the Courts Ordinances and the Trial Upon Information Ordinances. I do not agree. Neither No. 27 nor 47 purport to amend any ordinance, nor do they actually do so. They do not alter a single word in either the Courts Ordinances or the Trial Upon Information Ordinances. They provide in certain cases for an altered constitution of certain Courts, and in these same cases allow a preliminary investigation to be dispensed with. The words "or any amendment thereof" must be construed in their ordinary meaning, that is to include only Ordinances which by their title purport to amend the provisions of the principal Ordinances. I have no hesitation in holding that up to the 24th August 1936, offences under the Emergency Regulations could not be tried in accordance with the provisions of Ordinances No. 27 or No. 47 of 1936.

It may be said that this leads to an absurdity, as Ordinances Nos. 27 and 47 of 1936 were specially meant to deal with offences

under the Emergency Regulations. But an examination of these Regulations shows that there are many offences not included therein which might arise out of the present disturbances, and which up to the 24th August, 1936, could have been tried under the provisions of Ordinances 27 and 47 of 1936. But even if there were any absurdity, it is not for the Court to depart from the recognised rules of interpretation to put it right. As was said by du Parcq, J., in the case of Newell v. Cross and Others 155 L.T. 173:

> "I fully realise that the last thing which a Court ought to think of doing is to try in effect to alter the law by finding some ingenious means of escape from its clear provisions."

With regard to the ground of appeal (c) I have no doubt that Section 8A (i) is intra vires.

Under Article IV (i) of the Palestine (Defence) Order-in-Council the High Commissioner may make regulations for securing the public safety and the defence of Palestine and in particular may make provisions with regard to certain matters specifically set out. Mr. Shapiro for the appellant argued that as the possession of arms and ammunition was not specifically mentioned, any regulations with regard to it was ultra vires. He argued that the general words were governed by the particular subjects mentioned, and quoted a number of authorities with reference to the construction of general words following particular words, the converse case to the present. The words of the article are quite clear and show that the particular subjects mentioned do not in any way affect the general powers given. All that one has to ask oneself is "Is this regulation intended to secure the public safety or the defence of Palestine?" If the answer is "yes," it is *intra vires*. As was said by Lord Halsbury in Riel v. The Queen, (1885), 10 App. Cas. 675: "the words of the statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to." A regulation dealing with the possession of arms or ammunition is clearly directed to secure the public safety. This ground of appeal fails.

On grounds (a) and (b) I am of opinion that the appeal should be allowed and the conviction and sentence set aside.

JUDGMENT OF MR. JUSTICE KHALDI.

I agree with the judgment of Mr. Justice Manning but with an amendment to the amending last paragraph, as I am of opinion

that the judgment should be set aside and the case remitted to the District Court in accordance with Section 69 (c) of the Trial Upon Information Ordinance, 1924.

Delivered the 30th September, 1936.

CURRENCY.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 70/36.
C.A. No. 90/36.

BEFORE:

The Senior Puisne Judge (Manning, J.) and Copland, J.

IN THE CASE OF:

Clement Menni — APPELLANT.

v.

The Ottoman Bank, Haifa — RESPONDENT.

and

IN THE CASE OF:

Anis Mansour — APPELLANT.

v.

The Ottoman Bank, Haifa — RESPONDENT.

Hire of employee — Payment expressed to be made in foreign currency — Right of employee to be paid in foreign currency or the equivalent thereof at date of payment — Pension held payable in same currency as wages — Notification to employee not an alteration of hire agreement unless mutually accepted — Estoppel — Silence not considered as a representation unless there is duty to disclose and detriment to other party — Articles 67, 438, 439, 1647, 1655, Mejelle.

Employees of the Ottoman Bank joined the service of the Bank in 1919 and continued in the service of the Bank in Palestine during the Turkish Regime, after the Occupation of Palestine by the British and until 1933, their salaries during the entire

period being expressed to be payable in Turkish gold pounds. In 1931, Palestine went off the Gold Standard, but no new arrangement was made as to the manner of the conversion of the salary into local currency. In 1933 the Bank notified the employees that their salaries in future would be expressed in Palestine pounds and that the present salary would be converted at the rate therein specified. Upon the employees lodging a protest with the Bank, they were retired on pension and sued in the District Court for a declaration that the pensions had been incorrectly calculated, for consequent arrears of pension and for arrears of salary. The District Court found for the Bank, and the employees appealed.

HELD: Reversing the finding of the District Court and entering judgment for the appellants (1) That the notification by the Bank that in future salaries would be expressed in Palestine currency did not alter the original contractual obligations between the parties. The employees continued to work under the old contract in return for a wage payable in foreign currency, namely Turkish gold pounds, and should have been paid in that currency, or, if the Bank decided to pay them their salary in Palestine currency it should have been converted at the rate of exchange prevailing on the date of each payment. Similarly the employee was entitled to have his pension paid in the foreign currency or converted as aforesaid. (2) That when Palestine went off the Gold Standard in 1931 there was no duty on the employees to state to the Bank that they expected to continue to be paid in the foreign currency, and since their silence was not detrimental to the Bank it did not amount to a representation or admission estopping the employees from now asserting their contractural rights.

The case of Mennie is an appeal from the judgment of the District Court of Haifa (C.D.C.Ha. No. 160/35) dated the 5th day of February, 1936, and the case of Mansour was an appeal from the judgment of the District Court of Haifa dated the 16th day of April, 1936.

Sanders, Houry — for appellants.
Horowitz, Abcarius — for respondent.

JUDGMENT OF MR. JUSTICE MANNING.

These two appeals were heard together by consent, and it will be convenient to deal at first with what happen to be the main issues in each case. When these are decided the cases can be examined separately, as the facts are not exactly the same.

The appellants, Clement Menni and Anis Mansour, were employees of the Ottoman Bank (hereinafter referred to as the Bank). Both of them entered the service of the Bank before the Great War, and both entered that service in territory which at that time formed part of the Turkish Empire. Their respective salaries were expressed to be paid in L.T.Q., i.e. Turkish pounds, and there can be no doubt that at that time a Turkish pound meant a Turkish Gold pound.

After the War the territory in which they were serving was occupied by the British. The Bank still carried on its operations there and the two appellants continued as its employees. But Turkish currency was no longer used; Egyptian currency took its place, the rate of conversion being fixed at 87 3/4 piasters for each Turkish pound.

The territory in which they were serving became in 1924 the Mandated Territory of Palestine, but Egyptian currency continued to be used until 1927. In that year a Palestine pound was created, and its value was fixed at 975/1000 of an Egyptian pound. The Palestine pound was divided into 1000 mils, and the Bank accordingly calculated that 900 mils was a fair conversion rate for each Turkish pound. From 1927 the appellants were paid in Palestine currency at the rate of 900 mils for each Turkish pound.

In 1933 the Bank notified its employees in Palestine (including the appellants) that in future their salaries would be expressed in Palestine pounds, and that their present salaries would be converted into Palestine pounds at the rate of 900 mils for each Turkish pound. The appellants protested against this alteration and were both retired on pension, Menni on the 30th November 1933, and Mansour on the 31st December 1933. They both instituted separate actions against the Bank in the District Court of Haifa for a declaration that the pensions had been incorrectly calculated, for consequent arrears of pension, and also for arrears of salary. The District Court found in favour of the Bank in each action, and the appellants have both appealed to this Court.

Their claims are based on the allegation that when they were originally engaged in the service of the Bank their salaries were expressed to be paid in Turkish pounds, and that at that time Turkish pounds meant Turkish Gold pounds. Their salaries continued to be so expressed until May 1933, when the Bank made the alteration to which I have referred above. In 1931, Palestine had gone off the Gold Standard and from that time forward they

say 900 mils was not a fair equivalent for a Turkish gold pound. The alteration made by the Bank affected their salaries and their pensions.

It is not denied by the Bank that when the appellants entered its service the only Turkish pound known as a Turkish gold pound. Then came the war and the evidence shows that from 1915 onwards paper money superseded gold in the Turkish Empire, and the Turkish gold pound went out of circulation, though it is still used as a unit in commercial transactions. The Turkish paper pound was in theory equal in value to a gold pound and the various issues were expressed to be redeemable in gold at fluctuating dates. During the War the appellants were in Turkish territory, and it was of course incumbent on them to accept their salaries in paper, even if that paper had much depreciated. But it must not be forgotten that each paper pound received by them was nominally equivalent to a gold pound.

Then came the British occupation of Palestine and Turkish currency was no longer used. Before the War the Turkish gold pound had been legal tender in Egypt, and there was what was called a tariff rate of exchange, each Turkish gold pound being worth 87 3/4 piasters. After the British occupation, Egyptian currency was introduced into Palestine and the Bank now paid its employees at the rate of 87 3/4 piasters for each Turkish pound. There is evidence that Egyptian currency was at this time depreciated in purchasing power, but it is clear that an English pound note could be obtained for 97 1/2 piasters and that one could obtain in exchange for that note an English gold sovereign.

At this time the Turkish paper pound had depreciated and its market rate was considerably below 87 3/4 piasters (see transcript in Mansour's case p. 309). In converting the salaries of its employees the Bank did not adopt the equivalent in exchange of the Turkish paper pound, but chose the tariff rate of 87 3/4 piasters, which was the rate of a Turkish gold pound.

Again in 1927 when Palestine obtained its own currency, the Bank chose to convert the salaries of its employees at the rate of 900 mils to each Turkish pound. Palestine was at this time on the gold standard, and the mint parity between a Turkish gold pound and a Palestine gold pound was in the ratio of 9034 to 1000. The Turkish paper pound was in exchange worth nothing like 900 mils.

From these actions of the Bank it can be inferred that they recognised that the appellants' salaries were payable in Turkish gold pounds, and were convertible into local currency as such. But there are two other very important factors and the construction of the relevant documents has already been determined by authority. I refer to the case of the Ottoman Bank of Nicosia v. Dascalopoulos, (1934) A. C., 354. The facts are so similar to the present case that one is tempted, in deciding this part of this case, to set out the judgment in full and adopt it as deciding the point at issue. Dascalopoulos was, like the appellants in this case, an employee of the Ottoman Bank. He joined the staff in Turkey in 1905 and was transferred to Cyprus in 1923. He retired on pension in 1931. While he served in Cyprus his salary was paid at the rate of 100 Cyprus pounds for 110 Turkish pounds, a rate which had been adopted when both England and Turkey were on the gold standard. It was based upon the gold content of the English sovereign, which was interchangeable with the Cyprus pound, and of the Turkish gold pound. England having gone off the gold standard in 1931, Dascalopoulos claimed that his pension was payable in Turkish gold pounds converted into Cyprus currency at the rate of exchange on the day of each payment. His claim was upheld by two Courts in Cyprus and by the Judicial Committee of the Privy Council,

When Dascalopoulos joined the Bank in 1905 he (just as the appellants did) signed a declaration by which he bound himself to adhere to certain regulations affecting his employment and particularly with reference to his pension on retirement. The last part of regulation 16 runs as follows:

> "Toutefois, la pension ne pourra non plus être inférieure à Ltq. 45 par an pour un employé et à Ltq. 25 par an pour les gens de service".

As to this, Lord Blanesburgh, in delivering the judgment of the Judicial Committee, said at p. 357:

> "It may also be observed that at the date of the regulations the only Turkish pound either known or (with the possible exception of pounds of equivalent intrinsic value issued in paper by the Bank itself) in circulation, were gold coins of a special content, and their Lordships can have no doubt that the reference in the regulations was a reference to these Turkish gold pounds."

The next documents to consider are the paysheets of the Bank. Taking that of Mansour's for April 1933, his salary is shown in seven columns. The first column shows his "traitement", that is his actual pensionable emoluments. The second, third and fourth columns show certain additional sums added to these emoluments, and the seventh column shows a deduction. The fifth column shows the balance after this deduction is made. All the sums in these columns are expressed to be payable in Ltqs., i. e. Turkish pounds. The sixth column is headed "Net a payer, L. Pal" and shows the Ltqs. in the fifth column converted into Palestine pounds.

Menni's paysheet for April 1933, shows four columns. The first shows the traitement, the actual pensionable emoluments, the second a deduction, the third the balance. They are all expressed in Ltqs. The fourth column is headed "net a payer—L. Pal." and shows the Ltqs. in the third column converted into Palestine pounds.

Now in the Dascalopoulos case the paysheets were made out in a similar manner, except that the headings were in English and the Ltqs. were converted into Cyprus pounds. With regard to this Lord Blanesburgh said at p. 360:

> "This entry appears to be free from ambiguity. That the Ltq. 45 and Ltq. 4 are Turkish gold pounds is proved by the fact not really in dispute — that the so-called equivalent in column 7 is the Cyprus equivalent for the Turkish gold pound and nothing else. Equally clear is it, when the actual facts are remembered, that the real function of this column was to equiparate in the Cyprus currency, in which payment was actually being made and accepted, the respondent's contractual salary in Turkish gold pounds.
>
> "The bank does not accept this view. Even if, contrary to its submission, based upon reasons later to be stated, the Turkish pounds referred to are held to be Turkish gold pounds, even so it contends that the respondent is not entitled in Cyprus at all events, to any payment other than one in Cyprus currency exchanged at the rate of 110 Turkish pounds for 100 Cyprus pounds. Their Lordships are unable to accept this contention. They are satisfied that the 'equivalent' in Cyprus currency ascertained by that formula was, and was intended to be, a real equivalent. It was merely exegetical of the basic contract. It was a formula applicable

> only where the result was to produce parity in terms of gold. To both parties it was a convenience that the salary of the respondent, stationed in Cyprus as he was, should be paid in Cyprus currency. But the salary remained a salary due in Turkish gold pounds, and if it had been tendered by the bank in that form it must have been accepted by the respondent. In short these monthly entries express with clearness, as their Lordships think, the respondent's contractual rights in the matter of salary..."

I have quoted rather fully to make clear the construction placed by the Judicial Committee on the monthly paysheets of the Bank. In the present case instead of the words "equivalent in £S. Cp." we have the words "Net à payer, L. Pal." but the effect is clearly the same. From what I have said in the earlier part of this judgment it is clear that the "Net à payer" is the Palestine equivalent for a Turkish gold pound. Every word which I have quoted above is applicable, mutatis mutandis, to the contractual rights of the appellants in Palestine.

After dealing with this question Lord Blanesburgh went on to discuss the effect of the Ordinance bringing in an issue of Turkish paper pounds in 1915, and said:

> "So far, however, as the respondent's salary was concerned, it will be found, their Lordships think, that for so long as he was employed outside Turkey — and that is the only case with which their Lordships are concerned — his position was unaffected by the Ordinance or by any pronouncement of the bank following upon it".

The Judicial Committee had apparently before it evidence of one issue only of paper money. In the Mansour case there was evidence of six other issues, in November 1915, January 1916, August 1916, February 1917, October 1917, and April 1918. As regards all these issues there was a provision (translated by M. Kiatibian, a witness for the Bank) as follows:

> The circulation and acceptance of these notes of money shall be accepted in the same manner as money in cash for the payment and disbursements of transactions throughout the Turkish Empire and this is obligatory".

Any breach of this provision was punishable by fine or imprisonment.

In the Dascalopoulos case there was apparently evidence which led the Judicial Committee to believe that the Bank, within the Turkish Empire, could not fulfil its obligations to its employees by paying them in paper pounds. The evidence in the present cases shows that this was not so. But I do not think this makes any difference. The first issue was against a reserve of 150 million gold francs, the others were covered by German Treasury bonds. All the issues were redeemable in gold at various dates after the conclusion of peace. The employees of the Bank in the Turkish Empire were bound to accept their salaries in paper, but each paper pound was nominally the equivalent of a gold pound, and could, as far as could be then foreseen, be converted into a gold pound at a later date. There is evidence also that the bank at times paid part of the salaries in gold. The gist of the decision in the Dascalopoulos case is that when Dascalopoulos was engaged his salary was expressed in Ltqs., i. e. Turkish gold pounds, that when he was transferred to Cyprus his salary was still expressed in Ltqs., and that these Ltqs. were converted into Cyprus currency on the basis that the Ltq. was a Turkish gold pound. In the present case when the appellants were engaged their salaries were expressed in Ltqs., i. e. Turkish gold pounds, and when their place of employment became situated, owing to the result of the War, outside the Turkish Empire, their salaries continued to be expressed in Ltqs., and were at first converted into Egyptian currency at the tariff rate for a Turkish gold pound and later into Palestine currency at a rate which was obviously calculated on this same tariff rate.

Mr. Horowitz, on behalf of the Bank, has urged that there is a great deal of evidence in the present cases which was not before the Courts in the Dascalopoulos case and that this evidence ought to turn the scales in favour of the Bank. I have dealt with such variations of evidence as are apparent and still come to the conclusion that on this issue the present cases are not distinguishable from the Dascalopoulos case.

In the Menni case the Court below did not devote much time in its judgment to the consideration of this issue, but decided against the plaintiff principally on other grounds. The issue was, however, fully considered in the Mansour case, and they decided against Mansour on it. The judgment in that case makes no mention of the Dascalopoulos case though it was cited in argument. I think that the Court below misdirected itself on three material

points. The first of these is with regard to an issue of paper money in Turkey in 1925. This issue replaced the seven issues to which I had previously referred, it was not made against any reserve, and the notes were to be legal tender until the promulgation of a law determining the conditions under which they should be redeemable in gold. No such law has yet been made. In 1925 both the appellants were serving outside Turkey, and I have already cited a passage from the judgment in the Dascalopoulos case showing that their position could not be affected by any law made in Turkey.

The second and third points are that the Court below thought that the appellant were making a claim that their salaries should be based on the gold content value of the Turkish pound and that their contract with the Bank was a bullion contract. This is not so. All that the appellants say is that their salaries at certain material dates were expressed in Ltqs., i.e. Turkish gold pounds, and that they were entitled to have them converted into local currency at the rate of exchange prevailing. The principle was laid down by Lord Justice Bankes in Anderson v. Equitable Assurance Society of United States (1926), 42 T.L.R., 302:

> "It had never been disputed that where there was a contract to pay a sum in foreign currency in this country, in sterling, the true construction of such a contract was that the amount had to be paid in sterling at the rate of exchange ruling on the date of payment."

Some point was made of the fact that the mint parity between an Egyptian and a Turkish gold pound was 88.93 piasters, whereas the appellant was paid 87.75 piasters only in exchange. There is indisputable evidence that 87.75 piasters was always the rate at which a Turkish gold pound was exchanged in Egypt and it was quite natural to adopt it when Egyptian currency came to be used in Palestine. A further point was made that the mint parity between a Palestine and a Turkish gold pound was 903.4 mils, whereas appellants were paid 900 mils only in exchange. Now the tariff rate for an English sovereign in Egypt was 97.5 piasters, and the Palestine Pound was made equal to the English sovereign and was divided into 1000 mils. The Palestine pound was accordingly exchangable in Egypt for 97.5 piasters, i.e. 1000 mils was equal to 97.5 piasters, and a simple calculation will show that 87.75 piasters, the tariff rate for a Turkish gold pound, is equal to 900 mils. These small variations between gold content are of no importance,

what are of importance are the recognised rates of exchange, and what is perfectly clear is that at the relevant times neither 87.75 piasters nor 900 mils could on any basis be taken as the equivalent of a Turkish paper pound.

On this issue I have come to the conclusion that the Court below was wrong and the contract between the Bank and the appellants was to pay them their respective salaries in Turkish gold pounds. At a certain period during their employment their salaries had been raised to Ltq. 23 per month. In May, 1933, the agreement between them and the Bank was that in return for their services the Bank was to pay each of them 23 Turkish gold pounds per month. In that month the Bank decided that in future the salaries of its employees in Palestine were to be expressed in their paysheets in Palestine currency, and that these salaries were to be calculated at the rate of 900 mils for each Ltq. This did not constitute a new contract between the Bank and the appellants, for not only did the appellants not assent to the alteration, but both of them emphatically expressed their dissent in writing. The alteration in the Bank's books did not therefore change the contractual relation between the parties; after the alteration the Bank was still liable to pay each appellant Ltq. 23 per month, and if it decided to pay these sums in Palestine currency, the appellants were entitled to have them paid at the rate of exchange prevailing on the date of each payment.

As far as I gather from the proceedings in the Court below and from the arguments before us the Bank has never claimed that it was enforcing a reduction of salary on the appellants. The issue does not therefore arise as to whether the Bank was entitled to reduce their salaries.

The Bank, however, says that, assuming the appellants are correct in their contentions that the contracts are for payment in Turkish gold pounds, yet the appellants are now precluded by law from enforcing claims to unpaid salaries and increased pensions. The Court below agreed with the submissions of the Bank on this point. The first submission was that when Palestine went off the gold standard at the end of 1931 and the Turkish gold pound became worth more than 900 mils in exchange, the appellants, without any protest or objection, continued to receive their salaries at the rate of 900 mils for each Turkish gold pound. They so continued up to May 1933. This silence amounted to acquiescence and creates an estoppel — the appellants should not now be allowed

to say that they were entitled to have their salaries converted at a higher rate. The second submission that the acceptance by the appellants at the end of 1931 of 900 mils for each Turkish gold pound constituted a new contract, and that the old contract to pay Turkish gold pounds is no longer in force. These submissions have again been urged with great force before this Court.

It has been argued by both parties that the proper law of the contract is the Ottoman Law as it existed at the date when the contract was made. Mr. Sanders, on behalf of the appellants, agrees only with the reservation that if the Ottoman Law does not extend or apply to all the incidents of the contract, then the Court has to fall back on English principles of Common Law and Equity. The Ottoman Law relating to contract as it existed when the contract was made happens to be the same Ottoman Law that is at present in force in Palestine, namely the relevant articles of the Mejelle.

Reliance was placed by the Bank on the law of estoppel as laid down in Article 1647 and the following articles on this subject in the Mejelle. That article reads as follows (I am using Tyser's translation):

> "An antecedent statement of the plaintiff contradicting his claim prevents an action for ownership."

This is the leading article and a perusal of it and those succeeding it shows that it is "Statements" that are referred to. I cannot find it anywhere suggested in this part of the law that "statements" may be implied from conduct. But even if this could be so, there is article 1655, which is as follows:

> "When the excuse offered by the plaintiff as regards a thing which is concealed is clear, the making of the contradictory statement is pardoned."

Both the appellants have given a reasonable excuse for making no protest at the end of 1931. They say they knew their services would be dispensed with by the Bank, if they made any objection. Their surmises in this respect were correct, as when they did protest in 1933, they were both promptly retired on pension.

The Bank also relied on Article 438 of the Mejelle which reads:

> "In hiring silence is regarded as consent and acceptance."

It is clear that this part of the Mejelle refers to the hiring of servants as well as the hiring of property but from the example

given in Article 438 I interpret that article to mean that a definite statement must be made by one party to the other as to certain conditions. If the other is silent and continues in his employment, then his silence is regarded as an acceptance of the conditions. That article would apply if the bank had said to the appellants in 1931: Palestine has gone off the gold standard, but we shall still continue to convert your Turkish pounds at the rate of 900 mils", and if the appellants had then remained silent. But the Bank said no such thing. I think the true article of the Mejelle to apply to the circumstances is Article 67, which is as follows:

> "To a man who keeps silence no word is imputed, but when there is necessity shown, silence is a declaration. That is to say, it is not said of someone who keeps silence that he said such a thing, but where there is reason why he shall speak, his keeping silence is regarded as an admission and a declaration".

Now there was no reason why the appellants should have spoken in 1931. Their silence was not detrimental to the Bank. If they are right in their claims in these actions, the Bank has saved by their silence, as they make no claim for salary between 1931 and May 1933. They have given a good reason as to why they did not speak. In these circumstances their silence cannot be construed as an admission.

The Bank further relied on Article 439 of the Mejelle. This as follows:

> "After the contract, if there is a new bargaining by a change, or an increase, or a reduction of the price, the second contract is given effect to."

The Bank say that assuming appellants were entitled to have their Turkish pounds converted at the proper rate of exchange, their acceptance of 900 mils for each such pound constituted a new contract. But the word "bargaining" is the key-note to what this article means, and it connotes that there must have been negotiations of some kind. There were no such negotiations, and this article has no application to the circumstances of this case.

The Bank relied on certain other articles of the Mejelle, viz Articles 79, 1536, 1552, 1554, 1561, 1562, 1606 and 1609. Article 79 relates to admissions, Articles 1606 and 1609 to admissions in writing. I have already dealt with this aspect of the matter. Articles 1552 and 1554 relate to a compromise, Articles 1536,

1561 and 1562 to a release. None of them has any application to the circumstances of this case.

If, as Mr, Sanders has hinted, English Law has to be considered, it will be found that its principles bear a close resemblance to those of Articles 67 of the Mejelle, which I have set out above. In Greenwood v. Martins Bank Ltd. (1933) A. C., 51 Lord Tomlin said:

> "Mere silence cannot amount to a representation, but when there is a duty to disclose, deliberate silence may become significant and amount to a representation.... The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondants..... and, assuming that detriment to the respondents followed, there were, it seems to me, present all the elements essential to an estoppel."

These elements are firstly a duty to disclose and secondly detriment to the other party. I do not think there was at the end of 1931 any duty cast on the appellants to disclose to the Bank that their salary was so many Turkish gold pounds and that consequently they were entitled to the proper rate of exchange instead of a fixed rate of 900 mils. The real question is whether their silence caused any dertiment to the Bank, or caused the Bank to alter its position in any way. I can find no evidence of this, nor was it suggested by Abcarius Bey in his argument before us.

On this part of the case I have come to the following conclusions:

> (1) that the contract between the parties in May 1933, was that the Bank was to pay each of the appellants 23 Turkish gold pounds per month for their services,
>
> (2) that this contract was not changed by the decision of the Bank to alter its books in the manner already specified and that it consequently remained in force up to the respective dates of their retirements on pension,
>
> (3) that the silence of the appellants between the end of 1931 and May 1933, did not amount to a representation or admission which can preclude them from now asserting their contractual rights.

The case of each appellant will now have to be considered separately.

MENNI'S CASE.

Menni's claim is divided into three parts. I shall deal firstly with his pension. Article 14 of the regulations previously referred to is as follows:

> "Le montant de la pension est établi d'après le traitement dont jouissait l'employé on 31 Décembre de l'année qui précède celle de sa mise à la retraite."

His pension is therefore to be calculated on the "traitement" which he was receiving on the 31st December 1932. The paysheets show that this was 23 Ltqs., i.e. on the conclusion already set out, 23 Turkish gold pounds, and according to regulation 15 he is entitled to 52% of this, viz 11.96 Turkish gold pounds. He says that, according to the decision of the Dascalopoulos case this has to be converted into Palestine currency at the rate of exchange on the day of each payment. The Bank says "No, ever since Palestine went off the gold standard you received your salary at the rate of 900 mils to each Turkish pound. You so received your salary for December 1932, and you made no protest or objection. You must now receive your pension at the same rate."

This attitude of the Bank shows a misapprehension of the position. The article which I have quoted from the regulations shows that the pension is based on the "traitement", and the paysheets show that the "traitement" was Ltqs. 23. The fact that in another column of the paysheet the net salary after deductions was converted into Palestine currency at a certain rate does not mean that the "traitement" was a sum in Palestine currency. The "traitement" was expressed in Turkish pounds; these as I have already found were Turkish gold pounds, and the pension must be calculated in Turkish gold pounds. That pension amounts to 11.96 Turkish gold pounds, and this is what Menni is entitled to be paid as from the date of his retirement, and to have it paid to him at the rate of exchange on the date of each payment.

Reliance was placed both by the Bank and by the Court below on the case of Ottoman Bank. Chakarian, (1930), A.C. 277. This case was cited in the judgment in the Dascalopoulos case. There had been a decision of the Bank relating solely to the staff employed in Turkey, arbitrarily fixing a rate of 451 piasters for each Turkish pound. At the relevant date for the determination of pension, this decision applied to Chakarian. He had received

his salary at that rate without protest or objection and it was held that he was bound by and could not go behind that receipt. Lord Blanesburgh in the Dascalopoulos case, makes it quite clear that the Chakarian case was decided on peculiar facts of its own and that it cannot apply to an employee serving outside Turkey.

Menni's next claim is with regard to salary. From the end of May until the date on which he retired he was paid a monthly salary of £P. 20.700 mils. He says that this was incorrect and that his monthly salary was Ltqs. 23, i.e. 23 Turkish gold pounds, and that if this was paid to him in local currency, it ought to have been converted into local currency at the appropriate rate on the date of each payment. If this had been done he would have received more than £P. 20.700 mils each month, and he now claims for the difference. In accordance with my previous findings, this claim is well founded. The Bank, however, relies on certain documents which it says effectually dispose of any claim of Menni to arrears of salary.

Menni had been having, prior to May, 1933, a dispute with the Bank relative to certain matters connected with the third part of his claim, which I shall deal with presently. He had in consequence been refusing to draw his salary. He continued his refusal after the decision of the Bank to alter its books in May, 1933. Before his retirement, however, he decided to draw his salary, and it is on some of the receipts that he gave that the Bank relies for the purpose of extinguishing his claim.

Exhibit D. 6 contains 7 receipts. Three of them were given in October, 1933, and are for sums of £P. 29, £P. 10 and £P. 30 respectively. They are merely receipts for these sums. The fourth, fifth and sixth receipts were given in November, 1933, for £P. 25, £P. 30 and £P. 30 respectively. They are each expressed to be "à valoir sur mes traitements arriérés de L.Palest. 20.700 par mois." The seventh receipt is for £P. 25.381 mils and is expressed to be for "balance of my salaries from February, 1933, until the end of November, 1933."

As regards the fourth, fifth and sixth receipts the Bank say they contain an admission that appellant's correct salary was £P. 20.700 mils a month. As regards the seventh receipt they say that it is an admission that he has received all salary due to him and that as his salary was calculated at 900 mils for each Turkish pound, it is an admission that he accepts this rate of exchange. I do not agree. The appellant's letter of protest was never with-

drawn, and it must be read in conjunction with these receipts. If this is done, the receipts are mere acknowledgments of salary at the rates calculated by the Bank, but they do not contain any admission that these rates are correct, or any intimation that the protest and objection were withdrawn. These receipts do not, in my opinion, relieve the Bank from its obligation to pay the appellant his salary at the proper rate of exchange or prevent the appellant from pursuing his claim in that respect.

Menni has made a further claim in respect of certain sum which had been paid to him in addition to his pensionable emoluments. The first of them was a sum of Ltq. 12 per month which was paid to him while he was acting as sub-manager at Amman. When he ceased to act as sub-manager, the bank withdrew this allowance. Nothing is clearer than that the allowance was merely given because the appellant was acting as sub-manager of a branch, and that the Bank was perfectly justified in withdrawing it when it did.

The other two sums were what was called an "indemnité", of 75 Turkish piasters a month and a cost of living allowance of Ltq. 4.60 a month. It is clear that these were mere ex gratia payments by the Bank and that it might cease to pay them whenever it wished. The Court below was correct in rejecting the appellant's claim in respect of any of these allowances.

In view of my findings on the various issues the judgment of the Court below in Menni's case should in my opinion be set aside and there should be substituted a judgment to the following effect:

a) It is declared that the plaintiff is entitled, as from the 1st December, 1933, to receive from the defendant a monthly pension of 11.96 Turkish gold pounds to be converted into Palestine currency at the rate of exchange on the date of each payment.

b) It is further declared that the plaintiff was entitled to receive from the defendant from the 1st June, 1933, to the 30th November, 1933, a monthly salary of twenty three Turkish gold pounds, which should have been converted into Palestine currency at the rate of exchange on the date of each payment.

c) The defendant is ordered to pay to the plaintiff the difference between the sum that ought to have been paid

as pension to the plaintiff in view of the declaration contained in (a) and what has been actually paid to him as from the 1st December, 1933, to the date of this judgment.

d) The defendant is further ordered to pay to the plaintiff the difference between the sum that ought to have been paid to him as salary in view of the declaration contained in (b) and what was actually paid during the period mentioned.

The appellant has succeeded on the major issue in this appeal, but has failed on a minor issue. I think the appropriate order to make is to award him four-fifths of his costs here and below, such costs in this Court to include £P. 25 advocate's fees.

If the amounts in (c) and (d) cannot be agreed upon, the matter will have to be referred for determination.

MANSOUR'S CASE.

It will be convenient to deal first with the question of salary. The facts are the same as in Menni's case with the exception that between May and the 31st December, 1933, whenever Mansour gave a receipt for his salary, he protested, referring in each case to the letter of protest which he had sent to the Bank in May. In his case there are therefore no receipts on which the Bank could attempt to rely as an admission. In these circumstances it is unnecessary to repeat the facts. Mansour's claim is that during this period he was paid a monthly salary of £P. 20.700 mils, whereas he was entitled to Ltq. 23. On the findings already set out, his proper salary was 23 Turkish gold pounds per month, and as he was paid in Palestine currency, he was entitled to have it converted at the appropriate rate of exchange on each pay-day. This was not done, and he is now justified in claiming any arrears caused by the lower rate of exchange adopted by the Bank.

With regard to pension, Mansour's is based on the "traitement" he was receiving on the 31st December, 1933. At that date, that "traitement" was shown in the paysheet at £P. 20.700 mils, i.e. a sum in Palestine currency. His case therefore differs from Menni's; Menni's pension was based on his "traitement" as on the 31st December, 1932, a "traitement" expressed in Ltqs. In the Chakarian case (supra), Lord Thankerton said at page 284:—

"Their Lordships are of opinion that the pension must be calculated in terms of the salary which the respondent

in fact received on December 31st, 1922, irrespective of how that salary was arrived at."

I have already drawn attention to the fact that this case was discussed in the judgment of the Judicial Committee in the Dascalopoulos case. Lord Blanesburgh there made it clear that the Chakarian case was decided on facts of its own and that it had special reference to the case of an employee who was serving in Turkey at the relevant time. My finding on the question of salary in Mansour's case is to the effect that the salary which he was actually receiving on the 31st December, 1933, was not a correct salary, and that its incorrectness was due to a breach of contract on the part of the Bank. In such circumstances it would be inequitable to take the salary as fixed by the Bank. The salary, or "traitement", must be that which Mansour would have received if the Bank had not broken its contract. That "traitement" was 23 Turkish gold pounds per month. On Mansour's service, he was entitled to a pension amounting to 54% of this, i.e. 12.42 Turkish gold pounds per month, and to have this converted into Palestine currency at the rate of exchange prevailing on the date of each payment.

In this case, therefore, in my opinion, the judgment of the Court below should be set aside, and in lieu of it an order made as follows:

a) It is declared rhat the plaintiff is entitled as from the 1st January, 1934, to receive from the defendant a monthly pension of 12.42 Turkish gold pounds to be converted into Palestine currency at the rate of exchange on the date of each payment.

b) It is further declared that the plaintiff was entitled to receive from the defendant from the 1st June, 1933, to the 1st December, 1933, a monthly salary of twenty-three Turkish gold pounds, which should have been converted into Palestine currency at the rate of exchange on the date of each payment.

c) The defendant is ordered to pay to the plaintiff the difference between the sum that ought to have been paid as pension to the plaintiff in view of the declaration contained in (c) and what has been actually paid to him as from 1st January, 1934, to the date of judgment.

d) The defendant is further ordered to pay to the plaintiff the difference between the sum that ought to have

been paid to him as salary in view of the declaration contained in (b) and what was actually paid during the period mentioned.

If the amounts in (c) and (d) cannot be agreed on, the matter will have to be referred for determination.

(e) The defendant is ordered to pay to the plaintiff his costs here and below, costs here to include £P. 25 advocate's fees.

Delivered the 19th day of February, 1937.

JUDGMENT OF MR JUSTICE COPLAND.

I have had the advantage of reading the judgment delivered by my brother Manning and I fully agree in the reasoning and conclusions expressed by him on the main issues which are common to both cases. If it were not for the fact that we are differing from the learned judges in the District Court, I should be prepared to say nothing more on these issues, but out of deference to them and in view of their long and very careful judgments I will add a few words.

It is undisputed that when the appellants entered into the service of the Ottoman Bank, the only Turkish pound known was the Turkish gold pound, and that their salaries until 1915, when the first issue of paper money was made in Turkey, were always paid in Turkish gold pounds. From 1915 until the British Occupation of Palestine, the appellants being in Turkish territory were paid in Turkish paper money, but the paper pound was, at any rate nominally, equivalent to a gold pound, for the various issues of paper money were all expressed to be redeemable in gold, and were based on French gold francs or on German Treasury Bonds in gold. And the Bank never actually paid their employees the exact number of Turkish paper pounds for the equivalent number of Turkish pounds in which their salaries were expressed. But though the actual number of paper pounds may not have been the actual exchange value of the original Turkish gold pounds of the original contracts, increases were made in the salaries to compensate in some degree for the depreciation of the paper pound in terms of gold.

In 1918, after the British Occupation, Egyptian currency, which was and is still based on sterling, was introduced, and it

is to my mind most significant that in calculating the amount of Egyptian currency to be paid for the salaries which were expressed in the salary book in Turkish pounds, the tariff rate for the Turkish gold pound was adopted. The Turkish gold pound was legal tender in Egypt, at the fixed rate of 87¾ piasters Egyptian for each Turkish pound. This was not the exact exchange equivalent though the actual difference from mint parity is very small, but it was the legal standard rate for legal tender purposes, and had all the advantages of an easily understood fixed rate, and had certainly no relation to the value of the Turkish paper pound. And there is further evidence that in two months in 1918, one at any rate, of the appellants was paid the equivalent of his salary in Turkish pounds in English sovereigns at the rate of 112 piasters Turkish for the English pound — again a gold rate.

From September, 1925, when the gold standard was reintroduced in England, and consequently in Egypt, the salaries of the appellants were in fact paid at the equivalent gold rate. In 1927, on the introduction of the Palestine currency, the salaries expressed in Turkish pounds were paid at the rate of 900 mils for each Turkish pound — again the gold tariff rate, for 900 mils is the exact equivalent of P.E. 87¾. At no time was the Turkish paper pound worth anything like these adopted rates and at no time, I repeat, did the Bank offer to their employees in paper money the exact number of Turkish pounds in which their salaries were expressed. It seems to me that the Bank recognised that the salaries were to be paid in the equivalent in local currency of Turkish gold pounds.

But apart from this, I think that these cases now under appeal are determined by authority, for this question of whether the salaries of employees of the Ottoman Bank are payable in Turkish gold pounds or not has already been decided in the case of the Ottoman Bank of Nicosia v. Dascalopoulos, (1934) A.C. 354. The facts in that case are practically identical with those in the cases now before us, and as my brother Manning has remarked, much of the reasoning in the Dascalopoulos case applies, mutatis mutandis, in the present cases. I think that the learned judges of the Court below have failed to appreciate the real reasons for the decision in the Dascalopoulos case. I do not think that it can be distinguished merely by the fact that there was evidence that the Cyprus £1 note and the sovereign were in practice interchangeable. Lord Blanesburgh says at page 359:

"But the most conclusive evidence as to the nature of the Turkish pounds in which the respondent's salary in Cyprus was expressed is supplied by the salary book of the Bank framed in terms which for the present purposes are of great significance."

He then proceeds after describing the method adopted in preparing the paysheets, with the passage quoted by my brother Manning which it is not necessary to repeat. The paysheets of the appellants, in the present cases before us, are in exactly the same form as the paysheets in the Dascalopoulos case, with the sole exception, to meet local conditions, that instead of the words "equivalent in £.S.Cp." there are substituted the words "Net à payer L.Pal." To my mind, this makes no difference. It has been argued before us, that much evidence is available in these cases that was not before the Judicial Committee but that evidence seems to me in no way to alter the main facts, and I am unable to distinguish the present cases from the Dascalopoulos case. I think therefore that the respective contracts between the Bank and the appellants were that their respective salaries should be paid in Turkish gold pounds.

Further, the unilateral action of the Bank, in May, 1933, in expressing in the paysheets the salaries of their Palestine employees in Palestine currency instead of in Turkish currency, at the fixed rate of 900 mils for each Turkish pound in no way altered the original contracts of the appellants. Neither of the appellants assented to this change, both of them protested immediately the alteration was notified to them. In these circumstances they were still entitled to their original salaries as heretofore expressed in Turkish gold pounds to be converted into Palestine currency at the rate of exchange prevailing on the date of each payment.

With regard to the second main issue, common to both cases, namely, that, assuming that the appellants' salaries were to be paid in Turkish gold pounds, yet the appellants, between September, 1931, when the English, and consequently the Palestine, pound, went off the gold standard, and May, 1933, by accepting, without any protest, the payment of their salaries, converted at the old rate of 900 mils per Turkish gold pound, must be deemed to have accepted this rate and are now estopped from demanding to have their salaries converted at a higher rate. I agree entirely with the conclusions arrived at by my brother Manning, and I do not think that I can usefully add very much.

I cannot see that the appellants were under any duty to the Bank to make a protest. Article 1655 of the Mejelle is in these terms:

> "1655. When the excuse offered by the plaintiff as regards a thing which is concealed is clear, the making of the contradictory statement is pardoned."

The effect of the Palestine pound going off the gold standard would not be apparent, because the internal purchasing power of the Palestine pound remained practically unaffected. There was no reason why the appellants should protest, and their excuse that they know that if they did protest they would be placed on pension was justified by events, because that is exactly what did happen to them for when in May, 1933, fortified no doubt by the judgment of the Privy Council in the Dascalopoulos case they asked for their salaries to be paid on a gold basis, they were immediately retired. All the articles of the Mejelle which have been quoted to us imply a statement or a bargaining, neither of which are present in these cases. I agree therefore that the District Court was wrong in holding that there was an admission or an estoppel on this point.

It is now necessary to examine the two cases separately, for the facts in each are not exactly the same. I will take the Mansour case first for that seems to me to be the more simple of the two.

MANSOUR'S CASE.

In May, 1933, Mansour, in common with other employees of the Bank, protested at the alteration of his salary from Turkish pounds into Palestine pounds, and from that date until the 31st December, 1933, when he was retired on pension, he again protested whenever he signed his salary receipt, and made a note on the salary sheet referring to his original protest of May, 1933. His salary, previously to May, 1933, was 23 Turkish pounds per month, and I have already held that the Turkish pounds were Turkish gold pounds. The Bank was not entitled arbitrarily to alter this rate, and Mansour is therefore entitled to such arrears of salary on the basis that he was entitled to 23 Turkish gold pounds per month.

As to his pension, this is based on the "traitement" he received on the 31st December, 1933. I have already held that his proper salary on the 31st December, 1933, was 23 Turkish gold pounds, and that the Bank was wrong in calculating his salary

or "traitement" as £P. 20.700 being the equivalent of 900 mils for each Turkish pound. In view of the observations of Lord Blanesburgh on the case of the Ottoman Bank v. Chakarian, (1930) A.C. 277, in the Dascalopoulos case (supra) and in particular his remarks at the bottom of page 364, I think that the "traitement" must be, in view of Mansour's protests and his non-acceptance of the validity of the Bank's decision regarding his correct salary, the salary to which he was lawfully entitled, and not the salary which was shown in the salary book on the 31st December, 1933. I therefore agree that the judgment of the Court below in this case must be set aside and that there should be substituted therefore the order set out by my brother Manning with the consequences as regards costs indicated by him.

MENNI'S CASE.

There are certain minor claims in this case which can be disposed of without difficulty, and I will therefore deal with them first. In addition to his "traitement" or fixed salary, Menni received whilst acting as Assistant Manager in Amman a sum of Ltq. 12 per month. When transferred from Amman to Haifa in a subordinate capacity, the Bank withdrew this allowance. It is perfectly clear that this was a temporary acting allowance payable only when the appellant was so acting and that it properly ceased when he was no longer acting as Assistant Manager. Under no circumstances therefore can it be treated as a permanent increase of the "traitement" and the Bank were entitled to cease paying it when they did.

With regard to the other two sums, an "indemnité" of 75 Turkish piasters a month, and a sum of Ltq. 4.60 a month cost of living allowance, here again the Bank were entitled to withhold payment at any time, since they were entirely ex-gratia payments. The appellant's claim to these sums were therefore properly dismissed by the District Court.

I now come to the most difficult points, in my opinion, in this appeal, and these are the questions of the salary and pension of the appellant, Menni.

From the beginning of 1933, after his transfer from Amman to Haifa, Menni had been engaged in an altercation with the Bank, over the stoppage of the three allowances to which I have just referred, and he had refused to draw his salary. In May, 1933, in company with Mansour and other employees of the Bank, he

had signed a letter of protest against the alteration of his salary from Turkish to Palestine pounds. He continued to refuse to accept his salary until notified that he would be put on the retired list, when in October and November, 1933, he drew certain sums on account of his salary and gave therefor certain receipts on which the Bank relies as containing, first, an admission that his correct salary was £P. 20.700 per month, and secondly, a further admission that he had received all salary that was due to him up to the date of his retirement. These receipts are in Exhibit "D.6", and it is the fourth, fifth, sixth and seventh receipts which, to my mind, have caused the greatest difficulty in this case. The fourth to the sixth receipts inclusive have endorsed on them (I translate from the French) "on account of arrears of my salaries of £P. 20.700 per month." The seventh receipt has written on it the words "balance of my salaries from February, 1933 until the end of November, 1933". Unlike Mansour, Menni did not add a protest in the salary book every time he drew his salary after the original protest in May, 1933. As I have said, this part of the case has caused considerable difficulty and it is not without hesitation that I have reached a conclusion. On the whole, I agree with the opinion expressed by my brother Manning, that these receipts and the letter of May, 1933, which was never withdrawn, must be read together, and that the letter must be regarded as still in force and qualifying the statements on the receipts.

This being so, it follows that Menni is entitled to his salary, during the months in dispute, at the rate of 23 Turkish gold pounds per month, and his pension must be calculated on this same salary.

I agree in this case also that the judgment of the District Court must be set aside and that judgment must be entered for the appellant Menni in the form suggested by the Presiding Judge of this Court. I agree also to the order as to costs.

Delivered the 19th day of February, 1937.

DAMAGES.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

P.C. App. No. 1/35.

BEFORE:

Lord Atkin, Lord Alness and Lord Maugham.

IN THE CASE OF:

Sheikh Suleiman Taji Faruki — APPELLANT.

v.

Michel Habib Aiyub and Others — RESPONDENTS.

Contract for the sale of land — Variation of contract by letters — Extension of time for completion of transfer — Damages for delay in payment of money — Articles 111 and 112, Ottoman Code of Civil Procedure — Remedies in England in common law and equity available in Palestine — Application of distinction between penalty and liquidated damages — Article 46, Palestine Order-in-Council, 1922.

A contract for the sale of land provided that the transfer be effected within twelve months and contained a clause providing for the payment of damages in the event of breach. Before the termination of the twelve month period fixed for completion the date of completion was extended by an exchange of letters on the terms that the purchaser make an additional payment of £P. 400 on account and "that the remaining stipulations of the agreement remain in force as they are." The purchaser not having paid the £P. 400 and no transfer having been effected by the end of the extended period for completion, the vendor took action in the District Court for damages alleging as one of the breaches that the purchaser had not paid the £P. 400. The District Court held that the damage clause did not apply to the new term of the agreement but upon appeal to the Court of Appeal this finding was reversed and the appeal decided on this point. Upon appeal to the Judicial Committee of the Privy Council,

HELD: That the failure of the purchaser to fulfil his obligation under the letter rendered him liable to the payment of the damages prescribed by the original agreement.

HELD ALSO: That subject to the limitations therein contained the provisions of Article 46 of the Palestine Order-in-Council, 1922, enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their jurisdiction with the principles of equity, among other things the well established distinction between a penalty and liquidated damages.

Appeal from the judgment of the Supreme Court of Palestine sitting as a Court of Appeal (C.A. No. 176/32*) dated the 5th day of August, 1933.

JUDGMENT.

(Delivered by Lord Atkin).

In this case which is an appeal from the Court of Appeal of Palestine, the respondents and appellant had entered into a contract of sale in November, 1929, of certain land in the subdistrict of Jaffa and that agreement provided for the sale of the land at a fixed price in accordance with the particular category in which the various portions of land would be placed after survey, there being a different price per dunam in each category.

Then it provided for payment of £P. 200 in cash on the signature of the contract which has been paid; it then provided for payment of £P. 50 one month before effecting the transfer; it provided that the date of completion which would be the transfer was to be twelve months from the date of the agreement and that the vendors were to place the land in such a position as to be ready for transfer.

There seems to be some question as to whether or not they were at that time, or indeed at any time, in fact registered; but their Lordships have not to deal with that now.

Then there was a clause to the effect than the vendors should pay jointly and severally to the second party £P. 2,500 by way of agreed and liquidated damages without of the necessity of notice

* C. of J. 444.

if they committed a breach of all or part of their undertaking under clause 2 or any clause in the contract. Then by clause 8 it was provided that "The second party" — that is the purchaser — "shall pay to the first party £P. 2,500 as agreed and liquidated damages without the necessity of notice if he commits a breach of all or part of his undertaking under this agreement."

That agreement having been signed, apparently the purchaser went immediately into possession; but nothing further seems to have been done as far as the evidence before their Lordships is concerned by either side until in August, 1930, before the actual original date of completion had arrived, the parties agreed that the period of transfer at the date of completion should be extended to 13th February, 1932, provided that the purchaser paid the sum of £P. 400 on account of the price by the end of February, 1931, and then on transfer he was to pay the balance of the purchase price in some modified form.

That variation, which was effected by an exchange of letters proceeded on the terms "that the remaining stipulations of the agreement remain in force as they are."

The purchaser did not pay the sum of £P. 400 on account of the price in February, 1931, or at all, though he had been given notice to pay. The question of notice is not being dealt with now.

The extended time for completion, the 13th February, 1932, arrived, but nothing seems to have been done by anybody until in July, 1932, this action was commenced by the vendors against the purchaser to recover the sum of £P. 2,500, alleging two breaches, (1) that he had not paid certain taxes that he ought to have paid under the agreement, and (2) that he had not paid this sum of £P. 400.

The points that were raised on the pleadings involved a suggestion that the plaintiffs were in default, because they had not taken steps at the material time to complete their contract, and it also plainly raised the point that the amount was not due under the Ottoman Code of Civil Procedure, because it was only a question of delaying the payment of a sum of money and that in that respect interest alone should be paid.

When the case came on for trial, the learned Trial Judge, the District Judge, found first of all that there was no breach by the purchaser in respect of the payment of taxes. As regards the

breach, the non-payment of the £P. 400, he came to the conclusion that the clauses about paying £P. 2,500 for the breach of any stipulation did not apply to the new term in the agreement for the payment of £P. 400 and, therefore, this amount was not due.

Then there was an appeal by the vendors to the Court of Appeal, and the question about the effect of the Code of Civil Procedure appears to their Lordships to have been clearly raised before the Court of Appeal. They decided the case solely upon the point taken by the learned District Judge that the provision about the payment of £P. 2,500 did not apply to the varied contract.

They were clearly of opinion that that was wrong, and they say in their judgment: "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 his obligations under the letter is to render the respondent liable to payment of the penalty prescribed by clause 8 of the original agreement."

Upon that it appears to their Lordships that they were perfectly right, and there is no more to be said about the matter. It appears to their Lordships that the provision in the varied contract is quite plain.

Unfortunately the Court of Appeal did not deal with the point that was raised in respect of the article in the Ottoman Code of Civil Procedure. Upon that two questions arise and, it appears to their Lordships, are still open; the first is as to article 112, which provides that, if the contract be for the payment of a certain sum of money and there be delay in making such payment, damages may be awarded at the rate of 9 per cent per annum.

It is suggested by the appellant, the purchaser, that that clause provides the only remedy when there has been delay in payment of a sum of money and that in consequence it is not possible to sue for what may be called, without indicating any view about it, the penalty of £P. 2,500.

Article 111 says: "If the contract contains a clause binding either party in case of non-performance to pay a definite sum to the other party by way of damages, such sum may be awarded as damages, but neither more nor less than such sum." Article 112, it is said, deals exclusively with the remedy for delay in payment.

Their Lordships content themselves with saying that there is a good deal in the contention of the appellant to be considered; but they have not the benefit of any opinion of either of the Courts on that matter.

Moreover, there is a special difficulty in connection with it, namely that there is apparently a real dispute as to what the actual provision of the Ottoman Code of Civil Procedure is. The translation that is before their Lordships is the translation of Mr. Hooper, who has made a most valuable translation of the Code, but it is said that it is not in all respects accurate; it is said that the actual Code in Turkish reproduces accurately article 1153 of the French Civil Code, and, if it did, article 112 would apparently provide that the remedy by way of interest is the only remedy for default or delay in payment of a sum of money; but the translation does not appear to make it clear, at any rate, that the original provision in Turkish does say that that is the only remedy.

It is quite impossible for their Lordships to resolve this question, because they would require to be advised on a matter of that kind and on the construction of the original Turkish by the Courts who do in fact administer that particular law, and, therefore, it is essential before their Lordships can determine that question, if they ever have to determine it, that it should be considered by the Courts in Palestine and that judgment should be given by the Courts in accordance with the Code, stating their reasons and explaining what the true position as to that particular article is.

Then there is a further point that is taken which is again a question of construction of the Code, that article 111 only applies to a case where the non-performance is non-performance of the whole contract; in other words, is a breach which goes to the root of the contract, to use the English expression. Those two points must be determined, and, therefore, the case must be remitted to the Court of the District Judge in order to enable those points to be decided.

There are one or two other things it is necessary to say in respect of this matter. First of all, it does not appear to their Lordships that it ought at the further hearing to be open to the purchaser to raise the point that there was some default on the part of the vendor which excused him from making the payment of £P. 400 on the date on which it was due under the revised

contract. That point was raised, but there was no evidence given to support it at the hearing and it does not appear to their Lordships that it would now be fair to allow the point to be raised afresh.

On the other hand, it is said apparently that this particula piece of litigation does not go very far towards determining the rights of the parties, because the purchaser appears to be in possession; he appears at the present moment to have no legal title as far as registration is concerned and there are outstanding questions as to whether or not the purchaser on his part or the vendors on their part have not committed a breach or breaches of the agreement between them.

In the view of their Lordships nothing ought to prejudice the rights of either party to take such further proceedings as they may be advised if they wish the Courts to determine the differences which apparently must exist between them, and the Courts will exercise their jurisdiction in respect of any such further proceedings if they are brought before them.

All that it is necessary to say about that is that in exercising any such jurisdiction and in dealing indeed with the present case no doubt the Courts will bear in mind the powers which are vested in them under article 46, subject to the provision of the Ottoman law and of the Order-in-Council and the Ordinances in force, to exercise their jurisdiction "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."

There is the necessary proviso, of course, "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."

All that, of course, has to be very carefully considered; but, subject to all those observations, their Lordships think there can be no doubt that the provisions of the Order-in-Council do enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their jurisdiction with the principles of equity, among other things the well-established

distinction between a penalty and liquidated damages. All that their Lordships say is that no doubt the Courts in Palestine when dealing with this question and any other question that arises will bear in mind the provisions of article 46 of the Order-in-Council.

There then remains the question as to the costs of this appeal. In respect of the actual decision, the grounds of the decision were, in their Lordships' opinion, quite accurately given; but it is unfortunate that the Court did not consider the whole of the case, and it may be, indeed it is to be hoped it will be, that this case will not come before their Lordships again. In their Lordships' opinion, the right order as to costs will be that the costs of the former trial, the costs of the appeal to the Court of Appeal and the costs of the appeal to His Majesty in Council should abide the event of the new trial which will now be given, and if there should be any difficulty in respect of that or there should be no event upon which the costs should eventually be required to be paid, their Lordships will give liberty to apply to them, and they will humbly advise His Majesty accordingly.

Delivered the 11th day of October, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 161/35.

BEFORE:

The Senior Puisne Judge (Manning, J.) and Frumkin, J.

IN THE CASE OF:

Sara Shimon
Jacob Shimon — APPELLANTS.

v.

Joseph Hassoun — RESPONDENT.

Contract — Purchase price due on signing of agreement — Action for recovery of purchase price — Plea that purchase monies never paid — Presumption of receipt of money — Damages for breach of contract to transfer land — No damages recoverable where both parties in default.

An agreement for the sale of a plot of land was made between the respondent as seller and the appellants as purchasers under which the purchase price was made payable at the time of the signing of the agreement, but the agreement contained no acknowledgement of receipt. In an action by the purchasers before the District Court for the return of the purchase monies set out in the agreement and for damages for failure to complete, the vendor pleaded that in fact he had never received any purchase monies. The purchasers admitted that no money had changed hands on the signing of the agreement but contended that they had abandoned certain claims against the seller in lieu of the amount of the purchase price. The District Court having held that since the purchasers had not proved that they had paid money, they were not entitled to the return of the money nor to damages, the purchasers appealed. Upon appeal,

HELD: Allowing the appeal: (a) That although the document contained no clear acknowledgement of receipt, yet when the seller signed the contract and delivered it to the other side knowing that the money was payable at the time of signature, he must be considered as having assumed liability for the receipt of such sum; (b) That where both parties contribute towards the failure to

complete the transfer transaction in the Land Registry both parties are in default and neither is entitled to damages.

Appeal from the judgment of the District Court of Jerusalem dated July 25th, 1935.

Marein, Friedenberg — for appellants.
S. Mizrahi — for respondent.

JUDGMENT.

The first point to be decided in this case is whether the respondent in fact received the sum of £P. 140 which under the contract appellant was to pay at the time the contract was signed.

The document contains no clear acknowledgment of receipt, but when the respondent signed the contract and delivered it to the other side knowing that the money was payable at the time of signature, he must be considered as having assumed liability for the receipt of such sum.

As to the second point on the amount claimed as damages, it seems that both parties were in default.

On the 4th of October the respondent received a notarial notice from the appellant asking him to transfer the land until the 6th, which must have been on or about the 6th. If the respondent was really ready to transfer, he should have informed the appellant when exactly between the 4th and the 6th he wanted him to accept transfer. The appellant on his side should have shown his readiness at the day of the notice: and we therefore hold that neither of the parties has proved a good case for damages.

The appeal is, therefore, allowed, the judgment of the District Court set aside and judgment entered for appellant for the sum of £P. 140 with half of the costs in this appeal.

Delivered the 4th day of January, 1937.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 1/36.

BEFORE:

The Senior Puisne Judge, (Manning, J.) and Abdul Hadi, J.

IN THE CASE OF:

Haj Hassan Hammad — APPELLANT.

v.

Mgr. Louis Barlassina,
The Latin Patriarch, Jerusalem — RESPONDENT.

Contract for the sale of land — Purchase price paid and possession taken by purchaser — Registration not effected in the Land Registry due to default of vendor's agent — Action by vendor for re-possession — Availability in Palestine of remedy of specific performance — Equitable rights to land — Principles of law and equity applicable in Palestine — Civil procedure — Consolidation of several actions — Article 46, Palestine Order-in-Council, 1922 — Sections 3, 11 (1), 12, Transfer of Land Ordinance, 1920-1921 — Section 7 (1), Land Courts Ordinance, 1921.

By a written agreement of sale made in 1929, appellant undertook to sell certain land to the respondent. The respondent paid the entire purchase price and was let into possession but only a certain portion of the land was transferred to him in the Land Registry, the remainder, being 13 individual parcels, remaining legally in the ownership of the appellant owing to the failure of the appellant's agent to effect the transfer. In 1935, the appellant instituted thirteen actions in the Land Court for declarations that he was still the owner of the thirteen parcels. The Land Court consolidated the actions and dismissed them all on the ground that the plaintiff had not established his right to re-possession. On appeal to the Court of Appeal, the appellant's principal ground of appeal was the same as his ground in the lower court, namely,— that since his agent had failed to effect the transfer, the sale of these parcels was null and void and although he had received the full purchase price and put the respondent in possession, the respondent must yet yield up possession to him, — his only remedy being for damages for breach of contract and for the return of the purchase monies paid. Upon this principal ground of appeal,

HELD,

By the SENIOR PUISNE JUDGE, distinguishing previous decisions of the Court of Appeal, and having regard to the provisions of Article 46 of the Palestine Order-in-Council, 1922, that (a) equitable rights to land exist in Palestine on the same principles as in England, and (b), the remedy by way of specific performance is available to litigants in the courts of Palestine.

By ABDUL HADI, J. that where pursuant to an agreement for the sale of land no registration is effected in the Land Registry the provisions of the Land Transfer Ordinance, 1920-1921, have been contravened and the only remedy available is a claim for the payment of liquidated damages.

HELD ALSO: That since there was no local procedure regulating the consolidation of actions the procedure observed by the Courts of Justice in England could, under Article 46 of the Palestine Order-in-Council, 1922, be imported. Under this procedure the court has a discretion to allow actions between the same plaintiff and defendant to be consolidated and, therefore, only the improper exercise of the discretion of the lower court could avail as a ground of appeal.

Appeal from the judgment of the Land Court of Nablus (L.C.Na. No. 25/35) dated the 18th November, 1935.

Goitein — for appellant.
Kamal, Amon — for respondent.

JUDGMENT OF THE SENIOR PUISNE JUDGE.

This appeal relates to the transfer of land in Palestine, and it will make matters clear if, at the outset, I set out the law on that subject. The relevant Ordinance is the Transfer of Land Ordinance 1920-21. I may summarise its provisions by saying that if a person wishes to make a disposition of land, he has first to obtain the consent of the Director of Lands. He has to submit proof of his title and apply for registration. If consent is obtained and the proof of title is approved, then the necessary registration is effected in the name of the transferee in the Land Registry.

Sections 3 and 11 (1) of the Ordinance are as follows:

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

"11 (1) Every disposition to which the written consent of the Government has not been obtained shall be null and void; provided that any person who has paid money in respect of a disposition which is null and void may recover the same by action in the Courts."

These two provisions must be read together — and their effect may be said to be that, if the provisions of the Ordinance are not complied with, there can be no valid transfer of immovable property from one person to another. That is, if A. makes a disposition of land to B. and puts B. into possession without having complied with the Ordinance, the law will refuse to recognise the transaction and will still regard A. as being the owner. Furthermore, by the provisions of Section 12, A. and B. will each have been guilty of an offence and have become liable to a fine. But Section 3 certainly gives the impression that a disposition, which is originally invalid and null and void, may be subsequently clothed with full validity by compliance with the law, and this construction is in accordance with common sense.

This, however, is not the whole law on the subject. Article 46 of the Palestine Order-in-Council, 1922, hereinafter referred to as the Order-in-Council, is as follows:

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

Two decisions of the Privy Council may be cited to show how this Article affects the law of Palestine. The first in the case of Abdullah Bey Chedid and Others v. Tenenbaum [1]). In delivering the judgment of the Board, Lord Tomlin said:

> "Their Lordships' attention has not been directed to any provisions 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."

This means that when there is no local law, statutory or otherwise, referring to any particular obligation or remedy, the Court has to pay regard to the relevant English law, i.e., common law or equity, subject, of course, to the provisions of Article 46 of the Order-in-Council.

The second case is Sheikh Suleiman Taji Faruki v. Michel Habib Aiyub and Others (Privy Council Appeal No. 1 of 1935 [2]). In delivering the judgment of the Board, Lord Atkin said at p. 336, ante, after quoting the proviso:

> "All that, of course, has to be very carefully considered; but, subject to all those observations, their Lordships think there can be no doubt that the provisions of the Order-in-Council do enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity, and also enrich their jurisdiction with the principles of equity, among other things the well established distinction between a penalty and liquidated damages."

These are very clear words and they indicate in no uncertain manner, the interpretation to be placed on the Article. Apart from the equitable rule with regard to penalty and liquidated damages, the Judicial Committee do not bind themselves to say that any other particular doctrine of common law or equity is in force in Palestine. But they show how questions of this kind should be approached

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[1]) 2 C. of J. 406; P.L.R., 831.

[2]) Ante p. 331.

by the local Courts. Subject to the two exceptions which I shall presently mention, the Courts are to exercise their jurisdiction in conformity with the substance of the common law and the doctrines of equity in force in England and with the powers vested in Courts of Justice in England. The first exception is where there is any provision of the Ottoman law or of any local Ordinance applying or extending to the matter to be decided. If there is, then the English law does not apply and the matter falls to be decided in accordance with the local provision. If, however, there is no such local provision, then, before applying the English law, the second exception has to be considered, and that comes into play if there exist any particular circumstances in Palestine which do not permit the application of English law to the question to be decided.

By the Land Courts Ordinance, 1921, Land Courts were set up in Palestine to deal with disputes as to title to land. Section 7 (1) of the Ordinance is as follows:

> "7. (1) The Land Court will apply the Ottoman Law in force at the date of the British Occupation as amended by any Ordinances or Rules of Court issued since the Occupation; provided 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 the Ottoman Law prohibiting the Courts from hearing actions based on unregistered documents."

These words are very clear, directing the Court to have regard to equitable as well as legal rights to land. They may be said to be conclusive as to the existence locally of equitable rights to land. There is, however, a local decision with reference to this section, which was cited to me by Mr. Goitein on behalf of the appellant, viz: Pinhasovitz v. Litwinsky and Others (Land Appeal No. 58 of 1925)[1]). In that case Mr. Justice Corrie, who delivered the leading judgment, said that the section could be applied only to a case in which the sale took place before the British Occupation. At the close of his judgment however, he says this:

> "In view of the fact that the purchase money was not paid and that there was no delivery of the property, the agreement does not come within the class in respect of which the Court would make an order for registration in the purchaser's favour under the terms of Section 7 (1) of the Land Courts Ordinance, 1921."

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[1]) 5 C. of J. 1777 (Sub. No. L.A. 88/25).

That is, he does recognise an equitable right in the purchaser if he has paid the purchase money and been let into possession. It is clear that this decision cannot be treated as an authority that no equitable rights to land could come into existence after the Occupation. On the contrary, it might well be cited as an authority that a Land Court may order registration if the purchase money has been paid and the property has been delivered to the purchaser.

In the same judgment Mr. Justice Corrie said: "There is no law whereby specific performance of an agreement can be enforced in Palestine." It is quite clear that he is referring to the Ottoman Law and local Ordinances and that he did not consider the Order-in-Council. Further, a decision on this point was not necessary and no concurrence with it was expressed by either of the other learned Judges. The point is therefore open. It is necessary to determine it in this appeal, and in view of the words of Lord Atkin, which I have quoted from the Sheikh Suleiman Taji case (supra) and from what I have already said about Article 46 of the Order-in-Council, I hold that the remedy by way of specific performance is available to litigants in the Courts of Palestine. I hold also that equitable rights to land exist in Palestine on the same principles as in England. In view of the decision of the Judicial Committee in the Sheikh Suleiman Taji case (supra) it should hardly be necessary to make these findings, but it might be said that the words which I have quoted from that decision were obiter as regards the matters to be decided in this appeal.

Now, with regard to the facts.

In 1928 the appellant was the owner of a considerable quantity of land at Tayasir and in December of that year, he entered into a written agreement with the present respondent by which he undertook to sell to him the whole of that land for £P. 7,000 or thereabouts, the actual price depending on the exact area when determined. The appellant agreed (Clause 4) "to assist in the certification of the documents of sale, maps from the Mukhtars and neighbours and to facilitate all that arises in this connection." Clause 6 provided that if the appellant refused to transfer in the Tabu (i.e. the Land Registry) he became liable to pay a penalty of £P. 1000. In clause 8, the appellant undertook to be responsible for quiet enjoyment by the respondent for a period of 15 years.

On the 14th September, 1929, both parties appeared before a Notary Public at Jerusalem, and by an instrument in writing the

appellant appointed one Morcos to be his attorney for the purpose of transferring the land. The agreement of December, 1928, was recited. A map of the area agreed to be sold had been prepared and the actual price had been fixed at £P. 7213.500 mils. The instrument sets out the manner in which this price had been paid and the appellant admits that nothing more is due to him. The attorney was specifically authorised "to acknowledge and verify in the Land Registry the sale whether in one transaction or more as is found necessary and to sign documents, petitions and deeds necessary; and to have maps certified; and to register any correction of boundaries and area." The appellant further undertook that "he cannot terminate this power of attorney or dismiss the agent or back out or abrogate and nullify unless after payment of £P. 7213.500 mils with any penalty or damage he undertook."

The respondent entered into possession of the property agreed to be sold and remained in peaceable possession until the year 1934. In that year the appellant made an attempt to evict him from certain portions of the land. He brought an action before the British Magistrate at Nablus, but it was dismissed. He appealed to the District Court, but without success.

Undeterred by this failure, he instituted thirteen actions against the defendant before the Nablus Land Court in 1935. In each action he claimed a declaration that he was the owner of a specific portion of land in Tayasir in the possession of the defendant and asked for consequential relief. In the statements of claim he took up the position that he had never agreed to transfer those portions of land to the respondent, and that the respondent had got possession of the documents of title to these portions from a third party and not from himself.

The thirteen actions were consolidated by the Court. The appellant's advocate abandoned the position taken up in the statements of claim. He admitted that appellant had agreed to sell his land at Tayasir to the respondent, that he had put the respondent in possession of the whole, and that he had authorised Morcos to effect necessary transfers at the Land Registry. But, he said, with regard to these thirteen portions, Morcos did not effect the transfer; therefore, according to the law of Palestine, the sale of these portions is null and void, the land still belongs to his client and though he has received the full purchase price and put the respondent in possession, the respondent must now vacate and

yield up possession to the appellant. The respondent's only remedy is for damages for breach of contract.

The defendant pleaded that all the necessary transfers has been effected at the Land Registry.

No evidence was led before the Land Court, but after hearing arguments on each side, it decided in favour of the respondent in each case. It held that the appellant had failed to establish his case to the ownership of the land, but it made no definite finding on the question as to whether the provisions of the Transfer of Land Ordinance had been complied with with respect to the portions of land claimed.

The appellant has appealed to this Court. Mr. Goitein argued the appeal on his behalf, and his principal ground of appeal was the same as that urged before the Land Court, viz., that the Transfer of Land Ordinance had not been complied with with regard to the thirteen portions claimed and that therefore, the disposition of them was null and void, and the appellant was still the owner. He did not make any reference to Article 46 of the Order-in-Council.

I shall assume that the Transfer of Land Ordinance, has not been complied with with regard to the portions claimed.

The appellant has specifically carried out the whole of his contract with one exception, viz., he has not seen that the necessary transfers were effected in the Land Registry. Before deciding whether the respondent is entitled to specific performance the penalty clause in the agreements have to be considered. Clause 6 of the first agreement reads:

> "If first party refuses to transfer in the Tabu when asked by second party to sell the above referred to lands in Article 1, first party will pay £P. 1000 to the second party."

In the second agreement, which was made, it is important to note, after the purchase price had been paid, the appellant admits that he cannot back out or abrogate and nullify unless after payment of the purchase price with any penalty or damage he undertook.

The law on this point is stated in Halsbury's Laws of England, Vol. 27, p. 15.

> "Where the contract contains a stipulation that in the event of non-performance a certain sum of money shall be

paid, that fact is not in itself decisive in considering whether or not specific performance should be granted. Nor does the distinction between penalty and liquidated damages affect the answer to this question. The answer is to be found by considering the intention of the parties, that is, whether the party bound to performance has an alternative choice given to him by the contract, to perform or to pay the agreed sum, or whether he is bound to do a certain thing, with a penal sum or sum by way of liquidated damages attached as security. In the latter case the Court, notwithstanding the penal clause, enforces performance, if the contract be such that without the penal clause it would have been proper for specific performance."

From a perusal of the agreements, it is clear that only circumstances prior to delivery of possession were contemplated by the parties. The appellant had the choice of delivering up possession or of refunding the purchase price. But he chose to deliver possession, he did not choose to back out or abrogate or nullify, to use the words set out in the agreement. It is noteworthy that clause 8 of the 1928 agreement, which is a covenant for quiet enjoyment for 15 years does not provide a penalty in case of breach, it makes the appellant responsible for any damage incurred. He not only delivered possession, but allowed the respondent to remain in possession for 5 years. It is quite clear that it was not the intention of the parties that the appellant should have a right, unlimited in time save by prescription, to back out of his agreement and dispossess the respondent.

Similarly, the wording of clause 6 of the first agreement shows that only circumstances prior to the sale were contemplated. The words are: "If first party refuses to transfer in the Tabu when asked by second party to sell." It was never contemplated that the transaction should be apparently completed and that the appellant on discovering after a considerable lapse of time that his agent had made default in carrying out part of the contract, should be able to claim back part of the land and say to the purchaser "you must give me possession but you may sue for damages."

I am satisfied that neither of these penalty clauses can now interfere with the respondent's right to claim specific performance of that part of the agreement which has not been carried out.

I wish to refer again to the words used by Lord Atkin in the Sheikh Suleiman Taji case (supra) namely "that the provisions

of the Order-in-Council do enrich the jurisdiction of the Courts in Palestine ..... with the principles of equity." Certain of these principles may be invoked by the respondent, viz "Equity looks on that as done which ought to be done"; and "Equity does not allow a Statute to be made an instrument of fraud." There are also the well-known maxims, applicable both in equity and common law, "ex turpi causa non oritur actio" and "in pari delicto melior est conditio possidentis." There is nothing in the circumstances of Palestine or its inhabitants to hinder the application of these principles or to render them subject to qualification in the present case.

Mr Goitein for the appellant cited two authorities on behalf of his contentions. I do not think either of them in point, but I refer to them to show that they have not been overlooked. They were the Pinhasovitz case (supra), and Ismail Muhammad En-Nadi v. Rashid Ibrahim En-Nadi and another [1]).

This later case is reported very briefly. What was decided was that a mere power of attorney for the sale of land can of itself confer no interest in the land agreed to be sold.

In the Pinhasovitz case award had been made after arbitration and in pursuance of the award certain land had been registered in the name of one Sarah Litwinsky. Pinhasovitz appealed on the ground that the award was bad and that the registration should, therefore, be set aside.

The appeal was heard before Corrie, Baker and Khayat, JJ. The leading judgment was delivered by Mr. Justice Corrie. He did not consider it necessary to deal with the appellant's objections to the award. He said that the appellant was a person who had bought land by an unregistered deed in 1922. The vendor, in breach of his contract with the appellant, had transferred the land to some other person. The appellant could not therefore claim title to the land.

Mr. Justice Baker gave no reasons for his judgment, he said he found no grounds to interfere with the judgment of the Land Court.

Mr. Justice Khayat held that Pinhasovitz's only remedy was in damages.

As I have said neither authority is of assistance in the present

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[1]) 4 C. of J. 1502; P.L.R. 555.

case, which is concerned solely with the question whether a purchaser who has paid the purchase money and been put in possession, but whose title to part of the land, owing to a breach of contract by the vendor, is legally defective, has a good equitable defence against a claim by the vendor to oust him from his possession.

I have already dealt with the remarks of Mr. Justice Corrie in the Pinhasovitz case on the subjects of equitable rights in land and specific performance.

I with to refer to two other decisions which fall to be considered, in case the validity of the agreements made in this case should be challenged. In 1929 a Court consisting of Baker, Khaldi and Frumkin, JJ., decided that if the consent of the Government had not been obtained, an agreement for the sale of land was null and void under the Transfer of Land Ordinance. (Isaac Gabrilowitch v. Ali Ibn Hassan Abu Duyuk[1]). In 1930 a Court consisting of Corrie, Acting Chief Justice, Jarallah and Khayat JJ., decided that such an agreement was valid, that it was not a disposition of land within the meaning of Section 2 of the Transfer of Land Ordinance. (Yehoshua Hankin v. 'Ali Qasem Abdul-Qader[2]). I am in full agreement with this latter decision; as the definition of "disposition" in Section 2 of the Ordinance does not include an agreement for sale.

To sum up, there was a valid agreement for the sale of land by the appellant to the respondent. The respondent paid the purchase money, he was let into possession, and at the time of action brought had been in possession for five years. Owing to the default of the appellant's agent, certain provisions of the law were not complied with with the result that in law the appellant still remains the owner of the land. If the respondent is to be dispossessed now it is clear that damages will not afford an adequate remedy. There has been no default on the part of the respondent. He has thus an equitable right to the land and is entitled to sue for specific performance, and this is not affected by any of the penalty clauses in the agreement. Against any claim for the land by the appellant, the respondent has a good defence in equity.

There is yet one other matter to which I must allude. There is a law in Cyprus very similar to the Transfer of Land Ordinance,

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[1]) 1 C. of J. 392; P.L.R. 373.
[2]) 2 C. of J. 421; P.L.R. 574.

and there are various decisions under it which suggest that if a sale of land is unregistered, the Court will allow the vendor to dispossess the purchaser if the purchase money is refunded in full and compensation made for all improvements. I have not any evidence to guide me as to how far the English doctrines of equity apply in Cyprus. But my examination of the various cases convinces me that the present case can be easily distinguished from them in three important matters: first, that any failure to register in this case was the fault of the vendor, second, that there was no intention on the part of the purchaser to evade the law, and third, that there was a covenant for quiet enjoyment.

Mr. Goitein took a further objection that the Court below was not justified in consolidating the cases. He admits that there is nothing one way or the other in local procedure — but again he seems to forget that there is such a thing as the Order-in-Council. That lays down that so far as the Ottoman Law, local Ordinances and Regulations do not extend or apply "the jurisdiction of the Civil Courts shall be exercised ..... in conformity with the powers vested in, and according to the procedure and practice observed by or before the Courts of Justice in England" as on the 1st. November, 1914, "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." Under English practice a Court of Justice has a discretion to allow actions between the same plaintiff and the same defendant to be consolidated. In the present case I see no reason to think that the Court below made any improper exercise of its discretion and this ground of appeal fails.

It will be seen that I differ from my brother Abdul Hadi on the principal ground of appeal. I can see no useful object in sending the case back to the Land Court for a finding on the question whether the law was complied with as regards the thirteen portions of land. Whatever their finding might be, my decision would remain the same.

Delivered the 15th day of October, 1936.

JUDGMENT OF MR. JUSTICE ABDUL HADI.

This appeal was lodged against the judgment of the Land Court, Nablus, dated 18th November, 1935, whereby the thirteen actions brought by the appellant against the respondent were dismissed.

The appellant's counsel has raised two legal points in this appeal, namely:

1) That the Land Court was not entitled to consolidate the said thirteen actions.

2) That the title to certain portions of the land, which the appellant undertook to sell to the respondent and for the transfer of which he gave a power of attorney, did not pass as he did not fulfil his undertaking and failed to register that portion in respondent's name in the Land Registry.

The appellant's counsel argued before us as regards the first point, that the undertaking to sell and the power of attorney given by his client did not transfer the title to that portion of the immovable property to respondent as it was not registered in his name in the Land Registry, and as the Land Transfer Ordinance, 1920, made any sale of immovable property to which the written consent of the Land Registry was not obtained null and void. Respondent's counsel stated that all that the appellant undertook to sell to the respondent and in respect of which he gave a power of attorney, was transferred into respondent's name in the Land Registry.

As regards the first point appellant's counsel did not convince us that the Land Court has no right to consolidate the said actions in cases where the Court is of the opinion that the plaintiff, defendant and the subject matter of the actions are the same and that such consolidation facilitates the work of the Court and does not prejudice the rights of the parties.

As regards the second point I hold that an undertaking to sell or the giving of a power of attorney for the transfers even if the purchase price was paid and the land was handed over, does not transfer the title to immovable property unless the contract of sale of land is registered in the Land Registry. The Land Transfer Ordinance, 1920, has as one of its objects to secure and insure that all transactions made regarding immovable property should be registered in the official registers to do away with disputes regarding it. Section 2 of this Ordinance, defines, inter alia, "disposition" as a sale of any immovable property.

Section 3 provides:

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

Section 11 provides:

"(1) Every disposition to which the written consent of the Government has not been obtained shall be null and void; provided that any person who has paid money in respect of a disposition which is null and void may recover the same by action in the Courts."

I am of the opinion that what arises out of an undertaking to sell, in event of breach by non-registration in the Land Registry, is a claim for the payment of liquidated damages as provided in Section 4 of the Ordinance.

In the event that a portion of the immovable property which the appellant undertook to sell to respondent and in respect of which he gave a power of attorney, was not registered in respondent's name in the Land Registry, the respondent cannot claim that the title to these portions passed to him by virtue of the said undertaking.

Since the question as to whether a portion of the lands forming the subject matter of the sale was or was not registered in the Land Registry in the respondent's name is a question to be decided by the lower Court, I am of the opinion that the judgment should be set aside and the case remitted to the Land Court to determine this point and give judgment accordingly.

Costs to follow the event.

Delivered the 15th day of Ocrober, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 51/36.

BEFORE:

Copland, J., Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Aharon Soloway — APPELLANT.

v.

Chaim Wiesenfeld — RESPONDENT.

Contract for sale of land — Advocate appointed as common agent of parties to arrange Land Registry file — Default of common agent — Refusal of court to award damages.

On 21st May, 1934, an agreement was signed by the parties under which appellant sold to respondent a plot of land for £P. 200. The agreement contained a mutual covenant providing for the payment of £P. 200 as damages in the event of breach. Clause 7 of the agreement was as follows:

> "7. It is agreed that the transfer of the plot into the name of the purchaser will be made within three months from the date of the signing of this agreement, and for this purpose both parties undertake to sign all documents, certificates and vouchers required for the preparation of the transfer and parcellation, and also, to appear in the Land Registry for the arrangement of the transaction when they will receive a notice to this effect from Mr. I. Aizen, advocate, to whom is given over the arrangement of the aforesaid transfer and parcellation."

The respondent paid £P. 150 on account of the purchase price, and more than one year having gone by without his being called to accept transfer he sued in the District Court for the return of the £P. 150 paid by him on account and for the £P. 200 stipulated as damages for breach of contract. The appellant pleaded that he was in no way responsible for the breach and if there was a default it was due entirely to the failure of the agent to act. The District Court gave judgment for the £P. 150 and for

the damages requested, whereupon the appellant appealed to the Court of Appeal on the question of the damages.

HELD: Setting aside the judgment of the District Court for damages, that where the failure to fulfill the provisions of an agreement is due to the default of the common agent and there is no act on the part of either party which prevented the agent from carrying out his duties, neither party will be awarded damages for breach of the contract.

Felman & Fellman — for appellant.
Silberg — for respondent.

Appeal from the judgment of the District Court of Jaffa (C.D.C.Ja. No. 367/35) dated the 26th February, 1936.

JUDGMENT.

The parties to this appeal entered into a contract for the sale of land by Clause 4 of which the appellant undertook to transfer to the purchaser a plot of land free from any debt and taxes due either to Government or the Council of the Colony. The parties have, in Clause 7, entrusted the question of the parcellation and transfer to a certain advocate by the name of Mr. Aizen.

We do not think that there is any contradiction between the provisions of Clauses 4 and 7. The whole of the contract must be read together.

We hold that Mr. Aizen was the agent of both parties under Clause 7 of the contract. It is clear, and in fact not alleged, that there is no act on the part of either party which prevented Mr. Aizen from carrying out his duties under Clause 7 of the agreement, and therefore neither party is to blame.

For the above reasons we hold that the judgment of the District Court must be set aside and the respondent's claim dismissed with costs here and below to include £P. 5 advocate's fees.

Delivered the 8th day of April, 1937.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 61/36.

BEFORE:

Copland, J., Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Paulina Vangrover — APPELLANT.

v.

Mikhail Hanna Raji
Raffoul Hanna Raji — RESPONDENTS.

Agreement to vacate land or to pay £P. 3 for each day of delay — Person not paying rent not a tenant — Application of Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1935 — Possession of land as consideration — Withholding of legal proceedings as consideration.

Respondents sold their land to appellant and undertook to vacate within two months failing which they would pay £P. 3 for each day of delay. Respondents having failed to vacate within two months appellant took action in the District Court for £P. 3 for each day of the delay. The District Court having accepted the respondents' plea that they were tenants and that the undertaking was rendered unenforceable by the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1935, the appellant appealed,

HELD: (a) That the respondents, paying no rent could not be considered as tenants entitled to protection under the provisions of the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1935. (b) That the right to continue in possession and the withholding of legal proceedings was good consideration for the undertaking to pay the £P. 3 per day.

Appeal from the judgment of the District Court of Haifa dated the 16th March, 1936.

Weinshall — for appellant.
Sahyoun — for respondents.

JUDGMENT.

The respondents in this case signed an undertaking in writing to vacate a plot of land purchased by the appellant, within two months, failing which they were to pay the sum of £P. 3 for each day of delay.

When the appointed day fell, however, they failed to carry out their undertaking and the appellant therefore brought an action claiming the sum of £P. 393 in respect of a delay of 131 days.

The District Court of Haifa dismissed the appellant's claim on 16th March, 1936, on the ground that the Landlords and Tenants (Ejection and Rent Restriction) (Extention) Ordinance, No. 12 of 1935, renders the undertaking unenforceable.

Counsel for the appellant has raised two points for determination by the Court. He argues that the Ordinance relied upon by the Court of Trial does not apply to the present case for two reasons. First, because the said Ordinance refers to premises, while the subject matter of the lease in this case is land; and secondly because the respondents are not tenants within the meaning of the Ordinance as they were under no obligation to pay rent, and were thus in possession at will. On this second point the Court is in entire agreement with appellant's contentions, and we hold that since no rent is payable, the respondents are not tenants and that for these reasons the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1935, does not apply.

Respondents' attorney has argued, on the other hand, that the undertaking to leave is invalid for lack of consideration, and cannot therefore be enforced. With this the Court cannot agree, for clearly the consideration is two-fold, viz: the permission granted to respondents to remain in possession for two more months, and the refraining by the appellant of bringing an action against the respondents during this period.

For these reasons, the appeal is allowed and the case is remitted to the District Court to ascertain the number of days during which the respondents remained in possession after the date on which they contracted to vacate and to give judgment accordingly for the amount so found due. Costs to follow result.

Delivered the 12th day of April, 1937.

DEBTS.

In the District Court of Jaffa.

C.D.C.Ja. No. 218/34.

BEFORE:

The President (Copland, J.) and Mani, J.

IN THE CASE OF:

Kupat-Am Bank Co-operative Society, Ltd.	PLAINTIFF.
v.	
Nissan Aaronovitz	DEFENDANT.
and	
Haim Shugarman & Others	THIRD PARTIES.

Letter as admission of indebtedness — Document to be read as a whole — Article 1628, Mejelle — Civil procedure — Documentary proofs not admitted after judgment reserved — Article 10, Ottoman Code of Civil Procedure.

The plaintiff bank sued for a debt endeavouring to prove its claim by an admission of indebtedness contained in a letter signed by the defendant and others, which admission was in the following words: "Whereas up to date Mr. Nissan Aaronovitz is owing you £P. 350...."

HELD: That the letter should be read as a whole and that upon such reading it did not constitute an acknowledgement of debt.

HELD ALSO: That documentary proofs should not be produced after the court has reserved judgment.

Eliash — for plaintiff.
Smoira — for defendant.

JUDGMENT.

In this case the plaintiff Bank is suing the defendant on an admission of indebtedness alleged to be contained in a letter dated the 22nd July, 1930, addressed to the plaintiff and signed by the defendant and others.

The letter is in these terms:

"Jerusalem, 22nd July, 1930.

To the Management of Kupat Am,Tel Aviv,

Dear Sirs,

Whereas up to date Mr. Nissan Aaronovitz is owing you £P. 3550, of which £P. 2000 by transfer of his debt from the "Ashrai" Bank and the balance in cash; and to-day Mrs. Valero signed a mortgage to your order in the amount of £P. 5000 as security for the above debt, please make a note that the right to receive money in connection with the said mortgage as well as the moneys deposited with you and with the "Ashrai" Bank in connection with the affair Pierce-Gordon will be paid only against two signatures of which one is to be that of Mr. N. Aaronovitz and the second one either of Mrs. Menoucha Valero or Mr. Meir Rubin.

(Sgd.) Menoucha Valero.
N. Aaronovitz.
M. Rubin."

On the following day another letter was sent by the same signatories to the plaintiffs: varying the terms of the letter of 22nd July. This letter reads:

"Jerusalem, 7th Tamus 5690, 23. 7. 1930.

To the Management of the Palestine Kupat-Am Bank Ltd.
Tel-Aviv.

Dear Sirs,

We the undersigned hereby inform you that the notice which we gave you yesterday about the necessity for two signatories, that of Mr. Aaronovitz and Mrs. Menoucha Valero or Mr. Aaronovitz and Mr. Meir Rubin, for the purpose of receiving monies from your Bank, is null and void. From now onwards, Mrs. Valero may receive from your Bank monies on account of the mortgage by her signature alone,

without any necessity for an additional signature. The undersigned Mr. Aaronovitz has no right to receive from your Bank any monies on account of the said mortgage.

Kindly confirm us the above in writing.

Yours truly,

(Sgd.) M. Valero,
N. Aaronovitz,
M. Rubin."

The defendant denies that the said letter of the 22nd July constitutes an acknowledgment of indebtedness by defendant, and further that in any case it is cancelled by the letter of the 23rd July, and further still that by Article 1628 of the Mejelle, no claims can be founded on it.

In the first place I agree with the contention of the defence that this letter of the 22nd July does not constitute an acknowledgement. It is no good taking one sentence by itself and saying that that it is an admission of debt. One must take the letter as a whole and consider its purpose, and that purpose to my mind is perfectly clear, and that was to notify the plaintiff as to the signatures required to authorise payment in respect of some other transaction in which other persons were also involved.

This view is supported by the terms of the second letter of the 23rd July, which referring to the first letter, describes it as a notice about the necessity for two signatures and says that it is null and void.

The object of these letters is solely to inform the Bank what signatures should be taken by them on receipts for money paid by them. The so-called admission of indebtedness is contained in a recital in the letter of the 22nd July, commencing with the word "whereas".

I am satisfied that it cannot be considered an admission in such circumstances, but is merely introductory to explain the object of the letter to the plaintiff and the instructions therein contained, and cannot therefore form the basis of the claim in this action.

But the case does not rest here. This case originally came on for hearing on the 7th November, 1934, and in the course of the argument the plaintiff seemed to appreciate the position and

made the startling declaration that if this letter of the 22nd July was held not to be an admission it had other papers which would prove it and it would produce them.

The Court reserved judgment, and on the following day, the 5th November, the plaintiff filed certain other papers in support of its claim without prejudice to its original claim.

On the 21st November the Court heard arguments as to whether these further documents should be admitted or not, and reserved its judgment again. Since then further pleadings have been filed by each side.

It is difficult to see where this process will stop, if parties are to be allowed, when judgment has been reserved, to file fresh proofs and fresh arguments and pleadings. It can only be brought to an end by the Court watching its opportunity and getting its own judgment in when the parties are temporarily exhausted.

This of course is ridiculous, and I decline to believe that the Ottoman Code of Civil Procedure, inapt as it is in various ways, really countenances such things. Rules of pleading in this country are not strict and allow considerable latitude, but Article 10 of the Ottoman Code of Civil Procedure as amended does require a party to produce his documentary evidence with his statement of claim.

I agree that this rule is often not observed, but I decline to allow documentary proofs to be produced after judgment has been reserved. The object of pleadings is to let the other side know what the case is that he has to meet, so that the issues may be tried. Nine-tenths of the delays that occur in the trial of cases are due to the fact that parties will not file proper pleadings and time and again adjournments have to be given because a defendant does not know from the pleadings what the case against him is. I think that it is time that a stand were made and at any rate that a claim should be properly presented.

In this case, the plaintiff based its claim on this one letter of the 22nd July — even after the defence was filed on the 18th October, it took no steps to file the further documents which it now tries to produce and it had notice from the defence filed what its nature would be.

It is not right that a defendant who comes into Court prepared to meet a certain claim, should suddenly find in the course of the trial that another claim is produced against him with other documents and other proofs.

If this kind of thing is allowed to continue we shall one day find a plaintiff who has founded his claim on one contract, and realising that he is going to lose his case, producing in the course of the trial a second contract, of an entirely different nature and continuing the action on that second contract. If the courts are to allow business to be conducted in this way, I foresee no end to litigation.

The action in its present form must therefore be dismissed. The plaintiff will pay the defendant's costs and £P. 6 advocate's fees and the third parties' costs and £P. 6 advocate's fees for the advocate of the 3rd and 4th third parties. The provisional attachment granted in this action must be released.

Delivered the 8th day of March, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 26/35.

BEFORE:

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

IN THE CASE OF:

Haim Blumenthal — APPELLANT.

v.

Bank for Agriculture and Industry, B'nei B'rak, Limited — RESPONDENT.

Assignment of debt — Debt or claim to liquidated sum of money — Pleas available against assignee — Sections 2, 3, Assignment of Debts Ordinance, 1928.

E, who represented to the appellant that he had the sum of £P. 200 on deposit in a bank to his credit assigned the said sum to the appellant for value. The appellant's demand upon the bank for payment was refused and he sued the bank in the District Court for the amount assigned to him. The bank pleaded firstly, that no monies had been due to E, and that, in any event, the assignment was invalid it not being a claim "to a liquidated sum

of money" in accordance with Section 3 (1) of the Assignment of Debts Ordinance, 1928, and therefore the debt was not assignable. The District Court having accepted the latter plea and dismissed the action, the appellant appealed to the Court of Appeal.

HELD: (a) That the debt was a claim to a liquidated sum of money arising in the course of trade or business and was accordingly assignable under Section 3 (1) of the Assigment of Debts Ordinance, 1928. (b) That the bank was entitled to assert against the appellant any plea or defence which it could have asserted against the assignor at the date at which notice of the assignment was given.

Appeal from the judgment of the District Court of Jaffa (C.D.C.Ja. No. 347/34) dated the 11th December, 1934.

Hoffman — for appellant.
Sassoon — for respondent.

JUDGMENT.

This appeal arises out of a claim of an alleged debt of £P. 200 due from present respondents to one Aharon S. Elberg, who assigned the said debt to present appellant. The said debt purports to be a deposit of £P. 200 in the respondent bank.

Upon the hearing of the claim by the Jaffa District Court, the said Court decided in their judgment of the 11th December, 1934:

> "That the claim was brought under Section 3 (1) of the Assignment of Debts Ordinance, 1928, which provides that this law can only apply to debts arising out of commercial transactions, and whereas it was proved from the evidence of the assignor Mr. Elberg that the amount in claim represented his salary as an employee in the defendant Bank, we therefore dismiss this action in this present form with costs."

Section 3 (1) of the Assignment of Debts Ordinance, 1928, reads as follows:

> "The provisions of this Ordinance shall apply only to an assignment of a debt or claim to a liquidated sum of money which has arisen in the course of trade or business, or which is owing to a company or co-operative society

registered under any Ordinance in force from time to time concerning companies and co-operative societies."

It is common ground that the sum of money the subject matter of the assignment was consideration for services rendered by the assignor to the respondent bank and kept with them on deposit.

The debt being such as it is, we are unanimously of opinion that it must be considered "a debt or claim to a liquidated sum of money arising in the course of trade or business" and accordingly is assignable under Section 3 (1) of the before mentioned Assignment of Debts Ordinance.

The judgment of the lower Court must, therefore, be quashed, the appeal must be allowed and the case returned for a fresh judgment to be given after allowing respondent the right of asserting against appellant any plea or defence which he could have asserted against the assignor of the debt at the date at which notice of assignment was given in compliance with Section 2 (1) of the Assigment of Debts Ordinance.

Costs costs in the cause.

Delivered the 7th day of February, 1936.

ELECTIONS.

In the High Court of Justice.

H.C. No. 70/34.

BEFORE:

The Chief Justice (McDonnell, C.J.) and Toukan, J.

IN THE CASE OF:

Selim Cotran — PETITIONER.

v.

The Returning Officer, Acre — RESPONDENT.

Election of councillors to municipal area — Refusal by Returning Officer of nomination — Section 2 (2), Seventh Schedule to Municipal Corporations Ordinance, 1934 — Interpretation of statutes — Grammatical and ordinary sense of words to be adhered to.

The petitioner was nominated as a candidate for election as councillor to represent a division of the municipal corporation of Acre. The nomination form was signed by more than six persons whose names appeared in the register of voters but of the signatories less than six were on the register of voters for the division for which the petitioner was a candidate. The Returning Officer refused to accept the nomination on the ground that it was not a valid nomination under Section 2 (1) of the Seventh Schedule to the Municipal Corporations Ordinance, 1934, whereupon petitioner applied to the High Court for an order directing the Returning Officer to show cause why his refusal should not be set aside. Upon the return to the rule nisi,

HELD: (a) That the nomination form was invalid since it should have been signed by at least six persons whose names appear in the register of voters for the division of the municipal area for which they nominate. (b) That in the interpretation of statutes the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or repugnance with the rest of the statute, in which case the grammatical and

ordinary sense of the words may be modified so as to avoid that absurdity, repugnance and inconsistency and no further.

Application for an order to issue to the Returning Officer, Acre, to show cause why his order dated August 18, 1934 refusing to accept the petitioner's nomination as candidate for election as councillor should not be set aside.

Cattan — for petitioner.
Kantrovitch, J.G.A. — for respondent.

ORDER.

This is the return to a rule nisi directed to the Returning Officer for the Municipal Area of Acre, who has refused to accept a form pursuant to Section 2 of the Seventh Schedule to the Municipal Corporations Ordinance, 1934, nominating the petitioner as candidate for election for one of the divisions into which the Acre Municipal Area was divided by the Acre Municipal Area (Election Divisions) Order, 1934, (Supplement No. 2 to Gazette, page 549) on the ground that although the nomination form was signed by more than six persons whose names appear on the register of voters, less than six of those who signed the form were on the register of voters for the division of the municipal area for which the petitioner was a candidate and that, therefore, it was not a valid nomination under Section 2 (1) of the Seventh Schedule to the Municipal Corporations Ordinance, 1934.

The respondent, the Returning Officer, relies on Section 14 (3) of the Ordinance, the provisions of which say that where a municipal area has been divided, the register of voters shall be prepared to show the electors entitled to vote in each division.

The only authority which has been cited to us has been the case of the Queen v. Parkinson (1867) L. R. 3 Q. B. page 11, which turned upon the interpretation of Section 6 of an English Statute which is now repealed, 22 Vict. c. 35, which enacted that:

> "at any election of councillors to be held for any borough or ward, any person entitled to vote may nominate for the office of councillor himself (if duly qualified) or any other person so qualified (not exceeding the number of persons to be elected for the borough or ward) and every such nomination shall be in writing, etc."

The petitioner relies upon a dictum of Lush J. which is reported in this case as follows:

> "By Section 8, if the number of candidates is not greater than the vacancies, the persons nominated are to be elected without a poll, so that in effect, the persons nominating the candidate vote for him."

This remark must be read in the light of the dictum of Cockburn, C.J. which immediately follows it, in these terms:

> "the section clearly requires that the person nominating should be entitled to vote at the election for which he nominates, whether it be the whole borough if not divided or for a particular ward when the borough is divided."

In Section 2 (2) of the Seventh Schedule to the Municipal Corporations Ordinance, 1934, it provides that nomination forms must be signed "by at least six persons whose names appear in the register of voters for the Municipal Corporation." The drafting is by no means good for what is voted for is not the "corporation" which by Section 3 (1) means the inhabitants of the area but the Council. The question then is, can the dictum of Lush, J. in Queen v. Parkinson (supra) be applied in view of the provisions of Section 8 of the Seventh Schedule? After much consideration we have come to the conclusion that since in the English article the words: "Any person entitled to vote" have been held to mean any person entitled to vote for the particular ward for which he nominates, by a parity of reasoning the words "six persons whose names appear in the register of voters for the Municipal Corporation" occuring in Section 2 (2) of the Seventh Schedule to our Ordinance must mean six persons whose names appear in the register of voters for the division of a municipal area for which they nominate.

We are confirmed in this view by a consideration of the effect of Section 55, by which if the number of councillors falls below the number provided to constitute a quorum, the High Commissioner may direct that elections shall be held to fill the vacancies in the council.

Let us suppose a case in which owing to death or other causes an election has to take place in one division of a divided municipal area. If the petitioner is right, persons on the register of voters for a division which still had a sitting councillor could nominate a candidate for the division for which there was a vacancy.

In the interpretation of English Statutes one has to appply what was called by Lord Wensleydale in Becke v. Smith (1836) 2 M. & W., 191, the golden rule of legal interpretation which is that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance with the rest of the statute, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance and inconsistency and no further.

Now, Section 2 (3) of the Seventh Schedule of our Ordinance provides that no person shall nominate more than one candidate. If therefore the petitioner is right and a voter can nominate for any division in a Municipal Corporation on the register of voters for which his name appears: then, if he nominates for any one division he is functus officio, so that if he nominates for a division other than his own, he is precluded from nominating for his own division.

These are consequences which appear to us to be repugnant to the clear intention of the Legislature which we can collect from the rest of the Ordinance and in consequence the rule nisi must be discharged but we make no order as to costs.

Delivered the 10th day of September, 1934.

In the High Court of Justice.

H.C. No. 78/34.

BEFORE:

The Chief Justice (McDonnell, C.J.) and Khayat, J.

IN THE CASE OF:

Eliezer Perlman — PETITIONER.

v.

The Chairman of the Jerusalem Electoral Committee

The Returning Officer, Jerusalem

Shmuel Ende — RESPONDENTS.

Election of councillors to municipal area — Refusal by Returning Officer to allow inspection of nomination form — Sections 2 (1) and 2 (2), Seventh Schedule to Municipal Corporations Ordinance, 1934 — Affidavit in support of petition in High Court — Order nisi not granted on mere suspicion unsupported by evidence.

The third respondent was nominated as candidate for election as councillor in a division of the municipal corporation of Jerusalem. The petitioner who was also a nominee for the same division, suspecting that the nomination form of the third respondent was not signed by persons who were on the register of voters for that division requested the Returning Officer to grant him access to the nomination form of the third respondent, and upon his being refused petitioned the High Court for an order to issue to the respondents to show cause why the nomination form of the third respondent should not be declared void.

HELD: Refusing the grant of an order nisi that since the affidavit in support of the petition did not name any nominator who was disqualified, there remained only the allegation of the petitioner that the form was improperly signed. The High Court cannot grant an order nisi upon a mere suspicion unsubstantiated by evidence in proof of the fact suspected.

Levitsky — for petitioner.

ORDER.

The application is based merely on what the petitioner states in his petition to be "very strong reasons to believe that the nomination form of the third respondent has been signed wholly or in part by townsmen who are not entitled to vote for the election of a councillor, in Division 8."

No single name of a nominator who under the decision of this Court in Selim Cotran v. Returning Officer of Acre (H.C. 70/34)*) is not qualified to nominate for the division in question has been sworn to before us in an affidavit in support of the petition.

We cannot grant an order nisi upon a mere suspicion unsubstantiated by a single shred of evidence in proof of the fact suspected.

The petition is, therefore, dismissed.

Made the 25th day of September, 1934.

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*) See ante p. 365.

EVIDENCE.

In the Supreme Court sitting as a Court of Appeal.

A.A. No. 1/34.

BEFORE:

The Chief Justice (McDonnell, C.J.), Corrie, J., Khaldi, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Fatmeh bint Isa Shalbak — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Criminal procedure — Admission made before examining magistrate — Failure of magistrate to record whether proper warning given — Admissibility in criminal case of evidence of child against parent — Articles 170, 174, Ottoman Penal Code — Sections 13 (2) and (3), Trial Upon Information Ordinance, 1924 — Section 5, Law of Evidence (Amendment) Ordinance, 1924.

The appellant was charged with the premeditated murder of her husband by killing him with an axe. At the preliminary enquiry the magistrate addressed the proper caution to the accused that she was not obliged to say anything, but that whatever she did say would be taken down in writing and might be given in evidence upon her trial. The accused thereupon admitted having killed her husband. It did not appear from the record of the magistrate whether he had stated she had nothing to hope from any promise of favour and nothing to fear from any threat which had been held out to her to induce her to confess. At the trial before the Court of Criminal Assize the only corroboration of the admission of the accused was the evidence of her daughter. Upon the accused being convicted for murder, she appealed to the Court of Appeal.

HELD: (a) That the evidence of the daughter was wrongly admitted since in a criminal case a child is not competent to give evidence against a parent except in the case where the parent is charged with violence against that child. There was therefore no

corroboration of the evidence of premeditation and the conviction for premeditated murder was set aside. (b) That although it did not appear from the record of the examining magistrate that the proper warning had been given to the appellant, the magistrate might be called at the trial as a witness to prove that he had given the warning.

Appeal from the judgment of the Court of Criminal Assize sitting at Jaffa (A.Ja. No. 30/33) convicting the appellant of premeditated murder and sentencing her to death.

Cattan — for appellant.
Ghussein — for respondent.

JUDGMENT.

It is quite clear that the evidence of Mariam, the daughter of the accused, was inadmissible under Section 2 of the Law of Evidence Amendment Ordinance, 1924, and that Section 4 of that Ordinance only admits the evidence of a child against a parent when the parent is charged with violence inflicted to that child.

After having considered the literal translation of the warning given by the magistrate to the accused, we are satisfied that it complies with the provisions of Section 2 (2) of the Trial Upon Information Amendment Ordinance, 1929, but not with Section 2 (3), owing to the omission of any warning that the deponent has nothing to hope from any promise or to fear from any threat.

Even, however, if the magistrate had been called to prove that he had given such warning, in the absence of the evidence of the daughter a majority of the Court are not satisfied that there was premeditation, in view of accused's statement: "I was sleeping..... the cursed Devil deceived me. It struck me to kill my husband."

The conviction under Article 170 of the Ottoman Penal Code is set aside and one under Article 174 paragraph 1 of killing without premeditation is substituted therefore, and the sentence is that the appellant be kept in penal servitude for fifteen years.

We take no account of counsel's plea in mitigation, the one weak point in his able argument, as the crime was committed in circumstances of great brutality.

Delivered the 19th day of April, 1934.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 2/35.

BEFORE:

Baker, J., Frumkin, J. and Abdul Hadi, J.

IN THE CASE OF:

Fuad el Khaldi — APPELLANT.

v.

Raiseh Eddin el Khaldi — RESPONDENT.

Action to set aside registration of land in the Land Registry — Allegation that transaction of sale was in fact a mortgage — Evidence — Proof of lost document — Articles 80 and 82 para 3, Ottoman Code of Civil Procedure.

In an action before the Land Court to set aside the registration of land in the Land Registry on the ground that the registered owner was in fact a mortgagee, the plaintiff alleged that a document signed by the registered owner which was proof that the transaction by which the registered owner obtained registration was a mortgage and not a sale once existed but had been lost. The Land Court refused to hear oral evidence to prove the loss of the document holding that Article 82 para 3 "deals only with documents concerning debts and this transaction relates not to a debt but to an alleged mortgage," and dismissed the claim. Upon appeal,

HELD: That when any obligation or agreement the terms of which it was customary to reduce to writing has been lost accidentally oral evidence is admissible to prove the loss of the document and its contents.

Appeal from the judgment of the Land Court of Jerusalem (L.Jm. No. 85/34) dated the 29th day of November, 1934.

Kamal — for Appellant.
Aweida — for respondent.

JUDGMENT.

The Land Court in its judgment held that Article 82 para 3 deals only with documents concerning debts and as the document in issue related not to a debt but to a mortgage, the court refused to allow the plaintiff (appellant) to call evidence to prove the loss of the document.

Article 80 of the Ottoman Code of Civil Procedure, under the heading of "Proofs" prescribes that "every obligation and agreement the terms of which it is customary to reduce to writing", etc.... We are of the opinion that these words govern para 3 of Article 82, and therefore, when any document the terms of which it is customary to reduce to writing has accidentally been lost then oral evidence shall be admissible.

Accordingly, the judgment of the lower Court must be quashed and the case will have to be returned for the Court to hear evidence as to the loss, the contents of the document, and also to determine the appellant's right to sue.

Delivered the 20th day of November, 1935.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 23/35.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Frumkin, J. and Khayat, J.

IN THE CASE of:

Eid Ibn Farhan — APPELLANT.

v.

Khalaf Ibn Ali Kirreh — RESPONDENT.

Action for ownership of land — Proof of document — Authority to sign name on behalf of another — Testimony of attesting witness.

In an action before the Land Court for the establishment of the right of ownership of land the defendant based his right of ownership on a deed of sale made in 1915 by the claimants' father, which he produced, and which the claimant alleged was not

genuine. It appeared in evidence that the claimant's father was illiterate and that his name had been signed for him by the writer of the deed who also signed the names of some of the witnesses. Two witnesses had signed their own names. At the trial, one of the witnesses whose name was signed by the writer of the deed and one of those who signed personally testified to the genuiness of the deed.

HELD. That the due execution of the deed of sale was properly proved by the evidence of the attesting witnesses.

Appeal from the judgment of the Land Court of Jerusalem (L.Jm. No. 21/31) dated the 25th day of February, 1935.

El-Khatib — for appellant
Fauzi Dajani — for respondent.

JUDGMENT.

The respondent to this appeal, Khalaf ibn Ali Kirreh, relies upon a sanad of sale of land in Beersheba District in which the name of the alleged vendor, the father of the present appellant, Eid ibn Farhan Abu Abed, has been written by the person by whom the sanad itself was written. The sanad is duly stamped. One witness has signed it; another Attiyeh Odeh, has affixed his seal. The names of other witnesses have been written by the writer of the sanad.

The Court heard evidence of Attiyeh Odeh, the attesting witness, and also heard evidence as to possession since the date of the alleged sale.

The case is thus distinguishable from LA 85/22 [1]), Jawadallah and Muhammad, sons of Saleh Jawadallah v. Wardeh bint Saleh Jawadallah, in which all the names of attesting witnesses were written by the writer of the sanad and none of them were called to give evidence.

We hold that, on the evidence before it, the Land Court was entitled to hold that the vendor had authorised the writer of the sanad to affix his signature thereto.

The appeal must, therefore, be dismissed with costs.

Delivered the 16th day of February, 1936.

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[1]) 2 C. of J. 716.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 128/35.

BEFORE:

The Acting Senior Puisne Judge (Copland, J.) and Frumkin, J.

IN THE CASE OF:

Yousef Khalil Muhamad — APPELLANT.

v.

Yousef Ali Hamad — RESPONDENT.

Declaration in promissory note that consideration received in cash— Plea that note given in trust and without consideration — Evidence of witnesses other than parties to action not admissible against document.

A promissory note contained in the body of it a declaration that the consideration had been received in cash. In an action before the magistrate by the payee against the maker, the maker pleaded that in fact no consideration was given and produced the oral testimony of arbitrators who testified that the payee had made an admission before them to this effect. The decision was confirmed on appeal to the District Court and upon leave to appeal to the Court of Appeal being granted,

HELD: Allowing the appeal and remitting the action back to the Magistrate for a new trial that an admission against a document cannot be proved by the evidence of witnesses other then the parties to the action.

Appeal from the judgment of the District Court of Jerusalem, dated the 15th December, 1934.

JUDGMENT.

This is an appeal by way of leave granted in the following point of law:

> "Where in a promissory note the maker alleges as against the payee that although the consideration is in the body of the note declared to have been 'received in cash' in

fact no consideration was received and the note was given on trust, the Court may hear the evidence of witnesses other than the parties to prove this allegation."

Our reply to this is in the negative.

It is true that an admission made before arbitrators may be admissible in certain cases, but where the arbitrators give evidence, as in this case, regarding an admission against a document then certainly their evidence is inadmissible and was wrongly received.

This point has been decided so often, that we must express our surprise that leave to appeal on it is granted and comes before us for yet another decision in 1937.

The appeal is therefore allowed and the case remitted to the Magistrate's Court to hear the case afresh and give judgment accordingly.

Costs to be costs in the action.

Delivered the 21st day of January, 1937.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 135/35.

BEFORE:

The Senior Puisne Judge (Manning, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

The Levant Bonded Warehouse Co., Ltd. — APPELLANT.

v.

Abdul Hamed Bibi — RESPONDENT.

Warehousing of goods — Sale by depositor of goods deposited with bailee — Contractual relationship between purchaser and bailee — Article 1638, Mejelle — Liability of warehouseman for goods not received by him — Admission of receipt of goods made before delivery — Evidence to rebut such written admission — Findings of fact by trial court set aside by Court of Appeal.

A warehousing company signed a document called "Entry for Warehousing" admitting receipt by it from the Customs of 1125 bags of wheat. Evidence showed that documents of this nature had to be signed before delivery of the goods could be obtained. On accepting delivery the company found that 310 bags were missing. Upon an action against the company by the owner of the wheat for the value of the missing 310 bags the District Court found for the owner on the ground that the company was bound by its written admission of the receipt of the 1125 bags. Upon appeal to the Court of Appeal,

HELD: Allowing the appeal (a) That the company could not be sued for more than it had received, (b) That in view of the fact that the acknowledgement had to be signed before delivery could be obtained, it could not be regarded as an admission precluding the company from leading evidence to show that 815 bags only were received.

HELD ALSO: (a) That under the provisions of Article 1638 of the Mejelle a bailee may be sued by the owner of goods

although the owner was not the depositor, if the owner proves that the goods have been sold to him and that he has been authorized by the bailor to take delivery; (b) That findings of of fact made by the trial court due to an error may be set aside by the Court of Appeal.

Appeal from the judgment of the District Court of Haifa dated the 14th March, 1935.

JUDGMENT.

On the 9th November, 1933, there arrived at Jaffa by steamer from Basra 1125 bags of wheat consigned to the respondent through Barclays Bank. Pending payment of all sums due, the Bank asked the appellant Company (hereinafter called the company) to collect and store the wheat. This they proceeded to do but from the beginning they have maintained that owing to some mistake at the Customs at Jaffa they were able to collect 815 bags only, — the remaining 310 bags could not be traced. The respondent, after settling with the Bank, proceeded to collect the wheat from the company, but in the circumstances was able to obtain delivery of 815 bags only. He sued the company for the value of the 310 bags and obtained judgment for £P. 220, interest and costs in the District Court of Haifa.

The company has appealed. There were two main grounds, apart from the question as to the amount of damages. We propose to deal with the second ground first which was that there was never any contractual relationship between the respondent and the company and that therefore the company could not be sued. Mr. Salomon who appeared for the company, argued this part of the case from the point of view of both English and Ottoman law, but as the latter law provides for cases such as this, there can be no question of the applicability of English law. The concluding portion of Article 1638 of the Mejelle shows that a bailee can be sued by the owner of goods, although the owner was not the depositor, if the owner proves that the goods have been sold to him and that he has been authorised by the bailor to take delivery. The respondent's case falls within the terms of this statement of the law and he is consequently entitled to sue the company,

Mr. Salomon's next ground then is this, "Granted", he says, "that the company may be sued, it can be sued only for what

had actually been deposited, it cannot be sued for the 310 bags which it never received." He had a difficult task here for there were two findings of the District Court against him, one of mixed law and fact was that there was an admission by the company that it had received the whole of the 1125 bags, and it cannot be heard now to say that it received 815 bags only.

The document in which this admission is alleged to have been made is called "Entry for Warehousing." It was signed by the company acknowledging the receipt of the 1125 bags. But all the available evidence shows that documents of this nature have to be signed before any of the goods are delivered, and the documents itself contain internal evidence that this is so. We hold accordingly that it cannot be regarded as an admission, and that the company was not precluded from leading evidence to show that 815 bags only were received.

The District Court also made a finding of fact that the 1125 bags had been received by the company. The only evidence to support this finding was the admission to which we have just referred, and on the conclusion we have come to this evidence was not reliable. The rest of the evidence is overwhelmingly in favour of the company's contention that it received 815 bags only. Findings of fact by a Court below are not usually set aside, but in this case the findings of the District Court was clearly due to its error in regarding the "Entry for Warehousing" as an admission.

For these reasons the appeal will be allowed, the judgment of the District Court will be set aside and judgment will be entered for the company with costs here and in the Court below. Costs here to include £P. 3 advocate's fees.

Delivered the 4th day of November, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 149/35.

BEFORE:

The Acting Chief Justice (Manning, J.) and Frumkin, J.

IN THE CASE OF:

David S. Agassi — APPELLANT.

v.

David Aboutbul — RESPONDENT.

Cheque given by father to married daughter — Countermand of payment — Plea of fraud, duress or want of consideration — Admissibility of oral evidence to prove such defence — Circumstances under which cheque made and negotiated investigated where cheque not contradicted — Articles 80, 82, Ottoman Code of Civil Procedure — Revocation of gift — Articles 57, 848 Mejelle.

At a family gathering held on November 22, 1933, a few weeks after Simha the daughter of the appellant had been married to the respondent, the appellant handed to his daughter in the presence of the respondent a cheque for £P. 150 to be cashed by her on the understanding that certain immovable property valued at £P. 1500 was to be registered in her name. Some two weeks later, the respondent, who had obtained Simha's endorsement presented the cheque for payment and was informed that payment had been countermanded. Upon action on the cheque being brought before the District Court, the appellant pleaded that the endorsement had been obtained from Simha by undue influence and duress, that the cheque had been given conditionally on a condition which remained unfulfilled, that it was given without consideration, and that it was a revocable gift, and he applied to the court to hear oral evidence to substantiate these pleas. The District Court refused his request and found for the plaintiff. Upon appeal to the Court of Appeal,

HELD: Allowing the appeal and remitting the action for the hearing of the witnesses that in an action on a cheque, where the document itself is not contradicted but other matters such as fraud, duress and want of consideration are alleged, oral evidence may

be heard as to the circumstances under which the cheque was made and negotiated.

Appeal from the judgment of the District Court of Jaffa (C.D.C.Ja. No. 46/34), dated the 13th day of June, 1935.

Dukhan, Shwartzman — for appellant
Chacron — for respondent.

JUDGMENT OF THE DISTRICT COURT.

(Translation).

(Edwards, J. and Mani, J.)

It does not appear to the Court that there is a convincing defence in this case. It seems that plaintiff is the legal holder of the bill. We were requested by the defendant to hear oral evidence but it does not appear to the court that it should hear it since there is no claim of fraud, force or the non-existence of consideration in the indorsement of the bill. It seems that defendant's attorney admitted though not clearly, that the cheque was given as consideration for the deed of marriage. Defendant's attorney had, while pleading, the deed of marriage in his possession intending to rely upon it. Since the cheque originated from the deed of marriage, it cannot be treated as a gift. The deed of marriage is valid and based on good consideration, and this disposes of the question of moral obligation cited by defendant at Chalmers p. 96. With reference to the provisions of the Mejelle on which defendant relied, these are not to be relied on in preference to those of the Bills of Exchange Ordinance. We hold that the sum was given on account of the marriage.

Another question raised by defendant was that the cheque was given by way of dowry, and if this is so then questions of personal status are involved. It is true that matters of dowry are matters of personal status, but where a sum is fixed in a note or cheque founded on dowry then there is no question of personal status involved.

In the result the court finds no defence to the action on the cheque held by the plaintiff. Judgment is therefore given for the plaintiff for £P. 150 with interest from the date of protest, costs and advocate's fees of £P. 6.

Delivered the 13th day of June, 1935.

JUDGMENT.

This is an action on a cheque. Defendant admits the cheque. He alleged however, fraud, duress and want of consideration and asked to be allowed to call evidence on these points. The Court below refused his application apparently on the ground that none of these defences had been put forward.

We think the Court below was wrong and their judgment must, therefore, be set aside and the case remitted to them with instructions to hear the defendant and his witnesses on the above issues, and the plaintiff's witnesses, if any, in reply, and then to give judgment in the action.

Costs to abide the event.

We think that in an action on a cheque, where the document itself is not contradicted but other matters such as above are alleged, oral evidence may be heard as to the circumstances under which the cheque was made and negotiated.

Delivered the 5th day of January, 1937.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 55/36.

BEFORE:

The Chief Justice (Trusted, C.J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Tesher Orange Growers Association
Magdiel, Ltd. APPELLANT.

v.

David Pouchas RESPONDENT.

Leave to appeal on point of law — Theoretical question not to be propounded for Court of Appeal to answer — Section 6, Magistrates' Courts Jurisdiction Ordinance, 1935 — Evidence — Oral testimony to establish whether act performed in conformity with contract — Proof of contract — Commission of broker.

A society of orange growers requested the plaintiff to find a purchaser for its fruit and contracted to pay him 2% of the value of the fruit sold by him. Plaintiff found a purchaser and an agreement was prepared by an advocate and signed by the society and by the purchaser but the signed copies were left with the advocate with instructions that the agreement was not to become operative unless within two days the purchaser produced a bank guarantee. No such guarantee was produced and the sale proved abortive. Plaintiff sued before the magistrate for £P. 100 brokerage fees. The society contended that it had never entered into such a contract with the purchaser as would entitle the plaintiff to commission, and to prove its contention produced oral evidence to show that the signature of the agreement was not in itself intended by the parties to create obligations binding upon them. The magistrate found for the plaintiff and his finding was confirmed by the District Court on appeal. Upon appeal being taken to the Court of Appeal by way of special leave to appeal,

HELD: Allowing the appeal and remitting the case back to the magistrate for retrial, (a) That it is not the meaning of Section 6 of the Magistrates' Courts Jurisdiction Ordinance, 1935, that theoretical questions be propounded for the Court of Appeal to

answer, but that the President, before granting leave to appeal should satisfy himself that the judgment involved a point of law of novelty or complexity such as warranted an appeal to the Court of Appeal; (b) That there was no question in this case as to the variation of the written terms of a contract, the question being whether such a contract had been concluded as would entitle the plaintiff to commission. Evidence to establish whether such a contract had or had not been concluded is clearly admissible.

Appeal from the judgment of the District Court of Jaffa, dated 28th November, 1935, and delivered 13th January, 1936.

Turtledove — for appellant.
Goldman — for respondent.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa dated the 13th January, 1936, confirming the judgment of the Magistrate. It comes to us by way of special leave to appeal.

The District Court formulates, for the opinion of this Court, a theoretical question. In my view the meaning of Section 6 of the Magistrates' Courts Jurisdiction Ordinance, 1935, is not that theoretical questions can be propounded for this Court to answer, but that when a judgment involves a point of law of novelty or complexity such as warrants an appeal to this Court, the appeal can be brought to this Court by leave of the presiding Judge. The duty of the Judge is to satisfy himself that there is such a question of law.

As to this particular case it seems to me that the first point to which the learned Magistrate had to direct his mind was the question as to whether there was a contract whereby the plaintiff was entitled to remuneration.

The next question to which the Magistrate should have directed his mind was, — were the facts such that the plaintiff had earned his remuneration. Unfortunately, it is not altogether clear how the learned Magistrate directed his mind to the latter question.

Certain evidence was adduced as to the negotiations which took place between the Co-operative Society which had oranges to sell and an individual who was the prospective buyer of the oranges upon which a commission was alleged to be payable. It is

said that these negotiations, in fact, never terminated in a contract. It is argued, and some force is given to the argument by the judgment of the District Court, that the Magistrate may have been influenced in his decision by the technical question whether or not he was entitled to hear and consider evidence with regard to these negotiations, in other words, as is stated in the judgment of the District Court:

> "No oral evidence to vary the written terms of the contract is admissible as against respondent."

Alternatively, the Magistrate might not have had these difficulties in his mind. He may have decided the case on the credibility of the witnessess who appeared before him, but unfortunately, we do not know what view he took.

I am of opinion, therefore, that the case should be returned to the Magistrate with an intimation that he should direct his mind to the question.

> (1) Was there a contract between the plaintiff and the defendant whereunder the plaintiff was in certain circumstances entitled to commission.
>
> (2) Was such a contract entered into between the Co-operative Society and a purchaser as entitled the plaintiff to commission.

Evidence that no contract such as is contemplated in the second question was ever in fact made is, in my opinion, clearly admissible.

Costs to follow the event. We fix the advocate's fees at £P. 3 in respect of these proceedings to the party eventually entitled thereto.

Delivered the 8th day of April, 1937.

JUDGMENT OF MR. JUSTICE FRUMKIN.

Plaintiff (respondent) in this case sued the appellant for commission on a contract entered into between appellant and one Katz for the sale of oranges.

Appellant admitted that such a contract was signed, but alleged that it was not given effect to for lack of certain fomalities. The Magistrate heard evidence as to the circumstances under which the contract was to become effective, but made no finding as to

such evidence, and gave judgment for the plaintiff on being satisfied that he did intermediate the sale. On appeal, the judgment was confirmed on the ground that no oral evidence is admissible to vary the written terms of the contract.

Against this judgment the present appeal was lodged by leave granted by the President of the District Court on a point of law. In my view there is no question in this case as to the variation of the written terms of a contract, the question being whether such a contract ever became effective. The Magistrate who heard evidence made no finding as to that fact.

The appeal must be allowed, and the judgment of the District Court and Magistrate's Court set aside and the case remitted to the Magistrate for completion.

Costs will follow the event to include advocate's fees £P. 3 to the successful party.

Delivered the 8th day of April, 1937.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 102/36.

BEFORE:

Copland, J., Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Hassan Abu Habel — APPELLANT.

v.

Saleh Ibn Muhammad Saleh — RESPONDENT.

Commercial transactions between relatives — Evidence — Admissibility of oral evidence against document — Articles 80, 82, Ottoman Code of Civil Procedure.

In an action which arose out of two commercial transactions between relatives, and which were reduced to writing it was pleaded that the rule in Article 80 of the Ottoman Code of Civil Procedure that oral evidence was inadmissible against written agreements could not be applied since the agreements were between relatives.*

HELD: That even between relatives oral evidence was inadmissible to rebut the terms of a written agreement.

Zein-el-Din — for appellant.
Husseini — for respondent.

Appeal from the judgment of the District Court of Jaffa, dated the 25th June, 1936.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa, dated 25th June, 1936, which entered judgment for the plaintiff (respondent) against the defendant (appellant) for the sum of £P. 100 by the former to the latter under an agreement, and £P. 200 as liquidated damages with costs and expenses.

The case centres around two documents made between relatives:

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* See to the same effect, Levitsky v. Corn. 1 C. of J. 333; PLR 858.

1. The first was an agreement dated 3rd October, 1923, whereby defendant sold to plaintiff for a consideration of £P. 100 all the property that came to him by way of inheritance from his mother. He also undertook to effect transfer at the Land Registry Office.

2. The other document dated 7th Muharram, 1354,(1935) is an undertaking by the defendant to pay £P. 200 as liquidated damages to the plaintiff in case he fails to drop his rights that came to him by way of inheritance from his ancestor, heir of Sheikh Saleh Muhammad at the competent departments.

The defendant denied having received the £P. 100 mentioned in the agreement of 3rd October, 1923, and with regard to the second document he contended that it was kept as a security with a certain person upon the condition that each of the parties has to drop his right in respect of the land which he owns in the name of the other. In support of the above contentions, the defendant asked the District Court to hear his witnesses.

The District Court held that as the defendant has failed to corroborate his defence by any documentary evidence admissible against a written document, it was not inclined to hear parol evidence against two documents in writing.

In the Court of Appeal the appellant dealt either with questions of fact or with points not raised in the lower Court.

In our opinion the judgment of the District Court is quite correct and we do not see our way to interfere with it. Even between relatives oral evidence is not admissible against a written document.

The appeal must, therefore, be dismissed with costs and £P. 4 advocate's fees.

Delivered the 11th day of May, 1937.

EXECUTION.

In the High Court of Justice.

H.C. No. 58/33.

BEFORE:

The Senior Puisne Judge (Corrie, J.) and Khayat, J.

IN THE CASE OF:

Mohammad Abu Zallumeh et al — PETITIONERS.

v.

The Chief Execution Officer, Jaffa

Yousef Sayegh — RESPONDENTS.

Order by Chief Execution Officer for sale of land of execution debtor—Exemption from sale in execution of judgment—Application of Article 90, Law of Execution — Agricultural land of debtor.

An execution creditor obtained an order from the Chief Execution Officer for the sale of the debtors' parcel of land. The debtors applied to the High Court for an order to set aside the order of the Chief Execution Officer on the ground that the land was not exigible in execution it being exempted from sale under Article 90 of the Ottoman Law of Execution, 1332, as it was their only means of support and their dwelling place. The second paragraph of Article 90 is as follows:

> "Similarly, out of the lands belonging a judgment debtor who is an agriculturist, which land is not mortgaged or sold with a condition of right of repurchase, a field sufficient for the maintenance of himself and his family will be exempt from sale in satisfaction of debt."

HELD: That since the petitioners had produced no evidence that they were agriculturists the last paragraph of Article 90 did not apply to them and the order was therefore refused.

Application for an order to issue to the Chief Execution Officer, Jaffa, directing him to show cause why his order dated

the 1st day of June, 1933, for the sale of the petitioners' land should not be set aside.

Haddad, Porter — for appellants.
Boustani, Saleh, Shawa — for second respondent.

ORDER.

There is no evidence that the petitioners are agriculturists. Hence the last paragraph of Article 90 of the Ottoman Law of Execution, 1332, does not apply to them. The petition is dismissed with costs. No claim is made for advocate's fees.

Made the 18th day of April, 1934.

In the High Court of Justice.

H.C. No. 47/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.) and Abdul Hadi, J.

IN THE CASE OF:

Ahmad Atiyeh Jaber — PETITIONER.

v.

The Chief Execution Officer, Jerusalem

Shehade Saleh — RESPONDENTS.

Foreclosure of mortgage — Procedure where amount of mortgage debt contested — President of District Court as Chief Execution Officer — Section 2, Transfer of Land Ordinance No. 2, 1921 (now Section 14, Land Transfer Ordinance (Cap. 81)) — Amount due under mortgage deed to be ascertained by competent court — Duty of mortgagee to apply.

In foreclosure proceedings under the Transfer of Land Ordinance No. 2, 1921, before the President of a District Court in his capacity as Chief Execution Officer the mortgagor pleaded that no part of the amount claimed was due to the mortgagee, and upon it appearing that the mortgagor had prima facie grounds for

contesting the amount due, the President refused to make an order for sale. Upon a petition to the High Court by the mortgagee,

HELD: Dismissing the petition, (a) That where the President of the District Court finds that the mortgagor has prima facie grounds for contesting the amount due on the mortgage, his proper course is to refuse to make an order for sale until the amount due has been ascertained by the judgment of a competent court; (b) The application to the competent court should be made by the mortgagee.

Application for an order to issue to the Chief Execution Officer, Jerusalem, directing him to show cause why his order dated the 7th May, 1934, in execution file No. 469/34 refusing to order the sale of the mortgaged property should not be set aside.

ORDER.

It has been laid down in H.C. No. 90/32 [1]) Raji Issa and Another v. The Chief Execution Officer, Haifa and Another, that where "the President of the District Court finds that the mortgagor has prima facie ground for contesting the amount due on the mortgage, his proper course is to refuse to make an order for sale until the amount due has been ascertained by the judgment of a competent court."

And the judgment in C.A. No. 64/32 [2]), Hassan Shehab Ed-Din v. Khadduri Suleiman Darwish, makes it clear that the application to the court must be made by the mortgagee. It is true that in H.C. No. 90/32 (supra) this court held that the President of the District Court had power to order "immediate payment of such part of the amount claimed as is admitted by the mortgagor to be due and to postpone making an order for sale with regard to the amount in dispute..."

In the present case, however, no part of the amount claimed is admitted by the respondent to be due. We hold, therefore, that the President of the District Court was right in refusing to make an order for sale.

The order of this court made on the 4th July, 1934, is discharged and the petition is dismissed.

Made the 13th day of December, 1934.

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[1]) 1 C. of J. 291; Palestine Post, April 26, 1933.
[2]) 3 C. of J. 1074; PLR 885.

In the High Court of Justice.

H.C. No. 61/34.

BEFORE:

Baker, J. and Khayat, J.

IN THE CASE OF:

Dr. Haim Shtein — PETITIONER.

v.

The Chief Execution Officer, Jaffa

Heirs of Shlomo Barsky — RESPONDENT.

Eviction of tenant — Execution of judgment of Magistrate's Court confirmed on appeal — Jurisdiction of President of District Court as Chief Execution Officer to execute judgment of magistrate.

A judgment for eviction which was given by a magistrate was confirmed by the District Court on appeal and handed to the Execution Office for execution. The President of the District Court in his capacity as Chief Execution Officer having ordered the eviction to be carried out by force, the tenant applied to the High Court for an order setting aside the order of the President on the ground that since the original order was given by the magistrate the execution of the judgment should have been carried out by the magistrate.

HELD: That when an appeal is lodged in a District Court and a decision is given thereon, whether the decision be one affirming or reversing the decision of the Lower Court, the District Court is then seised of the whole matter and the President, as Chief Execution Officer, can lawfully order the execution of the decision.

Application for an order to issue to the Chief Execution Officer, Jaffa, directing him to show cause why his order dated the 6th July, 1934, ordering the execution of the judgment of the Magistrate's Court, Tel Aviv, dated 1st January, 1934, should not be set aside.

Felman — for petitioner.

ORDER.

We are satisfied that when an appeal is lodged in the District Court and a decision is given thereon, whether the decision be one affirming or reversing the decision of the Lower Court, the District Court is then seised of the whole matter and the President, as Chief Execution Officer can lawfully order the execution of the decision as such.

The application must therefore be dismissed.

Made the 9th day of July, 1934.

In the High Court of Justice.

H.C. No. 68/34.

BEFORE:

The Chief Justice (McDonnell, C.J.) and Frumkin, J.

IN THE CASE OF:

Hussein Abu Radwan — APPELLANT.

v.

The Chief Execution Officer, Jaffa — RESPONDENT.

Sale in execution — Exemption of sufficient land for maintenance of debtor — Article 90, Ottoman Law of Execution.

A judgment debtor who lived in Jaffa owned a plot of land in a village which he cultivated through an agent and which was his sole source of livelihood. The land having been put up for auction by the Execution Office, he applied to the Chief Execution Officer for a sufficient area to be left to him for support of himself and his family in accordance with Article 90 of the Ottoman Law of Execution. The Chief Execution Officer was not satisfied that petitioner was a cultivator of the land and refused the request whereupon petitioner applied to the High Court.

HELD: That since the debtor lived in the city and cultivated the land through another's agency he did not come within the

benefit of the exemption conferred by the second paragraph of Article 90 of the Ottoman Law of Execution.

Application for an order to issue to the Chief Execution Officer to show cause why his order dated the 3rd August, 1934, ordering execution proceedings for the sale of petitioner's land to proceed should not be set aside.

Olshan — for petitioner.

ORDER.

The proper translation of the Turkish text of the second paragraph of Article 9 of the Ottoman Law of Execution, 1332, runs as follows:

> "Similarly, out of lands belonging to a judgment debtor who is an agriculturist, which land is not mortgaged or sold with a condition of right to repurchase, a field sufficient for the maintenance of himself and his family will be exempt from sale in satisfaction of debt."

The petitioner admitted that he cultivated the land through another's agency and lived in Jaffa. We see no reason for differing from the conclusion of the Chief Execution Officer that the petitioner did not come within the benefit of the exemption conferred by the second paragraph of Article 90 of the Ottoman Law of Execution.

The petition is therefore dismissed.

Made the 15th day of October, 1934.

In the High Court of Justice.

H.C. No. 85/34.

BEFORE:

The Chief Justice (McDonnell, C.J.) and Frumkin, J.

IN THE CASE OF:

Ibrahim el Haj and Another — PETITIONER.

v.

The Chief Execution Officer, Haifa

Khalil Asa'ad and Others — RESPONDENTS.

Magistrate as Execution Officer of judgments of Magistrate's Court— Jurisdiction of Chief Execution Officer to execute judgment of magistrate — Leave to appeal not granted where judgment already executed.

A judgment for the recovery of possession of immovable property was given by a magistrate and confirmed by a Land Court. Application for leave to appeal was made to the President of the Court, and pending the decision of the President the Magistrate completed the execution of the judgment refusing an application for stay of execution. Subsequently, on October 24, 1934, the President of the Land Court purporting to act as Chief Execution Officer issued an order declaring the execution proceedings to be void, and on the same day and at the same hearing the application for leave to appeal was withdrawn.

HELD: (a) That from the moment of the withdrawal of the application for leave to appeal the President of the Land Court ceased to be seised with the jurisdiction as regards the execution of the judgment; (b) That once the execution proceedings had been completed the President could not, in any event, have granted leave to appeal.

Application to the High Court for an order directing the Chief Execution Officer, Haifa, to show cause why his order dated 24th October, 1934, declaring the execution proceedings to be null and void should not be set aside.

Horowitz, Asfour — for petitioner.
Shibel — for respondents.

ORDER.

Application was made to Judge Seton as President of the Land Court, Haifa, for leave to appeal to the Court of Appeal from a judgment of the Magistrate's Court, Acre, confirmed by the Land Court.

At the hearing of the 24th October, 1934, as the respondent himself admits, the application for leave to appeal was withdrawn. That being so the President ceased to be seised with the jurisdiction as regards the execution of the judgment from the moment of the withdrawal of the appeal, and what was more we are satisfied that the execution had been carried into effect and even had the President been properly seised of the application he could not therefore have granted it.

The rule nisi is therefore made absolute with costs to include £P. 2 advocate's fees.

Made the 22nd day of November, 1934.

In the High Court of Justice.

H.C. No. 3/35.

BEFORE:

Baker, J. and Khayat, J.

IN THE CASE OF:

Nazifeh Aref el Husseini — PETITIONER.

v.

The Chief Execution Officer, Gaza

Wasfieh bint Muhyiddin el Husseini — RESPONDENTS.

Judgment of Sharia Court—Judgment of Religious Courts executed by process and officers of civil courts — President of District Court as Chief Execution Officer — Article 56, Palestine Order-in-Council, 1922.

A judgment of the Sharia Court was handed to the Execution Officer of the Magistrate's Court for execution and an order for its execution was made by a magistrate. Upon an application to the High Court to set aside such order,

HELD: That the magistrate was without jurisdiction to issue the order since judgments of Religious Courts are to be executed in the same manner in which they were executed before the issue of the Palestine Order-in-Council, 1922, namely, by order of the President of the District Court as Chief Execution Officer.

Application for an order to issue to the Chief Execution Officer, Gaza to show cause his order dated the 17th December, 1934, for the execution of a Sharia Court judgment should not be set aside.

Taleb Khairy — for petitioner.
Omar Salah — for second respondent.

ORDER.

The High Court in H.C. No. 70/31 [1]) decided that Article 56 of the Palestine Order-in-Council, 1922, directs that the judgments of the Religions Courts shall be executed by the process and the offices of the civil courts, but neither in that Order nor elsewhere is it expressly provided by whom orders for the execution of such judgments shall be issued.

If follows that such judgments are still to be executed in the same manner in which they were executed before the issue of the Palestine Order-in-Council, namely, by order of the President of the District Court as Chief Execution Officer.

This decision has beeen followed in H.C. No. 18/33 [2]) and the order before us upon which this application is based being that of a magistrate who has no jurisdiction the order must be discharged with costs and advocate's fees assessed at £P. 1.

Made the 5th day of March, 1935.

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[1]) 4 C. of J. 1262.
[2]) Palestine Post, March 12, 1935.

In the High Court of Justice.

H.C. No. 47/35.

BEFORE:

The Acting Senior Puisne Judge (Baker, J.) and Abdul Hadi, J.

IN THE CASE OF:

Abdul Latif Sowan — PETITIONER.

v.

The Chief Execution Officer, Nablus

Jawdat Badawi Sha'ban — RESPONDENTS.

Execution of judgment of Ottoman court — Delegation of powers by Chief Execution Officer to magistrate — Decision of magistrate overruled by Chief Execution Officer — Judgments of magistrate not subject to service on debtor — Ottoman Judgments (Execution) Rules — Article 136, Ottoman Code of Civil Procedure — Article 19, Ottoman Law of Execution.

An unsealed copy of a judgment obtained on April 10th, 1916, before an Ottoman magistrate, was on 23rd July, 1929, produced to the Execution Office for execution. A magistrate acting as Execution Officer of the Magistrate's Court having ordered that the judgment could not be executed since it had not been served on the judgment debtor as required by Article 136 of the Ottoman Code of Civil Procedure and Article 19 of the Ottoman Law of Execution, the creditor obtained an order to the contrary on September 13th, 1934, in the following terms from the Chief Execution Officer:

> "After consideration I am of the opinion that this judgment was given by the Court of First Instance, Nablus, as a judgment given by the Magistrate's Court in accordance with the Magistrate's Law of 25.5.329, 19th October, 329, and 27th February, 329, as there were no magistrates at the time. The judgments issued by the Magistrates' Courts are not subject to service on the judgment debtor and therefore this judgment is valid. As it was lodged in the Execution Office on 23rd July, 1929, for execution; i.e. within the prescribed period therefore it should be executed."

Upon an application to the High Court to set aside the said order of the Chief Execution Officer,

HELD: (a) That a Chief Execution Officer may delegate his powers to a magistrate but that he does not thereby divest himself of all his powers as Chief Execution Officer, and may vary or overrule the orders of the magistrate; (b) That judgments issued by a magistrate are not subject to service on a judgment debtor prior to their execution.

Application to the High Court for an order to issue to the Chief Execution Officer, Nablus, to show cause why his order dated the 13th September, 1934, should not be set aside.

Abdul Latif — for petitioner.
Second respondent in person.

ORDER.

By virtue of the Courts (Amendment) Ordinance, No. 38 of 1932, a President of a District Court may delegate his powers of Chief Execution Officer to a magistrate within his District, but, having delegated such powers, he does not thereby divest himself of all powers of a Chief Execution Officer and as such he may at any time vary his orders. Therefore, it follows that he can overrule the decisions of a magistrate to whom he has delegated the powers of Execution Officer.

Rules of Court of the 16th September, 1927*), prescribe that "execution shall not issue of any judgment of an Ottoman civil or commercial court of first instance which, at the date when the Courts Ordinance, 1924, came into force, was subject to appeal....."

This judgment was not subject to appeal and therefore these rules cannot apply. The judgment was not subject to service.

Accordingly, the order must be discharged with costs and travelling expenses assessed at £P. 3.

Made the 12th day of September, 1934.

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*) Reference is to the Ottoman Judgments (Execution) Rules, Drayton, p. 2376.