COLLECTION OF JUDGMENTS

OF

THE COURTS OF PALESTINE

1919 — 1933

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

VOL IV.

ARRANGED
ACCORDING TO SUBJECTS
IN ALPHABETICAL AND CHRONOLOGICAL ORDER

WITH
COMPREHENSIVE AND DETAILED INDEX

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1935.

In the High Court of Justice.

H.C. No. 95/30.

BEFORE:

The Chief Justice and Jarallah, J.

IN THE APPLICATION OF:

Hikmat Fawal — PETITIONER.

VS

District Superintendent of Police, Haifa.
The Senior Medical Officer, Haifa. — RESPONDENTS.

Refusal of District Superintendent of Police to grant renewal of hotel licence — Keeping of brothel — House frequented by two or more femals for purpose of prostitution — Sec. 6, Registration of Trades and Industries Ordinance, 1927 — Exercise by Police of discretion in judicial manner — Executive action disallowed where right of process of law exists.

Application for an Order to issue to both Respondents directing them to show cause why the permit for reopening a hotel should not be returned to the Petitioner.

JUDGMENT.

The Court is of opinion that the grounds upon which, in his discretion, the District Superintendent of Police, refused approval of the renewal of this licence, as required under Section 6 of the Registration of Trades and Industries Ordinance, 1927, were exactly such grounds as would, if valid, have secured a conviction under Section 13 of the Criminal Law Amendment Ordinance, for keeping or managing a brothel for, by Section 2 (a) of that Ordinance a brothel is defined as "any house frequented by two or more demales for the purpose of prostitution".

The Superintendent of Police has told us, very fairly, that he proposed to lay a charge under this Ordinance, but that the Law Officers, Department advised that the evidence was not strong enough to justify a prosecution.

This being so we cannot say that the Superintendent of Police has exercised his discretion in a judicial manner, when he refused his approval on the ground that the house is frequented by prostitutes for the purposes of their trade when that is the very matter which he is advised there is not enough evidence to substan-

tiate in a Court of law under an Ordinance which expressly creates it an offence to keep a house which women frequent for such a purpose.

The rule nisi as amended must therefore be made absolute with LP.2 advocate's fees and costs against the Police as well as against the Senior Medical Officer, Haifa as to whom we are told that the statement that he refused approval on sanitary grounds was due to error.

Delivered the 26th day of February, 1931.

In the High Court of Justice.

H.C. No. 34/31.

BEFORE:

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

IN THE APPLICATION OF:

George Ayoub — PETITIONER.

vs

The Mayor of Beit-Jala — RESPONDENT.

Licence refused by Municipal Council to operate establishment for sale of non-alcoholic beverages — Sec. 4 (2) (a), Regulations of Trade and Industries Ordinance, 1927 — District Commissioner not licensing authority in municipal area — Quasi-judicial functions of Municipal Council when acting as licensing authority — Applicant for licence to have opportunity to answer objection made to issue of licence.

ORDER.

It is clear that under Section 4 (2) (a) of the Regulation of Trades and Industries Ordinance, 1927, the licensing authority in a municipal area is not the District Commissioner but the Municipal Council.

As such licensing authority the Council exercises quasi-judicial functions. It must make into consideration any objection that may be made to the issue of a licence, must give the applicant an opportunity of answering such objection and must use its own discretion in arriving at a decision thereon.

In the present case, the Municipal Council of Beit-Jala decided to refuse renewal of the Petitioner's licence after receiving

a letter from the District Officer, Jerusalem and Bethlehem, in the following terms:

> I have the honour to inform you that the District Commissioner has decided not to give a licence to George Ayoub to open his shop situate near the Girls School. I ask you to enforce this decision.

This letter was written on the 30th April, 1931. On the next day the Council passed a resolution in the following terms:

> Upon the receipt of the letter of the District Officer, the Council has decided not to give a café licence to George Ayoub in respect of his shop situate near the Girls School in the Russian Compound, Beit-Jala.

It is clear that in passing this resolution, the Council were not exercising their own discretion, but were merely giving effect to a decision made by the District Authorities, and the resolution so passed cannot stand.

The Order in this Court dated the 21st July, 1931, will be made absolute.

The Municipal Council of Beit-Jala must give a decision upon the Petitioner's application after consideration thereof in accordance with the terms of this judgment.

Delivered the 10th day of October, 1931.

In the High Court of Justice.

H.C. No. 71/31.

BEFORE:

The Chief Justice and Khayat, J.

IN THE APPLICATION OF:

George Ayoub — PETITIONER.

VS

The Mayor of Beit-Jala — RESPONDENT.

Licence refused by Municipal Council — Refusal to be based upon legal grounds — Ottoman Law in force in Palestine on November 1st, 1914, must have been final law having Parliamentary approval in conformity with Ottoman Law — Ottoman Law of Primary Schools of 23rd September, 1329, held to be only provisional law and not applicable in Palestine — Art. 46, Palestine Order-in-Council, 1922.

Application for an order to issue to the Respondent directing him to show cause why his order dated the 18th November should not be set aside.

JUDGMENT.

The Ottoman Law of Primary Schools of 23rd September, 1329, was only a provisional law which never received Parliamentary approval in conformity with the Ottoman Law; and in consequence is not validated by Article 46 of the Palestine Order-in-Council, 1922.

The refusal of the licence by the Municipality according to the Mayor's letter of 18th November, 1931, was therefore not based upon legal grounds and the Rule must be made absolute with costs to include LP.2 advocate's fees.

Delivered the 18th day of May, 1932.

In the High Court of Justice.

H.C. No. 95/32.

BEFORE:

Baker, J. and Khayat, J.

IN THE APPLICATION OF:

Mahmud Khalil Jammal — PETITIONER.

vs

The Mayor of Ramleh — RESPONDENT.

Refusal by Municipal Council to grant licence for vegetable market — Building permit granted for building to house cereal stores, but licence requested for vegetable market — Production of plan complying with requirements of Trades and Industries Ordinance, 1927.

Application for an Order to issue to the Respondent directing him to show cause why his Order dated the 16th of June, 1932, refusing to grant Petitioner a licence to sell vegetables by way of commission in the new building of the Waqf Abul Huda in Ramleh, should not be set aside.

JUDGMENT.

In this case a building permit was granted by the Town Planning Commission of Ramleh in respect of the premises, the subject matter of this application. It is clear from the plan attached to the application for the building permit made by the Mutawalli

of the said property, which is a waqf and produced in this case by the Petitioner himself, that the said permit related to cereal stores, which have actually been put up by the said Mutawalli.

The Petitioner subsequently applied for licence to sell vegetables in the store in question, appending to his application the original plan furnished by the Mutawalli.

The Municipality refused to grant the application on the ground that the building cannot be utilized for a purpose other than that for which it was built until a plan complying with the requirements of the Trades and Industries Regulations, 1927, has been furnished.

We hold that the Municipality was right in refusing the Petitioner's application, and accordingly the rule nisi granted to Petitioner on the 14th February, 1933, must be discharged.

Delivered the 18th day of March, 1933.

LIMITATION OF ACTIONS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 250/22.

BEFORE:

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

IN THE CASE OF:

Nimer Muhammad Hussein — APPELLANT.

VS

Nadim Ibn Ahmad Karimeh — RESPONDENT.

Plea of prescription against promissory note made in Court of Appeal for first time — Denial by son of signature of deceased father — Limitation of actions — Revival of prescribed indebtedness by admission of liability — Right to tender oath under Art. 146, Commercial Code — Art. 16, Proclamation of 24th June, 1918.

JUDGMENT.

This is an action based upon a promissory note dated Zi El-Hijjeh, 1333, signed by the father of the Appellant to the order of the ancestors of the Respondent. In the Court below Appellant admitted the seal of his father and at the said time denied his signature, saying that his father was illiterate. In a later stage of

the proceedings he produced a receipt signed by the ancestor of Respondent, which was, however, found to be at an earlier date than that of the bill. Subject to these statements there was no admission of the debt on the part of Appellant. Judgment was given against him.

This judgment is now appealed.

Among other defences Appellant is trying to upset the bill on the ground of prescription. The bill is a negotiable instrument given in connection with a commercial transaction between two merchants. The action was brought about five years and seven months after the date of maturity. There is no legal provision to prevent Appellant from setting up prescription on appeal as long as he did not admit the debt in the Court below. Neither the Moratorium Law nor Article 16 of the Proclamation of 24th June, 1918, apply in this case. The only right of Respondent is to serve the oath upon Appellant and any other heirs of his father under Article 146 of the Commercial Code.

Appeal allowed, and case remitted to the District Court for the oath to be administered and judgment to be given accordingly.

Costs to be costs in the case.

Delivered the 29th day of March, 1923.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 45/23.

BEFORE :

Corrie, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF :

Iskander A. Habbash — APPELLANT.

VS

Makhleh Khalil Soursock — RESPONDENT.

Limitation of actions re planted and unplanted land — Period not reckoned in calculating time for opposition or appeal against judgment of Ottoman Court — Art. 16, Proclamation (Establishment of Courts), of 24th June, 1918—Suspension of period of limitation—Arts. 1660, 1671, Mejelle — Art. 20, Land Code.

JUDGMENT.

Claim as to two plots of land, planted and unplanted. According to Mejelle, 1671, time began to run (as to limitation of actions) from December, 1322. Action was brought on 4th February, 1922 (1338) i.e. 16 Lunar years 1 Month have elapsed.

As regards planted land = Mejelle, 1660 (15 years).

As regards unplanted land = Land Code, 20 (10 years).

The Respondent alleges that this action is not barred because among other reasons) at the outbreak of war he was compelled to leave Ottoman Territory.

In support of his claim he has produced some certificates.

We are not prepared to hold, however, that if time has begun to run against a person, it ceases to run merely because he leaves the district in which his action must be brought. It is, however, the fact that for a part of the time the Respondent even if present in the neighbourhood, could not have taken proceedings owing to the fact that the competent Court was closed. The Proclamation dated 24th June, 1918, re-establishing the Civil Courts, Article 16, contained a provision that in calculating the period of limitation, the Courts thereby re-established should take into account the period from the closing of the Ottoman Court to the re-establishment of the Courts under the Proclamation. The Land Court is not one of the Courts re-established under the Proclamation, and the Land Courts Ordinance contains no express provision of this nature. But we hold that where the period of limitation expired during the interval between the closing of the competent Ottoman Court and the opening of the Land Court, time did not run against the Plaintiff during such interval and that he is entitled to a period after the opening of the Land Court equal to the time that elapsed between the closing of the competent Court and the expiry of the period of limitation within which to bring his action. As regards the planted land the period of limitation expired in December, 1337 (December, 1920 or January, 1921). The competent Court, the Court of First Instance of Jaffa, closed in the beginning of December, 1917, i.e. 3 years earlier.

Hence the Respondent had that period within which to commence his action after the opening of the Land Court and his action is within time.

As regards to unplanted land—the period expired in December, 1332 (January, 1916) before the closing of the Ottoman Court. Hence, as regards this land, the Respondent's action is barred unless he can establish either that time had not begun to run against him owing to his residence at a distance from the competent Court or that the period of limitation has been broken by a more recent acknowledgment of his title by the Appellant.

The judgment of the Land Court is set aside and the case remitted,—

a) As regards the planted land, that the parties may have an opportunity of presenting their proofs and arguments on the merits of the case.

b) As regards the unplanted land, that the evidence and arguments may be heard on the question of limitation, and if the action is found not to be barred by prescription then to decide the case on the merits.

Costs to be costs in the case.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 166/23.

BEFORE:

Corrie, J., Khladi, J. and Khayat, J.

IN THE CASE OF:

Sikali — APPELLANT.

vs

Toumah — RESPONDENT.

Limitation of actiors pending before Ottoman Court at date of Occupation — Suspension of period of limitation during period when Courts closed — Art. 16, Proclamation (Establishment of Courts) of 24th June, 1918.

JUDGMENT.

This is a question of prescription. Before the time elapsed the Courts were closed. See rule established in L.A. 45/23, Soursock vs. Habbash*.

Civil Courts were established by Proclamation No. 42, Art. 16.

The competent Ottoman Court was the Court of First Instance

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* See preceding judgment.

of Haifa which was closed on or before the 1st of October, 1918, which is the date of Occupation as fixed by Proclamation No. 75 dated 18th November, 1918.

The action brought is within time.

The judgment of the Land Court is set aside and the case remitted for hearing.

Delivered the 24th day of July, 1924.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 32/24.

BEFORE :

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

IN THE CASE OF :

Agnes, wife of Basil Yared of Beyrouth — APPELLANT.

VS

Messrs. Kaiser & Nasrallah Selim Khoury — RESPONDENTS.

Action to set aside sale of land made in 1319 (1901) — Limitation of actions — Reasons for suspension of period of limitation — Avoiding of prescription — Art. 1663, Mejelle — Allegation of fraud in procuration of sale — English rule of prescription applied — Art. 46, Palestine Order-in-Council, 1922 — Signature alleged to be obtained by undue influence.

JUDGMENT OF MR. JUSTICE HAYCRAFT.

I agree with the judgment of my learned brother that prescription was not avoided on any of grounds to be found in the Mejelle. Nor if property has been already partitioned among the heirs can it be held that prescription has no avail in favour of one of them against another.

We are by Clause 46 of the Palestine Order-in-Council, 1922, authorised to apply rules of equity to be found in English Law when not inconsistent with the Ottoman Law. There is a rule of Equity that prescription cannot be successfully pleaded in bar to an action to recover land of which the Plaintiff has been deprived by fraud unless the Plaintiff has allowed the time of prescription to run since he had knowledge of the fraud. But to avail herself of this equitable rule the Plaintiff must prove either that the Defendant was a party to the fraud, or has purchased with knowledge of it.

In order that the Appellant may succeed her case must rest on the statement of claim and not on matters set out subsequently.

The judgment of the Land Court of Jerusalem is affirmed and the appeal is dismissed with costs.

Delivered the 26th day of August, 1924.

JUDGMENT OF MR. JUSTICE KHAYAT.

Although Article 1663 of the Mejelle enumerates the excuses which oust prescription yet it does not limit them and therefore we can add excuses according to the circumstances of the case.

JUDGMENT OF MR. JUSTICE FRUMKIN.

This is an action to set aside a sale of land which took place in the year 1319.

Before dealing with the merits of this case we have to decide whether this action has not been barred by lapse of time. If we will take the dates shown by the Appellant as basis of prescription, even when such dates do not correspond with the dates shown by the other side, a larger period than that prescribed by law (10-Miri land, 15 Mulk) has passed between the date of sale and date of commencement of action.

Is there any reason to prevent running of time?

The Mejelle (Art. 1663) mentions three reasons; 1) Minority, 2) Absence, 3) Despotism of opponent. None of these reasons exist. Appellant was already of age at the time when the sale took place and even at the time when the power of attorney upon which the sale is based was drawn. The Appellant remained for some years in Haifa before leaving for Beyrouth and afterwards came to Haifa on several occasions so that absence could not be taken as an excuse. It is not alleged that no action could be brought because of the despotism of Defendants.

Appellant shows another reason why there should be no prescription and this is fraud.

We are not limited by the three reasons shown in the Mejelle, because they are only cited as examples not excluding other reasons so even without applying Section 46 of the Palestine Order-in-Council with regard to rules of Equity we may consider whether there is evidence of concealed fraud sufficient to prevent running of time.

The allegation of Appellant is that when giving the Power of Attorney to her elder brother she was not aware of its importance and has signed it merely out of obeyance and respect to her eldest brother and that she was not aware of the sale of her property to her brothers effected on the ground of the said Power of Attorney until some time before the commencement of the action and finally that this sale was only a fictitious one having for its object the distibution of the land the property of her father between his male heirs.

If this allegation were proved to be true would that amount to a concealed fraud and if so might not Appellant with reasonable diligence have discovered it long before?

It is the practice in this country to keep the real property within the family, and it is very often divided among the male heirs only for that purpose, because the females are supposed to be married outside the family and cannot carefully look after their property. But this practice does not always mean that the females are defrauded by the male heirs. In good families arrangements are made that the girls get cash instead of the share in the immovables and give releases or effect fictitious sales so that even if it is proved that the sale between the older brother as agent of Appellant and the brother Defendants was a fictitious one, it would to my mind in itself not be sufficient evidence of a concealed fraud and Appellant offered no other evidence.

Besides there are reasons for inferring that the alleged fraud if it ever existed, might with reasonable diligence have been discovered by Appellant long before. Whatever is said about obeyance and respect of girls towards their older brothers it is alright so long as they are not married and under the direct supervision of their brothers. Once married it is very natural and human for a lady and her husband to take an interest in their property and from time to time to enquire into the details relating to revenue, profits and losses, etc. even if such property is under the management of her brothers respectively or brother-in-law. It was never alleged that any accounts were asked for or given all that period. Had Appellant really thought that her share of the property inherited from her father still belongs to her, one can easily presume that she had many occasions to find out what happened with it. The fact that a very considerable interval of time (about 18 years) has elapsed between the alleged fraud and its discovery may of itself be a reason for inferring that the fraud

might with reasonable diligence have been discovered long before (see Halsbury, Vol. 19. p. 144) and hence there will be no reason for preventing running of time.

There is no excuse under existing Ottoman Law why prescription should not run in this case and I do not think that the application of the rules of prescription would under the circumstances of this case be contrary to principles of equity and natural justice.

The appeal is, therefore, to be dismissed on the ground that the case brought is out of time.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 56/24.

BEFORE:

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

IN THE CASE OF:

Mahmud Diab Abdel Rahman
and Others — APPELLANTS.

vs

Muhammad Ali Selim El-Amri
and Others — RESPONDENTS.

Claim for registration as owner of miri land — Plea of limitation of actions — Arts. 20, 78, Land Code distinguished — Lapse of ten years between time when right of action arose and commencement of proceedings — Adverse possession found to be under defective title — Right of occupier of state lands as against the Government — Time held not to run to bar the right of action between heirs and co-owners—Possession by one heir is possession by all.

JUDGMENT.

In this action to recover miri land the Respondents have set up the defence that the action is barred by lapse of time under Article 20 of the Land Code.

The Land Court has held that, after making all proper allowances, a period exceeding 10 years elapsed between the time when the Appellants' right of action arose and the commencement of proceedings, and the action has been dismissed.

At the same time the Court made a finding that the sâle to the Respondents' ancestor was invalid. The Appellants claim that on this finding judgment should be given in their favour, as time cannot run against them where the possession adverse to them is not under a good title; and they quote Article 78 of the Land Code, and the decision of the Council of State dated 30th of December, 1322.

We hold that the view put forward by the Appellants cannot be accepted. It is in our opinion inconsistent with the wording of Article 20, and if accepted, it would nullify the effect of the article, as it would clearly be unavailing to plead lapse of time as a defence, if it were also necessary that the Respondents should establish a good title to the land. Article 78 is part of Chapter IV of the Land Code which relates to "Escheat of State Lands" and applies to the rights of an occupier as against the Government, and not to the rights of claimants to the land.

The decision of the Council of State quoted by the Appellants is limited in terms to claims between heirs and persons holding land in partnership. It is, moreover, a decision only on the question of the action to be taken by a Land Registrar when a person applied to be registered by right of occupancy, and is not a decision binding, or intended to bind, the Courts. This is clear from the last paragraph:—

> "Therefore every claim by one of the heirs or co-owners on the ground of Haq el Qarar merely by reason of cultivation for a long period is one that needs a judgment."

This decision may be regarded as supporting the view that as between heirs and co-owners time does not run to bar the right of action, possession by one heir or co-owner being possession by all; it cannot be regarded as affecting the general rule clearly laid down in Article 20 of the Land Code, that in the absence of lawful excuse, failure to commence proceedings within the prescribed period bars the right of action.

We hold that the appeal must be dismissed with costs.

Delivered the 7th day of July, 1925.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 126/25.

BEFORE:

Seton, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

The Imperial Ottoman Bank, Haifa — APPELLANT.

vs

Nasif Jabbour and Others — RESPONDENTS.

Limitation of actions—Prescription of action on promissory note — Art. 146, Commercial Code — Art. 1660, Mejelle — Collateral undertaking based on promissory note is prescribed with promissory note.

Appeal from the judgment of the District Court of Haifa, dated the 26th June, 1925.

JUDGMENT.

I do not think that this case comes within Article 146 of the Commercial Code unless it be proved that the signatories of the promissory note were traders, merchants or bankers or that the promissory note was issued in connection with a commercial transaction. If the Respondents are unable to prove one or other of these circumstances the period of prescription is 15 years in accordance with Article 1660 of the Mejelle, and Article 146 of Commercial Code does not apply.

I am, therefore, of opinion that the judgment of the District Court should be set aside and the case remitted in order to give the Respondents an opportunity to prove either that the signers of the promissory note were merchants or that the promissory note was given in connection with a commercial transaction. If they fail in this and in the absence of any other defence I think that judgment should be entered in favour of the Appellant.

I do not think that the separate undertaking signed by Andrews and Bishara affects the question of prescription. The undertaking did not constitute a novation of the debt, and the debt therefore still rests upon its old title viz: the promissory note. If the promissory note is prescribed so also is the undertaking and vice versa. (Vide: William's French Law relating to Bills of Exchange, 1912, page 183).

Dated the 2nd day of September, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 137/26.

BEFORE:

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

IN THE CASE OF:

Wardeh Bint Yousef Mussalam El Biss — APPELLANT.

vs

Maryam Bint Eassa el Saich — RESPONDENT.

Limitation of actions — Bill not given between merchants non for commercial purpose — Prescription of action on promissory note — Art. 146, Commercial Code — Arts. 1589, 1660, 1746, Mejelle — Administration of oath — Proof of admission in bill.

Appeal against the judgment of the District Court, Jerusalem, dated 21st November, 1925, whereby the Appellant was ordered to pay 600 Napoleons with interest, and £E.1,500 advocate's fees.

JUDGMENT.

The Court holds:

That as the bill in suit was not given between merchants nor for a commercial purpose it is not subject to the rule of the Commercial Code as to limitation of actions; and hence that action upon the bill is not prescribed.

That the Appellant is entitled to administer to the Respondent an oath under Articles 1589 and 1746 of the Mejelle, "that the admission by the late Mussallim El Biss in the bill for 600 napoleons drawn in my favour dated the 16th June, 1920, is not false; and that the amount due thereunder has not been paid by the deceased either to me or to any other person in any manner whatsoever; that I have not released the deceased from debt; that I have not transferred it to any third person; that I have not received the amount of the debt from any person, and that I have not in my possession any pledge from the deceased in respect of the debt".

Dated the 20th day of October, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 34/28.

BEFORE:

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

IN THE CASE OF:

Khadija Bint Ahmad Isleem
Ni'meh Bint Ahmad Isleem — APPELLANTS.

vs

The Armenian Patriarch of Jerusalem — RESPONDENT.

Claim made to be registered as owners based upon inheritance and undisputed possession — Right of registered owner not in possession for long period — Possession obtained under agreement of lease — Sufficiency and genuiness of lease — Limitation of actions — Mere lapse of time held not to give rise to presumption of full ownership.

JUDGMENT.

The Appellants claim to be registered as owners of land by inheritance from their father Ahmad Isleem and undisputed possession since his death, a period of over 20 years.

The Respondent is registered as owner of the property and it is not disputed that the property has been registered, either in the name of the Respondent or of some person in trust for the Patriarchate, throughout the whole period of the Appellant's occupation.

The Respondent also alleges that the Appellants' father was in occupation of the property as tenant of the Patriarchate and, in proof of this, the Respondent has produced the counterpart, signed by the Appellants' father, of a lease of the property from the Patriarchate to him for the year 1322. The authenticity of this lease having been denied by the Appellants, the Land Court heard evidence and decided that the lease was genuine, and accordingly that the Appellants' father and the Appellants themselves were in occupation as lessees of the Respondent. On appeal, the Appellants have raised the question whether there was evidence upon which the Land Court could hold that the lease was genuine. The lease, however, comes out of proper custody. No ground for holding that it is forged has been suggested, and under the circumstances, we are of opinion that the evidence before the Land Court was sufficient.

It was also argued for the Appellants that, although in fact they were the Plaintiffs, they should be treated as Defendants in the case, the origin of which was a claim by the Patriarchate for arrears of rent. This is an argument the validity of which cannot be admitted. The Appellants have commenced the action, and it is immaterial whether their motive is to avoid execution of a judgment or to obtain a title to enable them to dispose of the property. Clearly, the Appellants cannot say that because an action by the Respondent for declaration of title might have been successfully met by the defence that the action was barred by lapse of time, therefore they are entitled to be registered as owners of the property. That, however, is not exactly the position of the Appellants. The Appellants' case is based not merely on possession, but upon title by inheritance, which is one of the three recognised grounds of ownership; and in the absence of anything to the contrary, such a claim, if established, would prevail against a claim based solely upon registration. It is, therefore, essential to the Respondent's defence that he should be able to prove that the Appellants' father was in possession only as a lessee. The question, therefore, arises whether such a claim by the Respondent is or is not subject to the rule as to limitation of claims by lapse of time.

We hold that where there is evidence that a Plaintiff's possession—or that of an ancestor through whom he claims—was founded originally upon some right less than that of full ownership, such as that of a lessee or mortgagee, mere lapse of time will not give rise to a presumption of full ownership, and it is for the Plaintiff to prove how he or his ancestor subsequently became entitled to possession as owner, even though since the date of the lease, mortgage, or other instrument under which possession was originally obtained, a time exceeding the period of limitation of actions may have elapsed.

The appeal must be dismissed and the judgment of the Land Court affirmed with costs.

Delivered the 26th day of July, 1928.

In the High Court of Justice.

H.C. No. 78/28.

BEFORE:

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

IN THE APPLICATION OF:

El Haj Abdul Fattah El Khatib — PETITIONER.

vs

Examining Magistrate of Haifa
Pietro Abela — RESPONDENTS.

Refusal by Examining Magistrate to issue warrant of arrest — Procedure to compel attendance of accused person — Section 4, Trial Upon Information Ordinance, 1924 — Limitation of criminal action — Court to take judicial notice of question of prescription of misdemeanour — Onus on complainant to show that offence is not prescribed.

Application for an order to issue to the Examining Magistrate of Haifa according to Section 4 of the Trial Upon Information Ordinance, 1924, directing him to issue summonses against Pietro Abela.

JUDGMENT.

The Court is of opinion that in a criminal case in considering the question of granting or refusing the issue of a summons or warrant, the Magistrate is entitled to take into account the question whether the period of prescription of a misdemeanour has passed or not, and that the onus of satisfying the Magistrate that the offence is not prescribed is on the person laying the charge. This was not satisfied by the details given in the complaint in the present case.

The Rule is, therefore, discharged.

Delivered the 11th day of April, 1929.

In the High Court of Justice.

H.C. No. 27/30.

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

IN THE CASE OF:
Abdul Salam El Kamhawi — APPELLANT.
vs
The Chief Execution Officer, Jaffa — RESPONDENT.

Limitation of action on bei-bil-wafa — Bei-bil-wafa held to have effect of mortgage — Prescription under Article 1660, Mejelle, held not to arise in the case of a mortgage — Article 118, Mejelle.

ORDER.

The Court holds that whether fifteen years have lapsed in this case or not, prescription under Article 1660, Mejelle, does not arise in the case of a mortgage and by the last two lines of Article 118, Mejelle, a Bei-Bil-Wafa has the effect of a mortgage.

The third point raised by the Respondent if raised before the Chief Execution Officer was not dealt with by him in his order. The order is therefore made absolute with costs.

Delivered the 6th day of October, 1930.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 31/30.

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

IN THE CASE OF:
Husni Jaber 'Aahed and Others — APPELLANTS.
vs
Muhammad Mahmud 'Abd el Haq
Omar Hussein 'Abd el Haq, as
an heir of his wife
'Alia bint 'Abd el Haq — RESPONDENTS.

Limitation of actions between heirs—Claim of land by inheritance—Inference by Land Court that there was partition between heirs not supported by evidence — Rule that prescription does not run as between heirs held to be absolute rule and not a rule to be applied in discretion of Court.

Appeal from the judgment of the Land Court of Jaffa, dated 4th February, 1930.

JUDGMENT.

The Appellant Husni Jaber claims by inheritance from his mother Khadijeh bint Mahmud 'Abdel Haq a share in lands formerly in the possession of his mother's father Mahmud. The Respondents are descendants of Mahmud.

Mahmud died more than 49 years ago, and Khadijeh died about 27 years ago. There is no evidence of any claim having been made by the Appellant or his mother before this action was commenced. The Land Court has held that the rule that there is no prescription as between heirs is not absolute, and that the Court has a discretion whether to apply the rule or not.

Under the circumstances of this case, the Land Court has held that the rule is not applicable, and consequently that Appellants' claim is barred by prescription.

This view the Court cannot accept. Where the Plaintiff's claim is by inheritance and is made against other descendants of a common ancestor, the rule is that the claim is not barred by prescription.

It may be that the Defendants may prove in defence possession of different parts of the ancestor's property by the respective heirs without dispute for a long period: and that the Court may infer a voluntary partition of the estate between the heirs which it may refuse to upset: but that is a totally different defence from that of prescription.

It would appear that the Land Court has inferred in the present case that there was a partition between Mahmud's heirs. There does not, however, appear to be any evidence in support of this finding and it is not consistent with the statement made by the Respondents in this Court to the effect that those heirs who paid fees to the Government took the land to the exclusion of those who did not pay.

Holding as we do, that the Appellant's claim is not barred by prescription, we allow the appeal, set aside the judgment of the Land Court and remit the case for hearing.

Costs will follow the event.

Delivered the 9th day of July, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 49/32.

BEFORE:

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

IN THE CASE OF:

Fahima Hanen — APPELLANT.

vs

Sheikh Assad Shukeiri — RESPONDENT.

Limitation of action for claim to land — Commencement of period of prescription — Absence from country as valid and legal excuse to interrupt running of period of prescription — Time to run from removal of excuse — Muddet el Safer — Arts. 1659, 1663, 1665, 1667, Mejelle — Art. 20, Land Code.

JUDGMENT OF MR. JUSTICE BAKER.

I am of the opinion that Articles 1663, 1659, and 1667 of the Mejelle and Article 20 of the Land Code prescribe (1) that prescription begins from the date on which the Plaintiff was able to claim the thing in dispute (Art. 1667 of the Mejelle) and (2) that absence from the country is a valid and legal excuse and that time does not begin to run until the removal of the excuse i.e. the return of Plaintiff to the country (Article 20 of the Land Code and Article 1663 of the Mejelle).

I am aware that under Article 1663 of the Mejelle it is arguable that the time during which a Plaintiff was "a long way off" (muddet el Safer) does not count in estimating the period within which a Plaintiff is required to bring his action and that Article 1664 defines Muddet el Safer as a distance of 3 days' journey or 18 hours at a moderate rate of travelling, also that the Cyprus Courts have held that residence in a foreign country was not absence on a journey (muddet el Safer) for the purpose of prescription (See Mehmel v. Kosmo C.L.R. Vol. 1, p. 12).

The Court however, in the case of Estrangin v. Tyan (Official Gazette September 16, 1926), has held that where the Defendant was living in a foreign country such absence was a cause for suspension of the running of the period of prescription (even though the person against whom the plea was put forward had a duly authorised agent in Palestine) and that actual presence

in Palestine of the Plaintiff during the whole period was required if the period was to run against him.

In accordance with the above decision the judgment of the lower Court must be quashed and the case remitted to enable the Appellant to produce evidence as to the dates he was absent and his return to Palestine and to give a fresh judgment following the law laid down in the above quoted case.

JUDGMENT OF MR. JUSTICE FRUMKIN AND MR. JUSTICE KHAYAT.

In view of the provisions of Articles 1663 and 1665 of the Mejelle, prescription does not commence to run until the excuse has ceased to exist. Hence if the Appellant or her predecessor in title were not in the country when the house in dispute was built, prescription would not begin to run until their first arrival into this country.

The judgment of the Land Court must therefore be set aside and the case remitted to enable both parties to prove the date of arrival of Plaintiff or her predecessor in title for the first time in this country since the building of the house, and to ascertain by calculation whether or not there was prescription, and proceed accordingly.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 102/32.

BEFORE:

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

IN THE CASE OF:

Mekhael Zifteh — APPELLANT.

VS

Syndics in the Bankruptcy of Yusef Dajani — RESPONDENT.

Limitation of action on promissory note — Death of guarantor of note — Interruption of period of prescription by attachment — Payment by heirs of part of indebtedness under note—Part payment held to be admission of debt interrupting prescription—Agreement subject to period of limitation of 15 years—Art. 146, Commercial Code — Art. 1660, Mejelle.

JUDGMENT.

On 6th December, 1926, the Appellant took a promissory note for L.E.375 payable on 29th February, 1927, signed by Abdullah Dajani and his father Yusef Dajani as guarantor. The latter died on 12th January, 1927, and on 3rd July, 1929, an order of adjudication of bankruptcy was made in respect of his estate.

The Appellant applied for and obtained an attachment on the properties of the deceased. Subsequently the heirs of the deceased guarantor paid to Appellant LE.144 on account of the said note. Thereupon the Appellant withdrew the attachment.

The Appellant having abandoned the point whether an attachment does or does not interrupt prescription he cannot take the point at this stage.

The District Court held that as five years had passed since the date of maturity the claim is prescribed and dismissed the case

The Court holds that the heirs of the Respondent have paid part of the value of the note and this is an admission of the debt which interrupts prescription regarding the balance. An agreement was later made whereby a plot of land was sold to Appellant. This is a new undertaking subject to the ordinary period of limitation of 15 years (vide Article 146 of the Commercial Code and Article 1660 of the Mejelle).

The judgment of the District Court is, therefore, set aside and the case remitted for it to enter into the merits of the case.

Costs to follow the event.

Delivered the 17th day of July, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 146/32.

BEFORE:

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

IN THE CASE OF:

Raful Hakim [APPELLANT.

vs

Eliahu Mehraz RESPONDENT.

Limitation of action on promissory note — Written undertaking to pay prescribed promissory note held to be new agreement — Document to pay within meaning of Article 146, Commercial Code — Articles 1660, 1667, Mejelle.

Appeal by way of special leave from a judgment of the District Court in its appellate capacity holding that the guarantee dated Jan. 17, 1920, in the following words was subject to a period of prescription of fifteen years.

"Whereas we are indebted to the order of the heirs of the late Ishak Mehraz in accordance with a promissory note signed by us for the sum of P.T. 31,519 (Haifa currency at the rate of P.T. 125 to the Turkish Pound) which promissory note is dated 29th January, 1914, due after one year and on the date shown below, we undertake to the said heirs to pay the value of this promissory note without a protest being made by them on it which has to be made before the expiration of five years from the date of maturity and to pay what is due on the above sum as legal interest. We have therefore written this undertaking to them in protection of their rights in the above promissory note".

JUDGMENT.

We have no doubt that the undertaking of June 17, 1920, was a new undertaking to pay and not a document within the meaning of Article 146 of the Commercial Code and accordingly, by virtue of Articles 1660 and 1667 of the Mejelle, the debt can only be prescribed after 15 years. It therefore follows that the judgment of the District Court on appeal was correct and it is hereby affirmed and the appeal is dismissed with costs and advocate's fees assessed at £P.3.

Delivered the 13th day of June, 1933.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 6/33.

BEFORE:

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

IN THE CASE OF:

Ahmed Sheikh Yousef and Others — APPELLANTS.

vs

Khalil Ghibeish and Another — RESPONDENTS.

Limitation of actions between heirs—Claim of land by inheritance—Possession of one heir is possession by all heirs — Right of action of heir not barred by prescription — Land of family frequently cultivated by one or more of the members of the family to the exclusion of the other members — Adverse possession of land.

JUDGMENT.

The Appellants claim before the Settlement Officer that the land in dispute had been in the possession of their ancestor, Hussein Ahmed el-Ghabash of Yahudieh village and had been registered in his name in the Land Registry. They allege further that upon Hussein's death, his shares descended to his children Ahmed, Suleiman and Fatmeh and that such shares were registered at the Tabu in the names of his two sons Ahmed and Suleiman only, and that Fatmeh was omitted and her name concealed, and that Fatmeh had died and had left among others the present Appellants who are now entitled to their predecessor's title in shares in the land. The Settlement Officer of Jaffa after hearing the parties ordered the registration in the names of the Appellants of the shares in question, overruling the plea that Appellants' claims were prescribed in view of the fact that the parties were co-heirs (the fact that the parties were co-heirs not being disputed). The said order was appealed against to the Land Court, Jaffa, and the latter Court held that it appeared from the examination of the Certificate of Succession that the parties were not members of the same family and in view of the decision of this Court in Land Appeal No. 36/30., they were now prescribed and accordingly reversed the decision of the Land Settlement Officer.

Now, the beforementioned decision of this Court in Land Appeal No. 36/30* (Musa Mouhammad Kaaban vs. Abdel Aziz Abbas Sheikh Talawi) prescribed inter alia, that: In actions for title to land where the Plaintiff claims by inheritance from an owner who is also an ancestor of the Defendant the general rule is that possession by one heir is possession by all the heirs and that hence an action is not barred by lapse of time; the rule being based on the fact that the land of a family is frequently cultivated by one or more of the members of the family to the exclusion of the other members and in such a case the possession by the cultivating

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* See ante, p. 959.

members is not adverse to those who do not cultivate and the latter cannot set up a plea of prescription".

In the said case, the Plaintiff was not a member of the same family as Defendant and it was held that possession of Defendants was possession adverse to Plaintiff's claim and that in consequence his action was barred by lapse of time.

The Land Court in their judgment state that it appears from the examination of the Certificate of Succession that the parties are not members of the same family and upon this ground set aside the Land Settlement Officer's decision relying upon the beforementioned decision in Land Appeal No. 36/30.

Now it has never been contested, neither is it in dispute that the present Appellants are of the same family, both parties being descendants from a common male ancestor and as such by virtue of the ruling in the beforementioned Land Appeal No. 36/30 they are entitled to be registered as owners of the predecessor-in-title's shares in the estate and, accordingly, the appeal must be allowed. The judgment of the Land Court is set aside and the judgment of the Settlement Officer, upheld. The Respondents are ordered to pay the costs and advocate's fees assessed at £P. 2.

Delivered the 16th day of January, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 151/33.

BEFORE:

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

IN THE CASE OF:

Aharon Shlomo Yudelovitz — APPELLANT.

vs

Israel Rosenthal — RESPONDENT.

Plea of prescription to action on promissory notes — Notes of trader prescribed after five years by Article 146, Commercial Code — Period of limitation in action for recovery of money loaned is 15 years — Art. 1660, Mejelle.

JUDGMENT.

The Appellant's action has been dismissed on the ground that it was barred by lapse of time under Article 146 of the Commercial Code as the promissory notes filed by him in support of his claim were more than 5 years old.

It is clear that if this were an action on the notes, it would be barred.

In the Statement of Claim, however, no mention is made of any promissory notes, and the cause of action alleged is a loan in Polish currency. This is clearly distinguishable from an action on promissory notes; and the period of limitation applicable to such an action is 15 years, in accordance with Article 1660 of the Mejelle. See CA 79/25, Wadie Tamari v. Karamano.*

The issue has to some extent been confused by the fact that the Appellant applied for and obtained an order for provisional attachment and it has been argued that such an order was irregularly obtained. But the question of limitation is governed not by what the Appellant put forward in his application for provisional attachment, but by the context of his Statement of Claim. He is suing for money lent and that is a claim to which the provisions of Article 1660 of the Mejelle and not those of Article 146 of the Commercial Code are applicable.

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

Costs will follow the event.

Delivered the 23rd day of November, 1934.

LIMITATION OF ACTIONS —

See also Heirs.

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* see ante, p. 701.

LOANS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 45/24.

BEFORE:

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

IN THE CASE OF:

Zeif Hazan — APPELLANT.

vs

Nahum Milstein — RESPONDENT.

Acknowledgment of debt signed in Odessa — Agreement to repay in foreign country — Right to administer oath — Plea that agreement involved payment of interest at a usurious rate — Question of administration of oath is question of procedure and governed by lex fori.

JUDGMENT.

This appeal raises the question of the law applicable.

The Appellant on 23rd January, 1920, signed in Odessa an acknowledgment of receipt from the Respondent of 1,140,000 Roubles as a loan, and agreed to repay it by placing £600 sterling to the credit of Respondent at a specified Bank in London. The Appellant having failed to place any money to Respondent's credit in fulfilment of this agreement, and having now his residence in Palestine, the Respondent has brought this action and obtained judgment.

On appeal the Appellant argues:—

1. That he is entitled to administer an oath to the Respondent that the acknowledgment in the document sued upon is false and that he did not receive more than 900,000 Roubles.

2. That he is entitled to prove that the agreement involved payment of interest at a usurious rate, and that by the proper law applicable he is entitled to have the amount of his liability reduced.

The Court holds:—

1. The question of the administration of an oath being one of procedure is governed by the lex fori, and hence the Appellant is entitled to administer an oath to the Respondent.

2. As regards the plea of usurious interest: it is to be noted that the agreement does not specify any date upon which the £600 sterling was to be credited to the Respondent. Indeed the transaction, though expressed to be a loan, appears in reality to have been a transaction in exchange; and in view of the absence of any agreed date for payment the transaction appears to have been purely speculative in character and it cannot be proved that the sum of £600 sterling was not a fair equivalent for 1,140,000 Roubles, or that any question of interest was involved. Accordingly the claim to prove usurious interest fails.

The judgment of the District Court is set aside and the case remitted for the oath to be administered to the Respondent.

Costs to follow the event.

Delivered the 29th day of January, 1925.

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

P.C. No. 38/28.

BEFORE:

Lord Blanesburgh, Lord Tomlin and Lord Russell of Killowen.

IN THE CASE OF:

Haj Ragheb Canaan — APPELLANT.

vs

Haj Said Canaan — RESPONDENT.

Action for money lent — Promissory note used as evidence to support loan — Proof of loan — Art. 1610, Mejelle — Oath tendered toprove absence of collusion—Sec. 11, Law of Evidence (Amendment) Ordinance, 1924 — Determination of value of oral evidence and credibility of witnesses — Jurisdiction of Court of Appeal to reverse finding of fact made by Court of First Instance — Effect of non-compliance with trifling formal provision of law — Art. 15 Appendix to Civil Procedure Code.

JUDGMENT.

This is an appeal from a judgment of the Supreme Court of Palestine, dated the 31st May, 1926, setting aside a judgment of the District Court of Nablus of the 10th October, 1925. The

District Court decreed the suit. The Supreme Court dismissed it with costs. The Plaintiff appeals.

The action was for £E.2,000 money lent by the Plaintiff Appellant to the Respondent. The loan was alleged to have been made on the 21st August, 1919. The action was commenced on the 15th December, 1924, more than five years after the loan. The date is suit is of relevance to a defence of prescription which was raised in the Supreme Court. His delay in instituting proceedings is also a circumstance which the Appellant has not explained. The case in so far as any questions of law and procedure may be involved is governed by and is to be determined by the Ottoman Codes of Civil Law (El-Mejelle), Civil Procedure and Commerce as amended or supplemented by Ordinances issued since the British occupation of Palestine.

The Appellant attached to his statement of claim, as a document on which he relied, a "sanad," purporting to be signed by the Respondent and being, in fact, a promissory note of the same date, 21st August, 1919, providing that the Respondent owed and would pay to the order of the Appellant 200,000 Egyptian piastres, "value received in my hands in cash". The note, however—and it is important at once to accentuate this—was not thereby brought into suit. The action, doubtless for very good reason, never became an action on the note. The claim for money lent remainded the Appellant's only claim. The note was introduced merely to strengthen or confirm it. If the loan were otherwise proved, the Appellant's case needed no support from the note. From the note his claim could derive no assistance if, in the result, it was shown that the note was unconnected with any transaction of loan.

The importance of all this in its relation to several of the matters discussed in the course of the proceedings was not always appreciated in the Courts below. If it had been some mistakes made might have been avoided. Subtle questions as to the admissibility of the evidence and the like under the El-Mejelle, so much discussed even in argument before the Board, are seen to disappear so soon as the note's true place in the proceedings is assigned to it.

The facts of the case are little involved. The real issue between the parties can perhaps best be exhibited if attention is first directed to the case which was put forward by the Respondent.

The Appellant and he are brothers. They are two of seven

sons who, upon the death of their father in 1899, continued to carry on in partnership at Nablus his business of a soap maker. By 1919 four of the brothers had withdrawn from the partnership. In that year three of them only remained in the business, the Appellant Ragheb, the Respondent Said, and a third brother Mustapha. The Respondent was possessed of the largest interest. He was in actual control of affairs and in obedience to an Ordinance of May, 1919, requiring such partnerships to be publicly registered, he duly registered this partnership, entering in the return, as the amount of capital paid up, a sum which in the view of the Appellant and Mustapha, represented a substantial under-estimate of the true position. These two became apprehensive that they might be precluded by the figures of the return from having the partnership accounts as at its date, truly taken with their respective shares correctly ascertained, and they insisted, with the Respondent, that they should be secured against that misfortune. And thus is explained by him the arrangement which resulted in the sanad or note in favour of the Appellant, as well as another of even date and of like amount in favour of Mustapha, coming into existence.

The arrangement was one between the three, a fourth brother Tahir taking an active part in the transaction. Under it, the Respondent made in favour of each of his partner brothers a promissory note for 200,000 Egyptian piastres, as for value received, each note being handed to and retained by Tahir, so that in his hands it might remain a security to the promise when the partnership accounts had been taken, either for any sum thereby found due to him or, in the event of the Respondent's successful insistence that the registered figures were conclusive as at their date, that it might be a security for its full amount. Each of the notes was expressed to be for value received in cash. The choice of words was deliberate. The notes were to be, ex facie, invulnerable. But if there was cash received, there was none retained by the Respondent.

What happened according to the Respondent was that when the notes were given, a ceremonial exchange of money took place in the presence of the parties and the witnesses. The practice described as one provided by the Sharia law was adopted. The money was produced, but not by either the Appellant or Mustapha. It was handed to the Respondent, and was thereupon returned by him mediately or immediately to the person from whom it came.

There was thus "mowataah," or collusion, in the only payment made. There was, so the Respondent insisted, no loan of any kind by the Appellant to him. Nor was his note handed to the Appellant. It was handed to Tahir in exchange for a receipt from him detailing the terms of the deposit, a document apparently in evidence in the District Court but not part of the record now. Long afterwards the note was obtained by the Appellant from Tahir, in order, so Tahir deposed, that he might go and settle his account with the Respondent. But this was without the knowledge or authority of the Respondent. The partnership has been dissolved and its accounts are being taken. As between the Respondent and Mustapha these have been agreed, and the note in his favour has been returned to the Respondent and is produced. Questions with the Appellant on the accounts remain outstanding. Accordingly, no liability even on the note has so far arisen. Such, broadly, was the Respondent's case.

The Appellant's story, on the other hand, was that there was an actual loan of £E.2,000 made by him to the Respondent on the date named; that it was evidenced by the note or sanad, handed to him direct and not handed to Tahir at any time; and that the Respondent's indebtedness to him was unconditional and had no connection whatever with his share in the partnership. It is to be observed that the transaction of even date between the Respondent and Mustapha was in no way alluded to by the Appellant. It is to be noted also that no explanation has ever been vouchsafed of his delay in instituting proceedings to recover his loan, or of the fact that it was on the day when the action was commenced, and only then, that the note was stamped under penalty.

The action came on for trial in the District Court on the 7th March, 1925. The hearing was protracted; it continued during eight days, taken at intervals between March and October, 1925. At the outset the Respondent's signature to the sanad was admitted, and it is clear enough that upon that admission made the Appellant's case, a highly technical one, was in the view of his advisers thereby established. The Court, however, proceeded to take evidence of the facts. First, witnesses were tendered by the Appellant to prove enmity between himself and the Respondent from the date of the sanad until the date of suit. Then the Appellant and the Responden gave evidence, apparently unsworn. Each of them seems to have spoken to the effect above attributed to him. It is, however, not certain that even the Appellant went so far as to say that he len

any money of his own to the Respondent on the date named, or, indeed, that he then lent to him any money at all. And amongst a great body of witnesses—those who attested both notes, brothers and other relatives of the parties, some, if not most of them, called by the Appellant himself—there is no trace of corroboration of the Appellant's allegation that either on the day in question or at any other time was there any loan by him to the Respondent of £E. 2,000 as alleged, or indeed at all. And, taking the evidence as a whole, their Lordships feel confident that the broad result may with sufficient accuracy be stated as follows:—

There was no loan of money in any sense by the Appellant to the Respondent. The transaction, on the day in question, between them took place at the same time and in presence of the same parties as the transaction between Mustapha and the Respondent; the two transactions were in every respect indistinguishable, and were carried through to achieve the same end. It was with the intention that the Appellant's promissory note should as such appear to be of full validity that the ceremony of passing money to the Respondent representing the amount of the note was gone through, as in fact it was. Whether any money was actually handed by the Appellant to the Respondent is more than doubtful. That any money of his own was even produced is not suggested by any witnesses, while the original source of the actual money used is by some of the witnesses attributed to Tahir and by others to Sadik, a fifth brother, who was present and attested the notes. It seems clear that after the money had reached the hand of the Respondent it was, having fulfilled the role, returned either mediately or immediately to the source whence it came, and that source was never the Appellant.

The learned Judges in the District Court were impressed by certain discrepancies in the evidence to which they call attention in their judgment, and some of which have just been alluded to. Their Lordships are not moved by these discrepancies. What really impresses them is the substantial measure of agreement amongst the different witnesses upon the points of real importance in the transaction. The passing of the money is with all of them a mere ceremony, and it is not surprising that six years later the descriptions given of that ceremony should vary in detail. Ought any doubt, for instance, to be cast upon the story as a whole because Sadik, perhaps the most satisfactory witness of all said, as he did, "I did not see that money was paid by Ragheb to Said"? Yet

this statement is the only passage from Sadik's clear evidence on the transaction generally to which the learned Judges make any reference.

That the notes were handed to Tahir and were directly given in connection with the partnership accounts is hardly in contest. The contrary is not stated by anyone. Sadik, the fifth brother just referred to, in terms said that the notes were drawn up as security for the settlement of these accounts; that they were deposited with Tahir by the Respondent, the Appellant, and Mustapha; and that the Respondent was to take them back after a settlement had been reached. Indeed, the Appellant's assertion that his claim in this action for money lent was unconnected with his share of the partnership can hardly survive the evidence quoted by the learned Judges, of Sadik, one of his own witnesses, which was that when in conversation he told the Appellant that if judgment were given in his favour in the action for £E.2,000 he would obtain a sum to which he had no right, the Appellant replied "This sum would be less than what my share is".

If the evidence, the effect of which has now been summarised, was all of it by law admissible — and it was apparently all of it accepted as such by the learned Judges — it would seem that the Appellant's case had disappeared long before the evidence was over. But that evidence as a whole the learned Judges apparently felt themselves entitled to disregard. In reaching their decision in favour of the Appellant they directed their attention to one branch of it only. They treated the action as one brought upon the note, and not pausing to consider the difficulties in the way of such a suit created by the deposit of the note with Tahir, they were apparently of opinion that so soon as the Respondent's signature to the note was admitted, the Appellant's case under Article 1610 of the Code was complete, unless the evidence as to "collusion" was satisfactory. And this they held it was not, by reason of the discrepancies already alluded to. Accordingly, intimating that such was their view, the learned Judges gave the Respondent the option to tender the oath to the Appellant to the effect that there was no collusion. Had the Respondent accepted the option, and had the Appellant repeated on oath the evidence already given by him unsworn, the result would, it is shown, have been to decide the ssue in his favour. Not unnaturally, therefore, in view of the evidence then before the Court, the Respondent declined the offer made him, intimating that he preferred to appeal rather than be

bound by the Appellant's oath. The learned Judges thereupon gave judgment against him for the amount claimed on the grounds:

(a) of the discrepancies in the statements of the witnesses called to prove collusion;

(b) of the Respondent's refusal to tender the oath to the Appellant; and

(c) of the Respondent's admission that the signature to the note was his.

The District Court having treated the action as brought on the note, the Respondent appealed to the Supreme Court, and raised for the first time the plea of prescription. The prescriptive period he alleged was five years from the date of the note: he was a merchant and the action was barred by Article 146 of the Commercial Code. In addition to a re-statement of his case as already here set forth, the Respondent pointed out that the Appellant's rights under the judgment were made independent of his claims in relation to the partnership and he applied to the Court for leave to adduce further evidence to demonstrate the real connection between the two transactions, and further to disclose the circumstances in which the Appellant had obtained possession of the note from Tahir and in respect of other matters. In argument the Appellant's answer to all this was confined apparently to the plea of prescription and in the result the Supreme Court repelled that plea. For the rest they held, clearly thinking no further proof necessary, that the evidence produced to the District Court was sufficient to show that the note for £E. 2,000 was given as a guarantee for the Appellant's share in the capital of the partnership and did not represent a loan as contended by him. The Appellant accordingly could not succeed in his action, which should be dismissed with liberty to him to bring a fresh suit in respect to his claim to a share in the capital of the partnership, and they so adjudged. This is an appeal from their judgment.

It appears with sufficient clearness from what they have already said, that in their Lordships' judgment that appeal can only succeed, if at all, on some purely technical ground. And it was upon technical grounds that it was mainly rested by learned Counsel for the Appellant. The first of these was that the promissory note, when produced, amounted within the meaning of Article 1610 to an admission of the Respondent's debt, and that no evidence was receivable to vary or qualify that admission. To this contention,

as it appears to their Lordships, the all-sufficient answer in this case, without going further, is that the Respondent's debt sued for was money lent to him, and that the note is neither on its face nor at all an admission of any such debt, which, in fact, remain entirely unproved.

Taking this view, it is unnecessary for their Lordships to discuss or even to consider whether if the action had in truth been based upon the note the defence of "mowataah" was not made good by ample admissible evidence.

The second contention of the Appellant was based upon Section 11 of the Law of Evidence Ordinance, by which it is provided as follows:—

> "The value of oral evidence and the credibility of witnesses are questions for the Court to decide, according to the demeanour of the witnesses, the circumstances of the case, and such indication of the truth as may appear during the trial. It shall not be the duty of the Court to make inquiry as to their credibility either through verbal testimony or by private inquisition".

In the Appellant's submission the Judges of the District Court were made by this Ordinance the final judges of the truth or falsehood of the evidence called before them and the Supreme Court had no jurisdiction to reverse any finding of the District Court upon that evidence. To which, as their Lordships think, the answer is that the Ordinance has not and is not intended to have any such sweeping operation as the submission involves. Its purpose is to substitute in the Courts in Palestine, in place of the principles of Turkish procedure which the Ordinance superseded, those which are normal in British Courts of Justice. Certainly the terms of the Ordinance cannot be so construed as to preclude a Court of Appeal from considering and giving effect, as in this case, to relevant evidence before the District Court which the learned Judges there did not, so far as appears, disbelieve, but which they ignored altogether.

Thirdly, the Appellant relied on Article 15 of the amendment of the Code of Civil Procedure dated the 9th April, 1911, which provides inter alia as follows:—

> "All judgments and orders of Court will contain full reasons for the rejection and acceptance of each of the claims put forward by the parties and the articles of the law on which the decision is based.....

"Any contravention of these rules will render the judgment void."

It was said that the judgment of the Supreme Court, the substance of which has been already stated, does not comply with the terms of this Article and is void.

Their Lordships are so far in agreement with this criticism as to say that the judgment of the Supreme Court does not appear to have been formulated with the conditions of this Article in mind, and it would be well if, so long as the Article remains in force, the judgments of that Court were framed in more obvious compliance with its provisions. But in the present case it is only necessary to look at the case on either side made before the Supreme Court to see the contentions which the learned Judges there accepted. Their judgment is sufficient as it stands, for every practical purpose, and their Lordships are not prepared to recommend any interference with it on what at most is here a trifling informality, quite void of effect. In no circumstances could they, in this case, recommend any course which would have as its result the restoration of the judgment of the District Court, for which, in its full result, nothing can be said.

Having reached these conclusions, it is unnecessary for their Lordships to deal with the Respondent's plea of prescription, raising as it does serious questions of general importance. It is better that such questions should be finally decided in a case in which they necessarily arise.

In the result this appeal, while quite destitute of merits, is in their Lordships' judgment equally unsupportable on any technical ground, and they will humbly advise His Majesty that it be dismissed with costs.

Delivered the 23rd day of June, 1930.

MAGISTRATE.

In the High Court of Justice.

H.C. No. 36/33.

BEFORE:

The Acting Chief Justice and Khaldi, J.

IN THE APPLICATION OF:

Salim Khalil Ayoub — APPELLANT.

VS

The Chief Execution Officer, Nazareth
Badi Awad Farah — RESPONDENTS.

Eviction from agricultural land ordered by Magistrate and confirmed by District Court on appeal—Judgment of District Court not clear—Application for directions to be made by Magistrate to District Court where judgment not clear—Article 6, Execution Law.

ORDER.

We hold that it is not clear whether the judgment of the District Court given on the 2th February, 1933, "that the matter of the crops be dealt with by the Magistrate on delivery" means that the Magistrate is to deal with this matter as a Court or as Chief Execution Officer of his Court.

Accordingly we hold that the Magistrate before taking any action should have applied to the District Court for directions under Article 6 of the Execution Law.

The order issued by this Court on the 6th July, 1933, is therefore made absolute with costs including £P.3 advocate's fees.

In the High Court of Justice.

H.C. No. 42/53.

BEFORE:

The Acting Chief Justice and Khaldi, J.

IN THE CASE OF:

Sami El Haj Youseff — PETITIONER.

vs

The Chief Execution Officer in the Magistrates' Court of Haifa
Sharif Asad Shameh — RESPONDENTS.

Application to set aside order of Magistrate sitting as Chief Execution Officer — Execution of judgment of Magistrate — Magistrate held not to have power to make an order for sale of immovable property in satisfaction of judgment debt.

ORDER.

The petition and the attached copy of the Order do not disclose any reference to an order for imprisonment.

The Magistrate has no power to make an order for sale of immovable property in satisfaction of a judgment debt.

No order will issue.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 171/53.

BEFORE:

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

IN THE CASE OF:

Farideh Ankiri — APPELLANT.

vs

Ouni Bey Abdul Hadi — RESPONDENT.

Jurisdiction of Magistrate to hear action for advocate's fees—Recovery by advocate of fees—Scale of Advocates Fees of November, 1918—Sections 19, 21, 22, 28, Advocates' Ordinance, 1922—No agreement between advocate and client as to costs—Interpretation of Statutes—Intention of Statute clear but repugnance between sections.

JUDGMENT.

Leave to appeal was granted by the District Court of Jerusalem from its judgment on appeal from the Magistrate's Court on the following points:—

Whether the District Court was right in law in holding contrary to the Appellant's contention:—

(1) That the Magistrate's Court has jurisdiction to hear an action for advocate's fees alleged to be due in respect of actions dealt with by another Court; and

(2) That the assessment of such fees may be determined by the Court in its absolute discretion without reference to the scale laid down in the Scale of Advocates Fees of November, 1918.

To take the second point first. The scale of fees referred to in the second paragraph of the judgment giving leave to appeal is that contained in Section 18 of the Rules of Court made by the Senior Judicial Officer which came into force on the 1st of October, 1918, and was published in the Gazette which was an official supplement to the Palestine News dated November 7, 1918. The fees in question have been reproduced on page 465 of Volume II of Bentwich's Legislation of Palestine.

Appellant draws our attention to the following paragraph from the judgment in the case of Daniels vs. Richardson (C.A. No. 36/33)*.

"The scale of charges authorised by Rule 18 of the Rules of Court, Advocates, issued by the Senior Judicial Officer, Major Orme Clarke, which came into force on October 1, 1918, published in the Palestine News Gazette No. 10 on November 7, 1918, has never been replaced: hence, by virtue of Section 21 (i) of the Advocates' Ordinance, 1922, the scale is still in force, and for any item to which that scale applies, only the charge prescribed by that scale can be allowed."

The case of the Respondent is that Section 28 of the Advocates' Ordinance (No. 13 of 1922), page 6 of the Gazette of July 15, 1922, expressly provides for the repeal of the whole of these Rules.

The Section in question runs as follows:

"The Rules of Court dated October 1, 1918, are hereby repealed provided that such repeal shall not affect the validity of any licence granted or of anything done or suffered thereunder".

* See ante, p. 93.

On the other hand Section 21 of the very same Ordinance lays it down that "Where there is no agreement between the advocate and the client, the advocate shall not be entitled to receive fees in excess of the scale of fees set forth in the Rules of Court dated October 1, 1918".

Now these Rules of Court are concerned not only with prescribing fees payable to advocates but also with rules relating to the licensing of Advocates, the conduct of Advocates and the procedure of Councils of Discipline. The position is then that the draftsman of the Advocates' Ordinance, having in Section 21 embodied the application of the Rules of October 1, 1918, and in Section 22 made further reference to this same scale, appears to have forgotten that he had done so when he reached Section 28 and included in it a repeal of the Rules without any saving of the scale of fees. As is said on page 407 of Maxwell on the Interpretation of Statutes: "Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskifulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

In the present case there is clearly a repugnance between Section 28 on the one hand and Sections 21 and 22 on the other, which can only be avoided by interpreting the repeal in Section 28 as not covering the scale of advocates fees prescribed in the Rules of October 1, 1918. This being so, we come to the other point.

Section 19 of the Advocates Ordinance 1922 does not go further than to lay it down that an agreement between advocates and clients "shall only be enforced upon order of the Court before which the action or proceeding took place." In the present case there was no agreement, and the amount involved was within the ordinary civil jurisdiction of a Magistrate.

We, therefore, hold that there was nothing in Section 19 of the Ordinance which would require the fee to be claimed only in the District Court in which the advocate appeared for the Respondent. This being so, we remit the case to the Magistrate's Court to give judgment in accordance with the scale contained in the Rules of October 1, 1918, with £P. 2 advocate's fee and costs.

Delivered the 4th day of October, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 189/33.

BEFORE:
The Senior Puisne Judge, Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Heselschwerdt Brothers — APPELLANTS.

vs

Jacob Iffland — RESPONDENT.

Jurisdiction of Magistrate — Claim under LP.100. — Sec. 1 (d), Magistrates' Courts Jurisdiction Ordinance, 1924 — Abandonment of excess to come within jurisdiction of Magistrate.

Appeal from a judgment of the District Court of Jerusalem dated August 23rd, 1934, setting aside the decision of the Magistrate on the ground that the Magistrate had no jurisdiction to hear the claim. Appeal was by leave granted on the following point of law: "Whether, when a claim for work done (as in this case) is on the face of it under LP.100 and it later on appears during the hearing that the claim is really more than LP.100 and the Plaintiff for some reason chooses to abide by his original claim, the case is one within the Magistrate's Court's jurisdiction irrespective of the Defendant's consent, and whether this depends on the kind of claim, i.e. that when the claim is based upon a document such as a promissory note or a bill, the Plaintiff is estopped from varying the sum stated on the face of the document."

JUDGMENT.

The amount claimed by the Appellants was LP.98.011.

In accordance with Section 1 (d) of the Magistrates' Courts Jurisdiction Ordinance, 1924, as amended by the Magistrates' Courts Jurisdiction (Amendment) Ordinance, 1930, Section 2, this claim is within the jurisdiction of a Magistrate's Court. The fact that on the evidence in support of the claim the Plaintiff might recover an amount exceeding LP.100. is immaterial.

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

Costs will follow the event.

Delivered the 13th day of December, 1934.

MAINTENANCE—

SEE ALIMONY AND MAINTENANCE.

MARRIAGE AND DIVORCE.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 34/24.

BEFORE:

The Acting Chief Justice, Khayat, J. and Abdel Hadi, J.

IN THE CASE OF:

Nabiha Tanios Haddad — APPELLANT.

VS

Issa Kattan — RESPONDENT

Agreement to marry — Breach of promise of marriage — Action for recovery of gifts given in consideration of a promise of marriage which had been broken off — General rule as to gift — Invariable custom with force of law.

JUDGMENT.

The District Court has ordered that the Appellant should give back to the Respondent certain articles which were given to her by him in view of a promise of marriage which has been broken off.

The general rule is that a gift of which delivery has been made is the property of the donee.

In order to take the present case out of the operation of that general rule, it must be proved to the Court that there is in the locality and the social class to which the parties belong a custom, so invariable as to have the force of Law, that in the event of an agreement to marry being broken, gifts are returned.

If the existence of such a custom is proved, it may be necessary for the Court to determine whether it is dependant upon the question of which of the parties has put an end to the agreement: and if so, to decide the issue whether or not the agreement was determined by the Appellant.

The judgment of the District Court is set aside, and the case remitted. Costs to follow the event.

Delivered the 29th day of March, 1926.

In the Special Tribunal.

S.T. No. 4/25.

BEFORE:

The Chief Justice and the Senior British Judge.

IN THE CASE OF:

Nabiha T. Haddad — APPELLANT.

vs

Issa Kattan — RESPONDENT.

Verbal contract of marriage — Marriage between persons of different Religious Communities — Proof that marriage was in accordance with rules of Religious Community.

JUDGMENT.

In this case the contract of marriage is alleged to have been made verbally between two persons, one of the Latin Community and the other of the Community of the English Church. There is nothing in the contract as presented to us to show that the marriage contemplated was a marriage of a religious nature according to the rules of the Latin Church, or made with any reform to Ecclesiastical rule of betrothal of the Latin Church.

In presence.

Given the 9th day of October, 1925.

BEFORE:

The Chief Justice of Palestine.

IN THE MATTER OF: An application under Section 55 of the Palestine Order-in-Council, 1922 to determine disputed jurisdiction.

IN THE CASE OF:

Selim Khayat — PETITIONER.

vs

Marie Khayat — RESPONDENT.

Change of religion under Ottoman law — Liabilities incurred in marriage contract — Jurisdiction of Religious Court to make order for alimony — Order for imprisonment made by Execution Officer for non-payment of alimony — Marriage of Melchite Church indissoluble — Avoidance of contractual obligations by change of religion — Jurisdiction of Chief Justice under Art. 55, Palestine Order-in-Council, 1922, in actions of personal status involving persons of different Religious Communities.

JUDGMENT OF THE CHIEF JUSTICE.

This is an application under Clause 55 of the Palestine Order-in-Council, 1922, for a decision as to whether an Orthodox or Melkite Religious Court should have jurisdiction to hear an action for alimony brought by the Respondent Marie Khayat against the Petitioner Selim Khayat.

Petitioner and Respondent were married in the Greek Catholic Church at Jisin near Tyre in 1897, he being a young man and she a child of about 12 years old, according to Petitioner's account, but older according to her account. There is a conflict of evidence as to whether Petitioner was at that time a member of the Orthodox or Greek Catholic Community known as the Melchite Church, but I am satisfied that both parties were then Greek Catholics.

It is stated by the Petitioner that in the following year both parties went before a court of the Orthodox Church at Acre, on the petition of the husband for a dissolution of marriage, that the wife attended and consented to a decree dissolving the marriage. There is no judgment, no register or any official entry being produced to prove the above, but I am assured that all the records of the Orthodox Church were removed or destroyed by the Turks during the war. No copy, official or otherwise, has been shown, but parol evidence has been given to the effect that such judgment was given. It is also urged that the Petitioner was remarried in the Orthodox Church in 1901 and the marriage would not have taken place unless the priest who performed it had been satisfied that the first marriage had been dissolved. We may assume that the priest who performed the ceremony of the second marriage was either ignorant of the first, or believed it to have been dissolved. The Respondent denies that she was ever present in a court of the Orthodox Church or ever consented to a dissolution of her marriage, or received any copy of such judgment. She produced three letters which she swears she received from her

husband, two in 1899 and one in 1900. In the first two he speaks as a husband to his wife, alluding to plans for their common future; in the last he breaks with her altogether. In none does he refer to a dissolution of their marriage. The Petitioner claimed that the letters are not his, and a committee of experts was appointed to examine the letters for the purpose of deciding whether they are in the Petitioner's handwriting. The report although in favour of authenticity did not appear sufficiently conclusive but I am informed by the learned judge who presided at that time, that the opinion of the committee was that the letters were in the Petitioner's handwriting and that this was the opinion they intended to convey.

In no document written before 1923 and produced before me is it asserted that there had been a dissolution of the first marriage. It was asserted when the present dispute arose in 1923 owing to a second order for alimony being made, by a Melchite Court. In no document dated earlier than 1923 do we find an assertion that the Petitioner has changed his religion at an earlier date than that of his second marriage. Petitioner stated in his evidence that he changed his religion when he became a dragoman of the Russian Consulate which would make it appear that Petitioner and Respondent were both Melchites when the dissolution of their marriage is said to have been decreed by the Orthodox court in 1898. The Petitioner is stated to have been re-married in the Orthodox Church in 1901. The date of the second marriage is based, so far as documentary evidence is concerned, on a certificate made not in 1901 but in 1923 relying on an older certificate dated 1908 which is about the time when the Petitioner was pressed by the Execution Officer for payment under a first alimony order made in 1905. It was in the same year that we first hear of his having changed his religion and having made a second marriage in 1901.

Although at an early stage in these proceedings I heard evidence on the issue of fact as to whether the Respondent had submitted to that jurisdiction, I am however now of opinion that it would be inadvisable to make any finding of fact on that issue: firstly, because such finding would be a judgment in a matter of personal status within the exclusive jurisdiction of a Religious Court, although a civil court might deal with such a question as incidental to a main issue; and secondly, because in the absence of any official record of the judgment it would be in my opinion unsatisfactory to decide the fact of a divorce in reliance on conflicting evidence of such a nature that I might be reduced to giving a decision grounding on the burden of proof.

Of one fact I am satisfied, and that is that both parties were at the time of their marriage members of the Melchite Church. The Khayat family is of Melchite origin and although the date of the Petitioner's change of religion is a matter of dispute, I am confident that in 1897 that change had not taken place.

In 1905 the Respondent sued the Petitioner before a court of the Melchite Church at Haifa and obtained a decree of alimony at the rate of two Napoleons a month. The Petitioner declares that he objected to the jurisdiction and refused to attend the court. According to the statement in the judgment, he was present and objected to living with his wife, but made no objection to the jurisdiction, nor asserted that the marriage in question had been dissolved or that he had married a second wife. Petitioner received in 1907 an order from the Melchite Court dated in July, 1905. He objected on the ground that he was a member of the Orthodox Church and not answerable to a Melchite Court. There had already been correspondence between the President of the Court of First Instance and the Orthodox authorities on the above subject and on 8th May, 1322 (1906) the Head of the Orthodox Community of Haifa had written to say that Petitioner had been registered as a member of their Community two years before. This did not satisfy the Execution Officer and he caused an enquiry to be made of the Census Officer of Haifa who stated in July, 1908, that Petitioner had changed his religion on 11th October, 1321 (24th October, 1905).

In the same year 1908 the Orthodox Archimandrite of Haifa gave a certificate in which the direct question appears to be avoided as to when Petitioner had changed his religion, but he is stated to be a member of the Orthodox Community and to have married a wife of that Community on 14th August, 1901, and to have had his daughter baptised in that Church in 1905. With regard to the last statement there is a declaration by the Melchite Archbishop of Acre made in July last, when Petitioner presented himself in 1905 as a Catholic and asked that his daughter, the child of Saada, his second wife, might be baptised in the Melchite Church. The Archbishop says that he refused to allow the parents to be present at the baptism as he regarded their union as illegitimate, and that Petitioner gave up the idea of the baptism in the Melchite Church.

In 1911 the Execution Officer made an order against Petitioner for 91 days' imprisonment for non-payment of money due under the judgment of alimony. The Order states that the Execution Officer has no right to question the validity of judgments presented

for execution, and then proceeds to discuss the question of the religion of the Petitioner when the judgment was made in 1905. The President of the Court of First Instance acting as Execution Officer refers to a correspondence between the Execution Office and the Russian Consulate in which reference was made to a letter from the head of the Orthodox Community written in 1908 which stated that the Petitioner became orthodox in 1901 when he married his second wife. The President in his order compares this with a letter mentioned above in which the head of the Orthodox community stated in May, 1322, that the change took place "two years ago" which would bring the date to 1904. The order goes on to say that the only official source in such a matter is the census which dates the change of religion as 11th October, 1321, (24th October, 1905) whereas the judgment of alimony was made on 7th June, 1321 (20th June 1905). The President was of opinion that the change of religion had taken place after the judgment, and he made his order accordingly. The order of the Execution Officer seems to assume that had the change of religion taken place before the judgment it would have been made without jurisdiction. In 1914 when, according to Petitioner he had been deported, the Respondent obtained an execution against some property of his, which she herself bought in the action for LT.100.

Until the present year no document professing to be authentic dated the change of religion earlier than 1901. In the present year when the question had become, as to speak, acute, we have a mazbata dated the 19th June, 1923, by the head of the Orthodox Church Community at Haifa and other persons that petitioner was married to Saada his second wife 22 years ago, three years after the dissolution of his previous marriage, and a statement dated the 18th May, 1923, from the Orthodox Archimandrite of Haifa to the effect that Petitioner joined the Orthodox Church at Haifa in 1895.

In 1913 a judgment of the Orthodox Church purported to set aside the alimony judgment of the Melchite Church on the ground that the tribunal of one religious community has jurisdiction only over persons of that Community and that the Petitioner was at the time of the judgment a member of the Orthodox Church. In this judgment the date of the change of religion appears to be based on a statement that he had contracted a valid marriage in 1901. Nothing is said about the dissolution of the first marriage having been decreed.

In May of the present year the Melchite Religious Court at Haifa made a fresh order increasing the alimony to LE.15 a month and execution was ordered by the President of the District Court. It was on account of that order that the present application was made.

The elucidation of this case has been aided by the assistance of learned assessors of both churches who gave their opinions on the question put to them with precision. The Melchite view of the marriage is as indissoluble, and although under certain circumstances a marriage may be declared void on grounds which render it ab initio invalid yet once a valid marriage has been contracted, it cannot be dissolved by any act of the parties concerned nor by the judgment of an ecclesiastical court, even that of the church concerned. It is regarded not merely as a contract between the parties who agree to the marriage but as sacramental obligation, and in this the Orthodox Church agrees, but holds itself entitled to grant divorce on certain grounds, while the Roman Church regards the obligation as of its nature indissoluble except by death of one of the parties. If it were found beyond question that the young girl was, as the Petitioner and his witnesses assert, taken by her father before the Religious Court of the Orthodox Church that consent would have no effect on her obligation of her marriage and she would be unable to contract a second marriage so long as she remained a member of the Melchite Church. Unless she is content to sever the religious ties of a lifetime and to change her religion in order to obtain a divorce, she is unable to remarry and remains tied by the law of her religion to a husband who has adopted another Church and another wife.

While the Melchite view is that no Court of any Church can dissolve a marriage, the Orthodox claims jurisdiction to dissolve a marriage when the parties consent although one of the parties may be of another community. The Orthodox Assessor volunteered this statement: "When two persons go before a court whether Melchite or Orthodox and accept jurisdiction, the decision of the court will be decisive. It is a question of jurisdiction of theory of marriage". I cannot do better than quote in extent the answers of the learned assessors to two questions in order to show what are the views of the churches concerned. The questions and answers are as follows:

QUESTIONS: Supposing the Orthodox Church has given a decree of dissolution of marriage valid according to its valid law will the Melchite Church give a decree of alimony to the wife who

consented to dissolution and against the husband who is not a Melchite but an Orthodox.

ANSWERS: MELCHITE ASSESSOR. The Melchite Church is always competent, if she asks our jurisdiction, because the marriage contract before the Melchite church retains all its validity and all that flows from the marriage is within the jurisdiction of the Church. When the husband was married in the Melchite Church he accepted all the consequences. It makes no difference whether the woman consented to the dissolution or not.

ORTHODOX ASSESSOR. The question of alimony is closely allied to that of marriage and its dissolution, and follows the dissolution. The Court which issued a decree of dissolution has exclusive jurisdiction to give or refuse alimony. No other Church would have competence.

QUESTION: Suppose no dissolution of marriage took place but the husband became an Orthodox. Would he still remain subject to the Melchite Church if his wife sued him for alimony in that Church?

ANSWERS: ORTHODOX ASSESSOR. If he accepted the jurisdiction the decree would be enforceable, but not if he disputed the jurisdiction.

MELCHITE ASSESSOR. The rule of marriage cannot be modified by one or other party. A change of religion does not alter the principle of marriage, provided both consented to the marriage. Otherwise there would be no respect for the contract of marriage law which 'could be avoided by changing his religion.

We have little information as to what view any civil courts would have taken in this matter, but I am informed by the advocate of the Petitioner that there is a decision of the Court of Cassation which goes so far as to declare that a decree of alimony has no further effect against a man who was married as a Christian but has since become a Moslem. I do not consider myself bound to be guided by an isolated decision which purports to allow a person who has become liable under a judgment valid at the time it was made to defeat that judgment by consequently changing his religion.

We come now to consider what is the jurisdiction of the Chief Justice. According to Article 55 of the Palestine Order in Council, it arises when an action of personal status involves persons of different religious communities.

The general rules established by Article 54 give the religious court of a Christian Community jurisdiction in alimony over members of the Community. If that rule were to be applied exclusively, and it was intended that in no case could a religious court exercise jurisdiction except in a case where the defendant was of the same Community, there would be no need for Clause 55. The addition of the Clause is intended to apply to cases in which it would be unjust to apply the law of the Defendant's community in deciding the rights of the Plaintiff. It was in my opinion the intention of the Privy Council not to interfere in the purely religious questions arising in Christian Communities, but to assert a certain independence on behalf of the civil administration when it became a question of which court should be recognised as competent in a case where a judgment is to have a civil value and be given validity in a civil court or to be executed by a civil authority.

A man may be validly married in the Orthodox Church and his children legitimate according to the view taken by that Community, while according to the view of a community to which he formerly belonged he may be regarded as living in concubinage and his children illegitimate. That state of affairs naturally arises in a country where a marriage is regulated solely by the religious laws of different communities living side by side, where a man may pass from one community to another, from one order of marriage laws to another.

What really matters to a man is the opinion of his own Community, and the Order-in-Council has nothing to say to this. What also really matters to a man is pecuniary obligation arising out of marriage and when it comes to recognising and enforcing this the Order-in-Council has something to say, and to that end has charged the Chief Justice with the duty of deciding which court shall exercise jurisdiction when an action involves parties of different religious communities.

In this case I have to decide whether the Respondent who was married to the Petitioner in the Melchite Church and who has always remained a member of that Community may sue him for alimony before a Melchite Religious Court, or whether she must follow him to a court of the Orthodox Church which he has joined since the marriage. To put it in other words may the Petitioner by changing his religion and joining another Community oblige his wife to follow him to the court of that community, a court which

does not administer the law of their marriage contract, but a law to which she is a stranger?

The answer in my opinion is this—the Petitioner when he married in the Melchite Church submitted to the Melchite law of marriage with its attendant censequences. It was his own law and the law of the woman he married, and the obligations it entailed were known to him as matters of common knowledge in the Community. Were I to hold that he could avoid these obligations voluntarily contracted by joining another Community, such a decision would not be in accordance with the duty put upon me by the Order-in-Council of doing justice between persons of different religious communities.

The case set up by the Petitioner that the marriage was dissolved in 1898 by a decree of an Orthodox Religious Court and by consent of the woman, will be for him to set up, if he be so minded, before the court which judges his first wife's claim for alimony. I hold that a Religious Court of the Melchite Church should have that jurisdiction.

A question has been raised as to whether the Melchite Church is one of the Christian communities contemplated by the Order-in-Council. I am satisfied that this community was recognised during the Turkish Regime as one of the religious communities of the Ottoman Empire and that its authority in religious matters over its own members was admitted. It has lately been recognised by the present Government as one of the religious communities whose courts have jurisdiction in matters of wills and succession. In my opinion, there should be a list as indicating which are the Christian Communities within the meaning of Clause 54 of the Order-in-Council. I have no doubt that the Melchite is one of the recognised Communities for the purpose of my present jurisdiction.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 22/29.

BEFORE:

Baker, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Hanna Odeh El Hassan

Priest Elias Hanna Rizk — RESPONDENTS.

Failure of priest to apply for licence to celebrate marriage — Effect of invalid marriage on misdemeanour involved in such marriage.

JUDGMENT.

The Court below based their judgment on evidence of one Bishop Militian who stated that there was no legal marriage in that the proper religious rites had not been performed. The Court, finding as a fact that there was no legal marriage and that accordingly a licence was not necessary, acquitted the accused.

Bishop Militian in his evidence stated that the second accused had been tried by the Ecclesiastical Court upon a complaint that the accused celebrated the marriage of a Latin already married and that the Ecclesiastical Court found that the act of the priest was illegal in that he had not applied for a licence to celebrate the said marriage.

It is not relevant to the issue whether a Religious Court considered a ceremony was actually a legal marriage or not, but it is for the Court to decide whether the ceremony purported to be a marriage in the opinion of the contracting parties and the witnesses present thereat. Elias El Hassan in his evidence states that he was of opinion that he was witnessing a marriage ceremony. The evidence of the other witnesses to the ceremony does not appear to have been heard.

We are satisfied that the Article must be interpreted to mean any form of marriage and the appeal is therefore allowed, and the judgment of the District Court quashed and the case returned to them for the Court to hear evidence of the witnesses to the ceremony particularly the contracting parties and their parents, and to make a finding as to whether the ceremony performed purported to be a marriage ceremony, and to give judgment accordingly.

Given the 7th day of May, 1929.

In the District Court of Haifa.

C. D. C. Ha. No. 52/29.

BEFORE:

Litt, J. and Hasna, J.

IN THE CASE OF:

Miss Alice Baba — APPELLANT.

vs

Shukri Yussif Embariki — RESPONDENT.

Promise to marry held to be civil contract and not matter of personal status—Jurisdiction of Religious Court in case of breach of promise to marry — Damages awarded for breach of promise to marry.

INTERLOCUTORY JUDGMENT.

The Court is of opinion that a promise to marry is merely a civil contract and as such is not a matter of personal status nor within the jurisdiction exclusive or otherwise of the Religious Court.

The Court is fully seised of jurisdiction in cases arising out of civil contracts and accordingly has jurisdiction in this case.

As regards the allegation made by the defence that an action has been lodged by Plaintiff in the Religious Court, the Court remarks jurisdiction, but that action was not an action for breach of contract at all and therefore it does not concern us.

Delivered the 8th day of July, 1929.

FINAL JUDGMENT.

The Court being satisfied that the Defendant has broken his contract to marry the Plaintiff without just reason, therefore gives judgment for the Plaintiff and assesses the damages for the wounded feelings of the Plaintiff at £P.25.

The Court accordingly gives judgment for this amount with costs and advocate's fee £P.5.

Judgment in presence, given the 15th day of July, 1929.

In the Special Tribunal.

S.T. No. 1/30.

BEFORE:

The Chief Justice, Baker, J. and Mgr. Barlassina, Latin Patriarch.

IN THE CASE OF:

Dr. Francis Khayat — PETITIONER.

vs

Mrs. Victoria Beyrouti for N. Beyrouti's heirs, Chief Execution Officer, Jaffa — RESPONDENTS.

Promissory note given by husband to wife in lieu of gifts promissed before marriage—Endorsement of note to third person—Settlement between husband and wife as matter of personal status—Exclusive jurisdiction of Ecclesiastical Courts—Negotiability of promissory note in Ottoman Law—Articles 51, 55, Palestine Order-in-Council, 1922—Res judicata—Articles 70, 93, 94, 145 Commercial Code—Limitation of functions of Special Tribunal—Section 8 (1) Courts Ordinance, 1924—Court of Special Tribunal not to act as Appellate Court.

JUDGMENT OF Mr. JUSTICE McDONNELL.

We are concerned in this case with a document which, on the 6th September, 1924, Dr. Khayat who was married to Renée, daughter of Nejib Bey Beyrouti, executed in the following terms:—

> "A 10 mois de date je paierai à l'ordre de ma femme Renée fille de Mr. Nejib Beyrouti la somme de huit cent livres Egyptiennes représentant la contrevaleur des bijoux que je me suits engagé à lui donner avant mon mariage."

On the 20th October, 1924, the wife Renée, who in consequence of material differences was endeavouring to obtain separation from her husband, endorsed this instrument in favour of her father, and he subsequently brought an action against Dr. Khayat in the District Court of Jaffa to recover the amount mentioned in the instrument.

Dr. Khayat in the District Court raised the objection that the Court had no jurisdiction to hear the case, as it arose out of marriage and was therefore within the jurisdiction of the Ecclesiastical Court, and a further objection was raised that the instrument, not having been given in respect of a commercial transaction, was

not negotiable, and that hence he (Dr. Khayat) was entitled to set up against the indorsee any defence that he could have set up against the indorser.

The Court held that the document, as a promissory note, was good as a negotiable instrument, and that hence the only course open to Dr. Khayat was to administer an oath to Nejib Bey Beyrouti that he was a bona fide holder for value.

This oath he refused to administer and judgment was given against him on the 18th December, 1925.

An appeal was lodged by Dr. Khayat on the ground that the promissory note was given by way of gift, and hence could not be sued upon. This appeal was dismissed on the 17th February, 1926.

On the execution of that judgment has arisen the question which this present Tribunal has to decide, which is framed in the following terms:—

> "Is the promissory note given by the Petitioner Dr. Khayat to his wife Renée of such a nature that any claim to enforce it, whether by Renée or anyone claiming through or in trust for her, is a matter of personal status lying within the exclusive jurisdiction of the Ecclesiastical Court or not?"

In my opinion the instrument in question having passed into the hands of a third party, a claim in respect of it cannot be within the jurisdiction of a Religious Court, as it is no longer a matter of personal status arising from the relation between husband and wife within the definition of Article 51 of the Palestine Order-in-Council by which "personal status" is defined as meaning, inter alia, "suits regarding marriage."

I have had the benefit of regarding His Beatitude the Latin Patriarch's judgment in this case, and it is necessary that I should add some comments on the opinions which he has expressed therein.

His decision is based upon the view that the instrument with which we are concerned is not a promissory note, and that therefore it was not negotiable and could not legally pass into the hands of a third party, and that in consequence, being an instrument affecting only Dr. Khayat who made it and his wife in whose favour it was drawn, it remains a matter of personal status inasmuch as it had for its object the completion of a promise of a gift to his future wife made by Dr. Khayat in contemplation of his marriage to her.

With all respect to His Beatitude, I am bound to say that in my opinion he is begging the question which alone this Tribunal is competent to decide, namely, not "what is the character of the instrument concerned", but, "is a claim by Renée or anyone claiming through her on this promissory note one of personal status lying within the jurisdiction of the Ecclesiastical Court or not."

The fact that the case stated for this Tribunal runs as follows:—

> "Is the promissory note . . . . . of such a nature that any claim to enforce it . . . . . is a matter of personal status."

does not entitle us to discuss the nature of the instrument in question. We can only decide on the question as to which Court has jurisdiction.

The fact that it is a promissory note is res judicata.

In the District Court of Jaffa the question as to whether an action on this instrument should not properly be taken in the Ecclesiastical Court was argued and the District Court held that it had itself jurisdiction in the matter (see page 7 of the Note of proceedings in the District Court).

The following is an extract of the judgment given by the District Court of Jaffa:—

> "The Bill contained the five requisite conditions to a promissory note prescribed by Article 145 of the Commercial Code, and as such was negotiable, vide Arts. 70, 93 and 94 of the Commercial Code."

The following were the grounds of appeal in the District Court filed on the 18th November, 1925:—

> 1. That the litigants are not the proper parties due to the irregular endorsement of the Bill.
>
> 2. Dr. Khayat can make any objection against the endorsee which he is entitled to make against the endorser.

On the 17th February, 1926, the Supreme Court sitting as a Court of Appeal confirmed the judgment of the District Court.

The functions of the Special Tribunal are expressly limited by Article 55 of the Palestine Order-in-Council, which runs as follows:—

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

The constitution of the Special Tribunal was prescribed by Section 8 (1) of the Courts Ordinance, 1924.

It will be seen that, quite apart from the express terms of the case stated for this Tribunal, our jurisdiction is confined to deciding whether or not the action on this instrument is one of personal status within the exclusive jurisdiction of the Ecclesiastical Court.

It would be ultra vires for us to discuss the nature of the instrument in question.

The District Court of Jaffa held that the instrument was a promissory note and that decision was upheld by the Court of Appeal. For us to express any opinion on that point would be not only to pass outside the terms of the case stated upon which alone we have to adjudicate, but it would be to set up the Special Tribunal as an Appellate Court from the Court of Appeal, which it most certainly has no right to be.

For these reasons, the answer to the question propounded must be in the negative.

Judgment is therefore given for the Respondent with £P.2 advocate's fee and costs.

Mr. JUSTICE BAKER: I concur.

JUDGMENT OF Mgr. BARLASSINA, LATIN PATRIARCH.

The question proposed for the consideration of the Special Tribunal is as follows:—

"Is the promissory note given by the Petitioner (Dr. Khayat) to his wife Renée of such a nature that any claims to enforce it, whether by Renée or anyone claiming through or for her, is a matter of personal status lying within the jurisdiction of the Ecclesiastical Court or not?"

The case takes its rise from the following document which Dr. F. Khayat gave his wife Renée Beyrouti on the 6th of September, 1924:—

"A 10 mois de date je paierai à l'ordre de ma femme Renée fille de M. Nejib Beirouti, la somme de huit cent livres Egyptiennes representant la contravaleur des bijoux que je me suis engagé à lui donner avant mon mariage."

His Honour in his judgment says that: "It is not what is the character of the instrument concerned" which is the question to be decided by this Tribunal. I would therefore beg to submit for consideration the following points in order to support my opinion:—

1. First of all, the restriction made by His Honour would seem to change the meaning of the thesis proposed to the Special Tribunal, which runs: "Is the promissory note . . . of such a nature that any claim, etc."; that means in other words: "The Special Tribunal, having in mind the nature of this note, must decide whether . . . ". otherwise, for what purpose has the phrase "such a nature" been brought out?

Therefore the nature of this instrument not only is not to be excluded from the consideration of the Special Tribunal, but on the contrary it has been put as the ground on which the judgment must be based: "is the note of such a nature that . . .?". Consequently we must decide of what nature this instrument is, to be able to come to the conclusion, within the jurisdiction of what Court lies the claim of those who base it on this instrument.

2. Much more, I venture to support my opinion when read in the same statement made by His Honour: "We are concerned with a document," that means, we must study it; and "our jurisdiction is confined to deciding whether or not the action on this instrument is one of personal status within the jurisdiction . . ." Because, to decide, whether an instrument is liable of any action, its nature must before be carefully considered.

3. Nevertheless, if we have to put aside the consideration of the legal nature of this instrument we must then consider its object, which is the payment of the sum for which the "claim of Renée or anyone else" is raised. In fact this claim must necessarily be based on a right; but such a right can only exist either in the legal form or in the nature of the instrument (which, His Honour says, to be ultra vires of the Special Tribunal) or in its content.

Now, if we speak of the right or less of Renée Beyrouti on

the sum of £E.800, we must admit that this is a question exclusively lying within the jurisdiction of the Ecclesiastical Court.

The reason is that this sum is closely connected with the question of marriage, and it does not escape His Honour that the Court of Jaffa accepted the sentence of the "Romana Rota" to proceed to the execution previously suspended in waiting for the same sentence.

Therefore, my conclusion is:

Any claim made by Renée Beyrouti or anyone through or in trust for her, for the payment to her of £E.800 on the part of Dr. F. Khayat, is a matter lying within the exclusive jurisdiction of the Ecclesiastical Court, and the instrument in question does not alter in any way the juridicial situation, purely being an engagement given in writing by Dr. F. Khayat to support his obligation.

Delivered the 9th day of February, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 4/31.

BEFORE:

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

IN THE CASE OF:

Salkind Stalbow
Mary Stalbow
Edith Stalbow — APPELLANTS.

vs

Bernard Carson — RESPONDENT.

Action for refund of monies paid by parents of wife as dowry — Settlement of interest in dowry — Breach of contractual obligation towards two persons — Actions by one of two persons jointly named as one party to contract — Fact of blood relationship immaterial in contractual relations — Application of English law under Art. 64, Palestine Order-in-Council, 1922 — Suit regarding marriage or divorce — Return of funds entrusted for certain purpose after purchase has been fulfilled.

Appeal from the judgment of the District Court of Jaffa, dated the 17th June, 1930.

JUDGMENT.

The first and second Appellants in this case are the parents of the third Appellant. They jointly brought the present action against the Respondent who is the father of the husband of the third Appellant, the claim being for the refund of money paid by cheque by the third Appellant and her husband to the Respondent, to be used by him for the erection of a building which was to be registered in the name of the married couple, the third Appellant, and her husband.

Up to the time when the action was brought, the house, although completed, was not transferred to the name of the married couple. The funds paid out to Respondent for the above mentioned purpose were deposited in a bank in the name of the married couple by the parents of the wife, namely, the first and second Appellants, who however, do not claim the refund of the money to themselves, but ask for judgment in favour of their daughter only.

The Court below held that this was a case concerning the settlement of interest in dowry during the continuance of the marriage state, and that such a case cannot be heard unless both parties consent.

In order to uphold this view two points have to be established; first whether this case in fact concerns the settlement of interest in dowry, and if so, whether under the law applicable by this Court the consent of both parties to the marriage is required.

In my view neither of these questions can be answered in the affirmative.

So far as the Respondent is concerned, there is certainly no question of settlement of interest in dowry. To take the view most favourable to him, he was entrusted by the married couple with the duty of doing a certain thing for them, and there is no reason why one of the couple should not be able to sue him if he or she thinks he has not done what he should have done under some sort of contractual obligation. The fact that the Respondent is the father of one of the couple does not alter his legal relation towards them. His position is the same as if he were a total stranger.

But even if it were a case of settlement of interest in dowry, I know of no authority under Palestine law under which both parties to the marriage must consent. The District Court

may have had in mind Article 64 of the Palestine Order-in-Coucil, 1922. But in order to apply English Law which is the personal law of the parties, their nationality being British, the case must first be brought under the definition of personal status in Article 51 of the Order-in-Council, and I fail to see how a claim for money entrusted by a married couple to the father of one of them can be regarded as a suit regarding marriage or divorce any more than could a claim for the return of funds deposited by the married couple, let us say, with one of the banks.

The judgment of the District Court is therefore, by a majority set aside and the case remitted for completion.

In trying the case on the merits, the Court will have to consider the fact that the moneys claimed from the Respondent have been moneys deposited in the bank and not in the name of the the third Appellant only, and also the fact that since the issue of judgment of the Court below the purpose for which the funds were entrusted has apparently been fulfilled.

Costs to follow the event.

Delivered the 31st day of December, 1931.

In the High Court of Justice.

H.C. No. 70/31.

BEFORE:

The Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:

Eliezer Miller — PETITIONER.

VS

The Chief Execution Officer, Jaffa.

Rivka Miller — RESPONDENT.

Judgment for alimony — Divorce sanctioned on basis of "heter"— Execution of judgment of Religious Courts — Payment of ketuba to divorced Jewish woman — Jurisdiction of President of District Court to order execution of judgment of Rabbinical Court — Sec. 18, Courts Ordinance, 1924 — Art. 56, Palestine Order-in-Council, 1922 — Liability of husband under Rabbinical law to pay alimony to contumacious wife — Question of procedure before Rabbinical Courts within competence of Rabbinical Court of Appeal — Re-opening of case by Rabbinical Court after delivery of judgment — Res judicata — Court of Chief Rabbinate as supreme authority on question of Jewish religious law.

Application for an order to issue to the first Respondent directing him to show cause why he should not refrain from executing the judgment of the Rabbinical Court of Appeal, Jerusalem, dated the 29th June, 1931. (14th Tamuz, 5691).

JUDGMENT.

The Petitioner Eliezer Miller is praying for an Order to the first Respondent, the Chief Execution Officer in the District Court of Jaffa to refrain from executing a judgment dated 14th Tamuz, 5691, (29th June, 1931) of the Rabbinical Court of the Chief Rabbinate of Jerusalem.

The Petitioner alleges that by the judgment, no copy of which is before this Court, he was ordered to pay the sum of £P.250 to the second Respondent Rivka Miller, and until payment of such sum to pay her by way of alimony £P.3 per month.

The judgment in question was given on appeal from a judgment of the Rabbinical Court of Petach Tikvah dated 24 Iyar, 5691 (11th May, 1931) whereby the Petitioner was ordered to pay to the second Respondent the sum of £P.100 and costs, but an order for the payment of alimony was refused.

The Petitioner and the second Respondent were formerly husband and wife, but by a judgment given on the 16th December, 1929, the Rabbinical Court of Petach Tikvah sanctioned the divorce by the Petitioner of his wife upon the terms that he should pay her £P.50 as her ketuba.

A certificate of this divorce issued by the Rabbinical Office of Petach Tikvah, dated 22 Shevat, 5681 (9th February, 1931) has been filed, and also a certificate of the subsequent marriage of the Petitioner to another lady.

The first point taken by the Petitioner is that the jurisdiction of a President of a District Court to order execution of judgments is defined by the Order of the Officer Administering the Government made under Section 18 of the Courts Ordinance, 1924, and published in the Official Gazette No. 122 of 1st September, 1924; and that it follows that the President of the District Court has no jurisdiction to order execution of a judgment of a Rabbinical Court.

Article 56 of the Palestine Order-in-Council, 1922, directs that:—

> "The judgments of the Religious Courts shall be executed by the process and 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.

It follows that such judgments are still to be executed in the 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 Offiicer of the District Court.

The Petitioner further argues that as on the 11th May, 1931, when the Rabbinical Court of Petach Tikvah issued its later judgment, the marriage between him and the second Respondent had been dissolved, they were then strangers in Law; and accordingly that the Rabbinical Court of Petach Tikvah had no jurisdiction to make any order upon the Petitioner to pay any sum to the second Respondent.

The Petitioner further argues that as his divorce was sanctioned upon the basis of a "heter", whereby 100 Rabbis certified that the second Respondent was a contumacious wife, it follows that, by Rabbinical Law, the Petitioner is under no liability to make any payment to his wife upon divorce.

"With regard to the first of these points, it is to be noted that the judgment of the Rabbinical Court of Petach Tikah of 11th May, 1931, recites the earlier judgment of the Court whereby the divorce was sanctioned, and that a copy of the judgment had been issued for delivery to the second Respondent; and the Petitioner does not deny that the decree sanctioning the divorce was issued in the absence of the second Respondent.

The judgment of the 11th May, 1931, further recites, that the second Respondent has appeared before the Court and requested it to reconsider her case. That is to say, the proceedings in the Rabbinical Court of Petach Tikvah, which led to the issue of the judgment of the 11th May, 1931, were in the nature of what in civil procedure is known as on Opposition to a judgment given in absence.

We have no knowledge of the rules of procedure of Rabbinical Courts, but in the absence of any authority to that effect, we are unable to hold, as the Petitioner has asked us to do, that a judgment given in the absense of one of the parties precludes the Court from re-opening the case on the application of such party. Moreover, the question being one as to the rules of procedure in Rabbinical Courts, it was within the competence of the Rabbinical Court of Appeal.

We are, therefore, unable to hold, upon the evidence before us that the judgment of the Rabbinical Court of Petach Tikvah dated the 11th May, 1931, and the appellate judgment of the Court of the Chief Rabbinate of Jerusalem were given in respect of a matter which was res judicata.

The other question raised by the Petitioner is a matter of Jewish Law upon which the Court of the Chief Rabbinate of Jerusalem is the supreme authority in Palestine.

To ask this Court to hold that the judgment of the Chief Rabbinate should not be executed because it is contrary to the principles of Jewish Law, is to ask this Court to act as a Court of Appeal from the Court of the Chief Rabbinate upon a question of religious law. This is clearly a matter which is not within the jurisdiction of this Court.

In our view, therefore, on the evidence before us, the Petitioner has not made out a case for the issue of an order and his petition must be dismissed.

Delivered the 21st day of March, 1932.

In the High Court of Justice.

H.C. No. 87/32.

BEFORE:

The Senior Puisne Judge and Baker, J.

IN THE CASE OF:

Simha bint Moshe Yusef Khatib — PETITIONER.

vs

The Chief Execution Officer, Jerusalem

Hassan ed Din El Khatib — RESPONDENTS.

Wife ordered by Chief Execution Officer to return to house of her husband—Marriage of members of different communities—Validity ot marriage ceremony performed in accordance with rites of Community of husband—Change by minor of Religious Community—Procedure on change of community under Sections 3, 4, Change of Religious Community Ordinance, 1927—Proof of age by examination by medical practitioner.

JUDGMENT.

The Petitioner, Simha bint Moshe Yousef is applying to this Court to set aside an order of the Chief Execution Officer, Jerusalem, given on the 3rd of November, 1932, for the execution of a judgment of a Sharia Court of Jerusalem of the 30th August, 1932, whereby the Petitioner was ordered to return to live in the house of her husband, the Respondent, Hussam ed Din El Khatib.

The petition is based upon the allegation that the Petitioner was a member of the Jewish Community at the time of the marriage ceremony which was performed according to the Moslem rites alone, and that such ceremony was not binding upon the Petitioner.

The reply made by the Respondent is that, previous to the marriage ceremony, the Petitioner had become a member of the Moslem Community. This the Petitioner denies.

The marriage was solemnised on the 10th August, 1929.

On the 13th August, 1929, a certificate of registration under the Change of Religious Community Ordinance, 1927, was registered in the office of the District Commissioner, Jerusalem. The entry in the register of which a certified copy has been produced, states that the registration is made "in virtue of a certificate, Form A of 11.8.29, produced to me confirming that the above named person was accepted into the Moslem Community". The certificate Form A referred to has not been produced and the register does not show upon what date the Petitioner was received into the Moslem Community; but evidence has been given before this Court that the reception took place on the 10th August, 1929, before the marriage ceremony.

No evidence has been given to the contrary, and we hold that the ceremony of reception of the Petitioner into the Moslem Community was celebrated before the marriage.

Under Section 3 of the Change of Religious Community Ordinance, 1927, a person who desires legal effect to be given to a change of religious community, must obtain registration by the District Commissioner, but we hold that, upon such registration being made, legal effect is to be given to the change of community as from the date of reception.

The Petitioner, however, relies upon Section 4 of the Ordinance, which provides as follows:—

"No change of community of a person under the age of 18 years shall be deemed to have legal effect, unless the consent of the parent or guardian of such person has been obtained and is communicated to the District Commissioner. If there is doubt as to the age of the person, the District Commissioner of the District in which he resides, in consultation with the local religious authority of the community which the applicant desires to leave, shall decide the matter."

In the present case, the Petitioner maintains that on the 10th August, 1929, she had not attained the age of 18 years, and it is not suggested that her parents' consent to the change of community was obtained.

The Petitioner has given evidence in support of her application and has filed affidavits by two persons to the effect that they were neighbours of the Petitioner's parents and that the Petitioner was born in December, 1912.

To rebut this evidence, the Respondent relies upon a medical certificate which was lodged with the District Commissioner in support of the application for registration of the Petitioner's change of religious community. The medical practitioner, by whom this certificate was given, certified that he examined the Petitioner on the 10th August, 1929, and that she was then "about 20 years of age".

The Petitioner, upon whom the burden of proof lies, has not called any medical evidence to the contrary, nor has she applied that the medical practitioner by whom this certificate was given should be called for cross-examination.

On the evidence before us, therefore, we are not prepared to hold that the Petitioner was under the age of 18 years at the date of her reception into the Moslem Community. Consequently, we are not prepared to hold that the Petitioner had not validly changed her religious community before the celebration of the marriage between her and the Respondent. The question whether or not the marriage would have been valid if the Petitioner had not previously been received into the Moslem Community has not been argued, and we express no opinion upon it.

The Petition is dismissed with costs.

In the High Court of Justice.

H.C. No. 70/33.

BEFORE:

The Chief Justice and Frumkin, J.

IN THE CASE OF:

Barhum bint Ismir — APPELLANT.

vs

The Chief Execution Officer, Jerusalem

Ismir — RESPONDENTS.

Execution of judgment of Ecclesiastical Court — Validity of Order by Chief Execution Officer to forcibly return wife to husband — Return of wife effected through instrumentality of Police — Articles 11, 46, Law of Execution — Reference to opinion of Ottoman Commentator.

ORDER.

In this case we granted a rule nisi to the Petitioner who asked that the Chief Execution Officer of the District Court of Jerusalem should show cause why his order of November, 2, 1933, should not be set aside.

The order of the Chief Execution Officer, which was based on a judgment of the Latin Ecclesiastical Court of Jerusalem whereby the Petitioner was directed to obey her husband, ran as follows:

> "Decided to order the return of the wife to her husband through the instrumentality of the Police."

It is admitted that such orders compelling wives to go to their husbands have not infrequently been issued hitherto by Execution Officers, and it appears that the validity of such orders has not before been questioned in this Court.

The Respondent relies on Article 11 of the Law of Execution which provides that it is the duty of the Execution Officer to attach the cash and goods of a judgment debtor and to use force in the exercise of these powers. It would be a wide extension of the sense of this Article to say that it empowers force to be employed in returning a recalcitrant wife to her husband.

Article 46 on the other hand, which contemplates the handing over of a child, provides that the unsuccessful party in a suit for the custody of such child shall be imprisoned unless it is not in

his power to hand over the child, but in no way gives countenance to any practice of the child being taken away by force by the police and handed over by them to the proper guardian.

In the absence of any authority we must be guided by the observations of commentators.

Ahmed Rafiq, the author of a work on "The Execution Law, Theory and Practice" which was published in 1924, was for many years Execution Officer of the Courts in Constantinople. In his comments on Articles 42, 46, 47 and 48 of the Execution Law, he divides judgments as regards execution into three classes:—

(a) Judgments for the delivery of a certain thing;
(b) Judgments to do or refrain from doing a certain thing;
(c) Judgments for the collection of a certain amount of money.

After dealing with the first two classes of judgments, he says that a judgment requiring obedience, viz: a judgment imposing upon a wife the duty of obeying her husband, does not come within any of the two classes, but is one for the execution of which one has to rely on Article 42. Such a judgment, he goes on to say, is a judgment containing a warning to obey and therefore if the person adjudged against refuses to obey, such person must be brought before the Execution Officer and warned to comply with the judgment. With this the execution proceedings come to an end, and the person adjudged against, if a wife, loses her right to alimony, and as it would be outside the scope of the judgment, it is not allowable to send her by force to the person in whose favour the judgment is given.

He then refers to an opinion expressed by him in file No. 1879 36/930 of the Execution Office, Constantinople, and to the decision of the Chief Execution Officer, thereon, which ran as follows:—

> "The constitution and continuation of matrimony is based on mutual consent. Judgments calling for obedience in their essence and spirit consist of a Sharia warning to secure this aim, their legal consequence being to put an end to the obligation of the husband to support his wife in case of non-obedience. It is considered by me proper to act accordingly: but it has been the practice hitherto to execute such judgments by way of sending the wives to the house of their husbands by force. As the husband has no legal or Sharia right to keep his wife imprisoned in his house, to leave the wife in the

house of her husband would mean going back to the epoch of slavery and it is therefore impossible. On the other hand to restrict execution to one occasion (meaning, just to bring the wife to the house without forcing her to remain there) would not secure the object and moreover, as such procedure would amount to arbitrary and compulsory measures which brought no result, it is very questionable whether such procedure would even be in accordance with Sharia Law.

"Submitted for a ruling to serve as a basis in similar action". The quotation goes on

"The order of the Chief Execution Officer is as follows :

Execution proceedings in Sharia judgments the effect of which is to order obedience thereto come to an end by informing the person adjudged of the effect of the judgment. There being no express or implied provision in the judgment for delivery by force, it is ruled to act in accordance with the opinion stated above."

In the face of this opinion we are satisfied that, whatever may have been the practice in the past, there is no justification for the Chief Execution Officer to order that a wife be forcibly returned to her husband whether by the Police, as in this case, or otherwise and we make the Order absolute with £P.2 advocate's fee and costs.

MESHAA—

SEE ALSO LAND, LAND SETTLEMENT.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 57/25.

BEFORE :

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

IN THE CASE OF :

Hassan Ali Ayad and Others — APPELLANTS.

vs

Ahmad Muhammad Radwan and Others — RESPONDENTS.

Common lands of village registered in name of individuals — Custom of village — Manner of registration of common lands — Art. 8, Land Code.

JUDGMENT.

There is evidence on which the Land Court could find that all the land in dispute formed part of the common land of the village of Aslin, and was distributable, together with the unregistered land and other registered lands, according to the custom of the village.

The only question therefore is the form in which registration should be effected.

In view of the terms of Article 8 of the Land Code it is clear that registration cannot be in the names of all the villagers.

In our view the proper course is for each plot to remain registered in the name of the present registered owner, with an entry against each such plot that it is common land subject to the custom of the village of Aslin.

The judgment of the Land Court will be varied accordingly.

Costs to be paid by the Appellants.

Delivered the 29th day of March, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 121/26.

BEFORE:

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

IN THE CASE OF:

Mahmud Ahmad Salameh, and Others — APPELLANTS.

vs

Saleh Ibrahim Ismail — RESPONDENT.

Common lands or village — Disputed ownership of land — Custom of village — Possession of land for more than 10 years — Arts. 8, 20, Land Code — Admissibility of oral evidence against registered owner to prove that lands in his name are common land of village — Sec. 7 (2) Land Courts Ordinance, 1921 — Nature of meshaa tenure — Closure of competent Court as excuse to prevent running of prescription — Art. 16, Proclamation No. 42 of 24th June, 1918 — Application of principle that possession by one heir is possession by all heirs — Plea of adverse possession as between co-owners — Cultivation of land no proof of adverse possession — Manner of registration of common lands.

JUDGMENT.

In this action the Plaintiff Saleh Ibrahim Ismail, an inhabitant of the village of Beit Lid, claimed against Mahmud Ahmad Salameh and others that the tract of land known as Ard Ramleh Hannuneh, of which the Defendants or their predecessors in title are registered as owners, is common land of the village of Beit Lid, and by the custom of the village, is divisible annually for cultivation among all the adult male inhabitants.

The Land Court on the evidence before it has made the following findings:—

"1. That Ard Ramleh Hannuneh was held by the registered owners not as their own individual property but as Meshaa for the adult males of Beit Lid.

2. That for more than 10 years certain defined portions of Ard Ramleh Hannuneh known as (1) Khor Zutieh, (2) Ard el Sellaga, (3) Khor Abu Yehia, (4) Ard el Zahranieh (5) Ard el Ayun, (6) Ard el Sidr, (7) Ard Imm el Ikhrak, and (8) El Menawieh, have been in the exclusive and undisputed occupation of the Defendants Fuad and Farid Hamdallah Mahmud, Muhammad and Naser, sons of Ahmad Salameh, or some of them.

3. That the present number of the adult male inhabitants of Beit Lid is 275."

On these findings the Land Court has given judgment as follows:—

"We therefore declare that Ard Ramleh Hannuneh, except the portions known as (1) Khor Zutieh, (2) Ard el Sellaga, (3) Khor Abu Yehia, (4) Ard el Zahranieh, (5) Ard el Ayun, (6) Ard el Sidr, (7) Ard Imm el Ikhrak, (8) El Menawieh, is Mesha' for the adult male inhabitants of Beit Lid, and that the Plaintiff is entitled to one share out of 275 shares in the said lands (save as aforesaid):—And we order the Defendants not to interfere with the Plaintiff in the use and enjoyment of his said share.

And in accordance with Article 20 of the Land Code we dismiss the Plaintiff's claim as regards the portions of Ard Ramleh Hannuneh known as Khor Zutieh, Ard el Sellaga, Khor Abu Yehia, Ard el Zahranieh, Ard el Ayun, Ard el Sidr, Ard Imm el Ikhrak, Ard el Menawieh."

Against the judgment both sides have appealed.

With regard to the first finding of the Land Court, the objection has been taken that such a finding cannot be made against a registered title solely upon the evidence of witnesses, unsupported by written evidence. But the rule that under Section 7 (2) of the Land Courts Ordinance, 1921, witnesses can be heard to prove against the holder of a Kushan that the land registered in his name is common land of a village and that his registration is as a trustee for the villagers, was established in the case of Zeita village lands (L.A. 59/23), and applied in that of Aslin village lands (L.A. 57/25).

This forms one of the recognised exceptions to the general rule of which the case cited by the Defendants of Afifeh bint Elias, Rahmeh and Others v. Naim Jirius Abyad and Another (L.A. 137/23)[1] and the reported case of Faram Saleh Haddad v. Haj Abdel Wahid Sammar (L.A. 109/24)[2] are examples, that a formal transaction evidenced by registration cannot, in the absence of documentary evidence, be disproved by verbal evidence.

Against the first finding of the Land Court, it has further been argued by the Defendants that Meshaa for the adult males of a village is a form of tenure which is legally inadmissible, as the Law does not recognise the existence of village customs of this nature, with regard to cultivable land.

This Court has, however, already given effect to similar village customs in the above-cited cases of Zeita and Aslin villages; and no authority has been quoted either in those cases or in the present appeal for the view that a village custom governing the distribution of the common cultivable land of the village is contrary to law; though the intention of Article 8 of the Land Code may well have been to put an end to Meshaa holdings by inducing the co-owners to partition and register their separate titles.

The Court therefore has only to deal with the Plaintiff's appeal.

The Defendants Farid and Fuad are not villagers of Beit Lid. Hence possession by them is adverse to the Plaintiff's claim; and as the Land Court has found that they have been in possession for more 10 years of the piece of land known as Khor Zutieh, Ard el Sellaga and Khor Abu Yehia, they can rely, as to those lands, on Article 20 of the Land Code.

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[1] Ante, p. 764. [2] Ante, p. 771.

The Plaintiff argues that in calculating the period of limitation, allowance must be made for the time during the war when the Courts were closed: and that if that period be deducted less than 10 years have elapsed since the date when his right of action arose.

Closure of the competent Court, however, is not one of the excuses recognised by the Ottoman Law as to limitation of actions. Accordingly, when the Courts were reconstituted after the British Occupation, it was found necessary to make express provision for this matter, which was done by Article 16 of the Proclamation No. 42 of the 24th June, 1918.

It is doubtful whether the rule contained in that Article applies to proceedings in a Land Court constituted under the Palestine Order-in-Council, 1922, but that is not a point which has to be decided, or even if the rule applies, it does not assist the Plaintiff.

The Plaintiff's cause of action arose in March, 1914, so that his right of action would, under Article 20 of the Land Code, become barred in March, 1924.

At that date there had been a Land Court in existence for nearly three years, so that the provisions of Article 16 of the Proclamation, which afford relief only in a case where the term of limitation expired within the period when the Court was closed, have no application.

As against the Defendants Farid and Fuad the Plaintiff's appeal must be dismissed with costs.

The Defendants Mahmud, Muhammad and Naser, sons of Ahmad Salameh, however, are in a different position. They are inhabitants of Beit Lid, and as such are entitled to cultivate shares in the common land of the village. The Land Court has found that for more than 10 years they have had undisturbed possession of the portions of Ard Ramleh Hannuneh, known as Ard el Zahranieh, Ard el Ayun, Ard el Sidr, Ard Imm el Ikhrak and El Menawieh, and has held that by virtue of such possession they have a good defence to the Plaintiff's claim under Article 20 of the Land Code.

The Land Court has based its judgment with regard of these Defendants upon a rule of law which it has expressed as follows:—

> "It is clear that if a person who is entitled to an undivided share in land is in the exclusive possession of the

whole land or a part of it for more than 10 years, the title of his co-owners to their undivided shares either in the whole or in such part (as the case may be) will be barred by such possession, and the same law will apply if the person in possession is not a co-owner but a stranger; the Ottoman Law regards the co-owner who is in exclusive possession as agent for the other co-owners only in the case where all have inherited the premises in dispute from the same person."

The rule so stated appears to require qualification.

It is true that the principle that possession by one heir is possession by all heirs does not apply to co-owners whose title arises otherwise than by inheritance from a common ancestor.

It follows that one co-owner (who is not a co-heir) can set up adverse possession as a defence to a claim by another co-owner based on their common title.

But in order that such defence may be sustained, the possession by the Defendant must clearly be adverse to the title by co-ownership. Mere cultivation of the land, which might have been cultivation as a co-owner, is not sufficient to cause time to run in favour of the Defendant. Time will only run in his favour from the date of some act which implies a clear denial of the title by co-ownership.

In the present case there does not appear to have been any such denial of title until these proceedings were commenced.

It is alleged that the Defendants were cultivating an area in excess of their distributive share. But it has not been shown that the remainder of the common lands were insufficient for the needs of the other villagers, and there is evidence that the majority of the villagers of Beit Lid preferred to cultivate other common lands (known as the Eastern lands) which were nearer to the village.

The Defendants Mahmud, Muhammad and Naser, therefore, cannot make good their defence under Article 20 of the Land Code; nor, in the face of the Land Court's findings that Ard Ramleh Hannuneh was registered in the name of 20 persons as trustees for the general body of the villagers, can these Defendants make good their title by registration.

As against them, the Plaintiff's appeal must be allowed and the judgment of the Land Court set aside with costs here and below.

One other question arises on the judgment of the Land Court. The Land Court has found that the number of adult male inhabitants of the village of Beit Lid was 275, and has declared that "the Plaintiff is entitled to one share out of 275 shares" in the common lands.

It is no doubt proper that in an action of this nature the Plaintiff should state and prove the exact share in the common lands to which he was entitled at the date of action: and this Court required this to be done in the above-quoted case of Zeita village lands.

It does not follow, however, that under the custom of the village, a villager will always be entitled to the same share, and the entry in the books of the Land Registry should not be in a form which would give the Plaintiff a fixed share in the common lands in perpetuity.

Following the judgment of this Court in the case of Aslin village, we hold that the appropriate form of judgment is a declaration that upon payment of the prescribed fees the Plaintiff is entitled to have entries made in the Land Registers with respect to all the lands in dispute other than Khor Zutieh, Ard el Sellaga and Khor Abu Yehia, that they form part of the common land of the village of Beit Lid cultivable according to the custom of the village by the adult male inhabitants.

Delivered the 11th day of January, 1928.

MISDEMEANOUR.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 1/26.

BEFORE:

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

IN THE CASE OF:

Farid Hafez El-Shaq'a — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Possessor of firearms — Occupier of place where firearms found — Section 29, Firearms Ordinance, 1922.

JUDGMENT.

The Court holds that there is not evidence that the Appellant was the occupier of places where the arms were found to the exclusion of other persons, and accordingly that he cannot be deemed to be the possessor thereof under Section 29 of the Firearms Ordinance, 1922.

The appeal is allowed, the judgment of the District Court is set aside and the accused is acquitted.

Delivered the 11th day of February, 1926.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 37/27.

BEFORE :

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

IN THE CASE OF :

Hassan Ali El-Jaber, and Others — APPELLANTS.

vs

The Attorney-General
Muhamad Said
Taher Haj Hassan — RESPONDENTS.

Conviction for destruction of trees — Application of Article 253, Ottoman Penal Code — Criminal law strictly interpreted — Criminal procedure — Amendment of information by addition of new Section — Application of Section 45, Trial Upon Information Ordinance, 1924 — Section 19, Forests Ordinance, 1926.

Appeal from the judgment of the District Court of Nablus dated May 23rd, 1927, whereby the first four Appellants were convicted and sentenced to one year's imprisonment and Appellant No. 5 to six months' imprisonment under Article 253 of the Ottoman Penal Code and to pay jointly and severally the sum of L.P. 30 to the civil claimants in lieu of damages.

JUDGMENT.

There appears to be considerable doubt as to the application of Article 253 of the Ottoman Penal Code. The accused are entitled to have the Article interpreted strictly, and we hold that, as there was not total destruction of any tree, the article does not apply and the accused must be acquitted of an offence thereunder.

It is clear, however, that the facts found constitute an offence under Section 19 of the Forests Ordinance, 1926.

But as that Section was not charged in the information, and as it involves a heavier sentence than the Article charged, the District Court could not have amended the information by adding a count under Section 19 and therefore we cannot do so.

The proper course was to apply Section 45 of the Trial Upon Information Ordinance, 1924, and commit the accused into custody to be charged with the said offence.

We therefore set aside the judgment of the District Court and remit the case for Section 45 to be applied.

Delivered in presence the 13th day of October, 1927.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 40/27.

BEFORE:

Corrie, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Wadi El-Bustani — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Wilful and malicious uprooting of trees—Section 19, Forests Ordinance, 1926—Pasture lands used ab antiquo by village—Article 97, Land Code—Right to uproot trees to be exercised through the Court.

JUDGMENT.

The Appellant has been convicted of an offence against Section 19 of the Forests Ordinance, 1926 (in the judgment of the District Court referred to as the Forestry Ordinance, 1925). The District Court has found as a fact that he wilfully and maliciously uprooted eucalyptus trees planted by the Palestine Jewish Colonisation Association under a licence from the Government.

The Appellant's main ground of appeal is that the Barrat Caesarea lands in which the trees were planted have been assigned ab antiquo to the Arabs settled on those lands as pasture lands to be held in common; that it follows from Article 97 of the Land Code, that if anyone plants trees in such lands the inhabitants "may at any time have them pulled down or uprooted"; that he, as agent of the Arab settlers, was thus entitled to uproot; and

lastly, that the provisions of Article 97 are not affected by Section 19 of the Forests Ordinance, 1926.

This argument was not accepted by the District Court which held that "Even if El-Bustani be right in his interpretation of Article 97 of the Land Code, such does not help him, for it is obvious that any right which persons may have had under that Article of redressing their wrongs by uprooting trees has been definitely taken away by Article 19 of the Forestry Ordinance under which the accused persons now stand charged."

The prosecution, however, are not asking us to support this view of the effect of Section 19, and we do not think it can be maintained.

If under the law in force before the Forests Ordinance was enacted, the Appellant had a right to uproot the trees, such uprooting would not be wilful and malicious within the meaning of Section 19 (1).

The Court has therefore to determine whether Article 97 of the Land Code does confer on the Appellant the right that he claims.

It is objected to by the Prosecution that, assuming for the purpose of the argument that the lands in question have been assigned as common pasture lands, Article 97 does not mean that the inhabitants have the right to uproot trees wrongfully planted on those lands without applying to the Court.

Article 35 of the Land Code which deals with wrongful planting by one person in the land of another, makes it clear that the landowner can only have vines and trees uprooted "through the official", and it would seem curious that persons entitled merely to a right of pasture should be given a remedy which is denied to an owner. The relevant passage in Article 97 is translated by Fisher,

> "If anyone erects buildings and plants trees thereon the inhabitants may at any time have them pulled down or uprooted."

Ongley's translation is:

> "The inhabitants can at any time have them demolished or pulled up."

Young's version of the same passage (Young, Vol. VI, page 72) is:

> "Les habitants pourront à toute époque les faire démolir et arracher."

All these translations suggest that the inhabitants are not entitled themselves to uproot trees wrongfully planted, but may

have them uprooted by the competent authority. On reference to the Turkish text it appears that these translations are correct, and that the right conferred upon the inhabtiants is a right to have the trees uprooted by the competent authority, and the Article confers no right upon the inhabitants themselves to uproot the trees.

Another point has to be considered.

It has been argued by the Appellant that uprooting of trees by a person who in good faith, though mistakenly, believes that he is entitled to do so cannot be wilful and malicious so as to render him criminally liable under Section 19 (1) of the Forests Ordinance. But where a party wilfully causes damage to the person or property of another, it is for the party so acting to prove his right to do so: and if he fails to establish a legal right to cause such damage he cannot be held to have acted in good faith.

If the Appellant had taken the proper course of bringing an action in the Land Court, and while such action was still pending, had uprooted trees in exercise of his alleged right, it would have been obvious that his action was wilful and malicious. Still more is that the case where the Appellant has not attempted to establish his right by legal proceedings.

The conviction of the Appellant under Section 19 (1) of the Forests Ordinance, 1926, must therefore be affirmed.

As to the sentence. The District Court says of the Appellant: "We consider that he was the sole instigator of all the trouble and that without him nothing untoward would have occurred." Accordingly the Court differentiated betwen the Appellant and the other convicted persons in regard to sentence. We see no reason to dissent from this view nor from the view that, as a result of the Appellant's action, a serious disturbance of the peace might easily have occured.

There is nothing, however, in the evidence to support the description of the Appellant as a "professional agitator," or to suggest that he incited the Arabs to uproot trees with a view to creating a disturbance. He would appear to have been actuated by a genuine though mistaken belief that by so doing they would further their own economic interests.

We therefore hold that the fine imposed on the Appellant should be reduced to £P.25 and that in default, he should serve a term of three months' imprisonment.

The costs of this appeal are to be paid by the Appellant.

Delivered the 29th day of December, 1927.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 19/28.

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

IN THE CASE OF:
Fayad Darwish Abdul Qader — APPELLANT.
vs
The Attorney-General — RESPONDENT.

Imprisonment of young offender — Secs. 7 (1), 9, Young Offenders Ordinance, 1922 — Power to detain in Reformatory for period equivalent to period of imprisonment to which accused would be liable for non-payment of costs.

JUDGMENT.

The Court holds that under Section 7 (1) of the Young Offenders Ordinance, 1922, there is no power to detain in a Reformatory for a period equivalent to the period of imprisonment to which accused would be liable for non-payment of costs.

It therefore orders that costs amounting to £P2.800 mils be paid by Darwish Abdel Qader, his father, under Section 9 of the Young Offenders Ordinance, 1922.

Delivered the 10th day of April, 1928.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 8/30.

BEFORE:
Baker, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:
Ahmed Hamdan Ghuneimeh — APPELLANT.
vs
The Attorney-General — RESPONDENT.

Death caused by accused through carelessness or non-observance of laws — Art. 182, Ottoman Penal Code — Contributory negligence of victim as ground for reduction of sentence.

JUDGMENT.

There was evidence before the Court below upon which they could lawfully find the facts necessary to support their judgment and the judgment must be confirmed.

We do, however, find that there was contributory negligence on the part of the deceased and taking this into consideration we reduce the sentence to one of a year's imprisonment and to pay the costs of this appeal.

Delivered the 4th day of June, 1930.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 90/30.

BEFORE:

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

IN THE CASE OF:

Abdul Mu'ti El-Khalafawi — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Suspension of driver's licence — Right of appeal from sentence of imprisonment not exceeding one year — Section 60, Trial Upon Information Ordinance, 1924 — Section 16, Road Transport Ordinance, 1929 — Interpretation of Statutes — Refusal by Court to remedy error of legislature.

JUDGMENT.

Section 60 of the Trial Upon Information Ordinance as amended by Section 6 (1) of Ordinance No. 37 of 1929 only allows an appeal from a conviction, if the sentence is a term of imprisonment exceeding one year. There is no right of appeal, therefore, from this sentence of imprisonment.

As to the suspension of the licence, Section 16 (a) of the Road Transport Ordinance No. 23 of 1929 says that any Court before whom a person is convicted of an offence in connection with the driving of a vehicle may suspend the driver's licence and disqualify him from obtaining a licence for not less than twelve months. Section 16 (4) then says that a person so disqualified may appeal against the order to the District Court.

The legislature clearly forgot that at the beginning of Section 16 it empowered any Court to suspend a licence and contemplated only in Section 16 (4) a suspension by a Municipal or a Magistrate's Court.

Ir is not for this Court to remedy the error of the legislature which clearly has not empowered us to hear an appeal from a suspension by a District Court. Appeal dismissed with costs. Conviction and sentence affirmed.

The sentence to run from the date of conviction.

Delivered the 10th day of September, 1930.

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

CR. A. D. C. Jm. No. 63/32.

BEFORE:

De Freitas, J., Plunkett, J. and Valero, J.

IN THE CASE OF:

A. Binya — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Leakage of cesspit into house of neighbour — Order by Health Department to demolish cesspit held ultra vires — Section 7 (4) Public Health Ordinance, 1918—Disobedience of notice by District Commissioner as continuing offence.

JUDGMENT.

The conviction and sentence of the learned Magistrate is confirmed except that the order to demolish the cesspit is quashed. Section 7, Clause 4 of the Public Health Ordinance, 1918, does not empower the Magistrate to order the cesspit to be demolished, but empowers the Military Governor, i.e. the District Commissioner to have the building etc., put in order at the expense of the owner or occupier.

Appellant would be well advised to consider whether disobedience of a notice by the District Commissioner is not a continuing offence.

MISDEMEANOUR —

SEE ALSO CRIMINAL LAW.

MORATORIUM LAWS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 48/24.

BEFORE:

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

IN THE CASE OF:

Yona Dinovitz — APPELLANT.

vs

Gershon Harris Rosenbaum — RESPONDENT.

Interest on overdue debt not recoverable unless stipulated for in the agreement — Effect of Moratorium Laws on obligation to discharge debt — Right under Moratorium Laws to collect interest on principal postponed — Interest payable from date of commencement of action.

Appeal from the judgment of the Land Court of Jaffa, dated 26th December, 1923, in Action No. 259/23, whereby the Appellant was ordered to pay the sum of £E.578.73 to the Respondent and interest at 7% as from 12th November, 1914, until 31st July, 1919, and at 9% as from the date of the commencement of action, that is 6th December, 1922, until payment provided that it does not exceed the principal sum with costs.

JUDGMENT.

The agreement between the parties was that the Appellant should repay to the Respondent in April, 1916, the sum of 15,000 Francs gold with interest at 9% for the period of two years for which the loan was made.

It is argued for the Respondent that under this agreement he is entitled to interest at the rate reserved until the date of payment. Had this been the intention however, it would have been simple to have expressed it in the agreement. The agreement however, provided for payment of interest "during the two years",

and the Court holds that the intention was that if the Appellant should fail to pay principal and interest at maturity, the Respondent should thereupon become entitled to recover the principal sum and interest for the two years by a sale of the Appellant's vineyard as provided in the agreement.

At the date of maturity however, the Moratorium Laws were in force. Under these laws a creditor could not obtain payment of the whole of the principal sum due to him but was entitled to interest on the part postponed, which interest in a case such as this, where no rate of interest until payment was fixed, was payable at 7%, without the necessity of protest: and the Respondent is entitled to interest accordingly. Such provisions ceased to be in force on 31st December, 1917.

As protest was not made within the extended period allowed by Proclamation, interest ceased to be payable after the 31st December, 1917, on any part of the principal sum until the date of commencement of action as from which date interest is payable on the whole of the principal sum at 9%. Subject to this amendment the judgment of the District Court is affirmed.

Delivered in presence the 28th day of November, 1924.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 78/24.

BEFORE:

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

IN THE CASE OF:

The Russian Ecclesiastical Mission, Jerusalem, represented by Archimandrite Meletios — APPELLANT.

vs

Yona Gurevich — RESPONDENT.

Action by endorser on bills which he had endorsed to other person — Endorsement "valeur reçue" not complete endorsement passing property under Arts. 93, 94 and 95 of Commercial Code — Scope and period of Moratorium Laws — Payment of interest under Moratorium Laws.

Appeal from the judgment of the District Court of Jerusalem, dated 25th February, 1924, whereby Appellants were ordered to

pay 25,000 Francs gold and interest on certain bills described in the judgment at the rate of 7% and costs of the action.

JUDGMENT.

The first point raised by the Appellant is that the Respondent is not entitled to recover on the bills which form the basis of the action, on the ground that he has endorsed them over to the Anglo-Palestine Company.

The endorsement in each case is "valeur reçue" and this is not complete endorsement passing the property in the bills under Articles 93, 94 and 95 of the Commercial Code, but operates only as a power of attorney. There is nothing therefore to prevent the endorser from suing on the bills on his own behalf.

As regards interest, the first question is whether interest is payable under the Moratorium Laws.

The bills were all signed on the 14th August, 1914, and the 2nd Moratorium Law, Article 4, limits the operation of its provisions to debts incurred before the 21st July, 1330.

Article 9 of the Moratorium Law No. 4 also provides that the preceding laws shall not apply to debts incurred after the 21st July, 1330, that is the 3rd August, 1914. The bills therefore do not come within the scope of the Moratorium Laws.

With regard to the question of protest, it is clear that protest could not have been duly made according to Law on the date stated in the Certificate of the Notary Public, and the Respondent must have known this.

We therefore hold that interest is payable by the Appellant as from date of commencement of action, namely the 2nd March, 1921 and runs at 9% to date of payment.

The judgment of the District Court is modified accordingly. Costs of this appeal have to be paid by the parties in equal shares.

Delivered the 29th day of June, 1925.

In the District Court of Jerusalem.

C.D.C. Jm. No. 176/26.

BEFORE :

Baker, J. and Abdel Hadi, J.

IN THE CASE OF :

The Commission on the Finances of the Orthodox Patriarchate — PLAINTIFF.

vs

Isaac Cohen — DEFENDANT.

Action against lessee for rent due — Offer to pay rent in bonds not cash — Right to set off claim which might be subject of cross-action or counterclaim in same Court — Stay of actions against Orthodox Patriarchate — Special moratorium with respect to debts of Patriarchate.

JUDGMENT.

It is agreed that Isaac Cohen owes the Greek Patriarchate the sum of £.758, being rent owing for premises let to the said Isaac Cohen.

The lessee agreed to take the premises and pay a yearly sum therefor, the rent having now become due, the lessee offers to pay the said rent in bonds of the Patriarchate in lieu of cash, this the Commission have refused to accept.

And the question for this Court to decide is whether the lessee can be allowed to set off the amount of these bonds against the money owing for rent.

I am of opinion that although the lease of the premises stipulated that the rent must be paid in cash, if the lessee has a claim against the lessor which is of such a nature that it might be made the subject of a cross action or counterclaim in these Courts then he is justified and entitled to plead set-off, provided always that the debt was in existence and was an actionable and enforceable debt both at the time when the action was commenced and when the plea was pleaded.

The debt was in existence at the time when this action was commenced. Was it, however, an actionable and enforceable debt ? Now by virtue of an Order dated the 3rd September, 1918, issued by the Senior Judicial Officer, all actions against the

Patriarchate were stayed; this order was subsequently impliedly confirmed by Article 4 of the Ordinance for the liquidation of the debts of the Orthodox Patriarchate of June, 1921, which states inter alia: "As a condition of the prolongation of the special moratorium now in force with respect to the debts of the Patriarchate", etc.

I am therefore, of opinion that there exists a special moratorium with respect to the debts of the Patriarchate and that the debt owing by the Patriarchate to Isaac Cohen is not an actionable and enforceable debt which would enable him to plead set-off.

I therefore hold that the defence of this case of set-off is bad and cannot be pleaded.

Judgment in presence subject to appeal.

Dated the 17th day of June, 1926.

MORTGAGE.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 100/24.

IN THE CASE OF:

Israel Haim Eisenstein — APPELLANT.

VS

Zirel Liberman — RESPONDENT.

Land sold by unregistered deed and subsequently sold again by same vendor by registered sale — Waiver of claims to property — Proof of mortgage — Denial of signature by party alleged to have signed to be investigated by Court.

JUDGMENT OF THE LAND COURT.

Having considered the pleadings and documentary evidence of both parties in this case, the Court finds:—

1. That the plot of land in suit was sold by its original owner Mr. Yusef Eliashar by unregistered deed, to Plaintiff's father, who started building thereon.

2. That before the building was completed the land was sold by Eliashar to Defendant by registered sale and Plaintiff's father

completed the building and subsequently occupied it as lessee of Defendant.

3. That on completion he gave to Defendant's husband a writing of quittance contents of which involve:

(1) That he completed the house as Defendant's agent;

(2) that he was paid for his services in full;

(3) that he waived all claims to any right in respect of the whole property in suit.

(See document dated 17.9.5677 corresponding with 8.9.24 English style).

The Plaintiff (the deceased's son) now claims that the transaction by which the land converted to Defendant was a mortgage and that the house standing thereon was erected by his late father at his own expense.

In support of his allegation Plaintiff refers the Court to a copy of a lease given by the Respondent's husband to her father, showing a clause promising to sell to the Plaintiff's father, on payment of a certain price.

The Court finds:—

That this clause is no proof that the land and the house was mortgaged with Defendant and her husband, as the promise does not establish Plaintiff's right and on the other hand the document is not admitted by Defendant who holds the property in suit by Tabu.

Whereas there is no evidence proving that any mortgage rights were secured on the land and the house, other than the fact that the land was acquired by Plaintiff's father and the latter erected a building thereon;

And whereas the evidence upon which Plaintiff relies is rebutted by the deed of discharge referred to whereby Plaintiff's father admitted having completed the house as Defendant's agent;

The Court, therefore, decides to dismiss Plaintiff's case with costs and £E.2 advocate's fees.

JUDGMENT OF THE COURT OF APPEAL.

It appears that the Land Court was not satisfied with the evidence produced by Plaintiff to the effect that the transaction was one of mortgage, relying thereby on the deed of discharge dated September 8th, 1924, equivalent to September 17, 5674.

Whereas Plaintiff denies the above deed and his signature thereon, it was incumbent on the Court to consider this point, and upon consideration if it be proved that the Sanad is valid then the case is terminated and if not the Court has to consider the weight of the evidence and then pronounce judgment accordingly.

The judgment is set aside and the case remitted to the Court below for necessary action.

Dated the 25th day of June, 1925.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 68/25.

BEFORE:

The Acting Chief Justice, the Acting Senior British Judge, and Jarallah, J.

IN THE CASE OF:

Fatmeh Ahmad Khaledi
Anis Bey Ata Jabri and Others — APPELLANTS.

vs

Imperial Ottoman Bank
Muhammad Abdul Rahim
Ahmad Hassan Abu Laban — RESPONDENTS.

Claim by mortgagor for return of land sold through Execution Office—Irregularities alleged in sale proceedings—Law of Mortgage of Immovable Property, 1331 — Section 6, Mortgage Law Amendment Ordinance, 1920 — Defeasibility of title of purchaser at execution sale—Effect of fraud on sale of mortgaged property.

Appeal from the judgment of the Land Court of Jaffa, dated the 19th day of March, 1925.

JUDGMENT.

The Appellants are claiming land which was mortgaged by them, and on failure on their part to repay the mortgage money, was sold through the Execution Office by the Imperial Ottoman Bank to the other Respondents, and registered in their names under an order by the Chief Execution Officer given on the 20th March, 1923.

The claim is based upon alleged irregularities in the proceedings of sale.

The sale however was made under the provisions of the Law of Mortgage of Immovable Property of 1331, and Section 6 of the Mortgage Law Amendment Ordinance, 1920, provides that :—

> "Where immovable property is sold under the said Law, the registration thereof in the name of the purchaser shall transfer to him all the estate and title of the mortgagor, in the property mortgaged, and as against the morgagor, the purchaser's title shall be indefeasible".

While it may be that this Section would not protect a purchaser in the event of fraud on his part being proved, no such allegation is made in this case.

The object and effect of the Section is to protect a purchaser against claims of the nature of those raised by the Appellants.

The appeal must be dismissed.

Delivered in presence the 1st day of April, 1926.

In the District Court of Jaffa.

C.E.O. Ja. No. 452/26.

BEFORE :

The Chief Execution Officer, Jaffa.

IN THE CASE OF :

Moyal's Estate — APPELLANTS.

vs

Gabali — RESPONDENTS.

Priority in execution of judgment for interest on mortgage — Recovery of interest on monies advanced by purchaser under provisional sale with Istighlal — Redemption of mortgaged property — Interest not provided for in mortgage to be sued for separately.

This is an application that a judgment for interest on a mortgage should be considered as privileged and rank before ordinary creditors.

The matter has been argued in Chambers, and in support of the application counsel for the petitioning creditor has quoted a judgment given in this Court, which, he states, has been confirmed on appeal — Antebi vs. Ashour and Others, in which it was held that on a provisional sale with "Istighlal" if the property is not redeemed within the period fixed, the purchaser or mortgagee is entitled to interest on the amount of the money advanced.

There is no doubt that in a mortgage, in which there is no clause securing payment of interest, such interest has to be sued for separately.

In this case, the petitioning creditor, though this was a sale with power of redemption with right of possession and usufruct did not at any time enter into possession, nor did he take the annual proceeds of the property. He claimed interest, as he was fully entitled to do, by means of a separate action, and obtained judgment.

By not taking possession, by not exercising this power of usufruct — he must be held to have renounced his rights to such.

For this reason I am of opinion that as the interest was only to be obtained by bringing a separate action,— it is not covered by the original security, and the judgment is not privileged.

The motion of the petitioning creditor is therefore dismissed with costs.

Dated the 20th day of December, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 75/27.

BEFORE:

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

IN THE CASE OF:

Israel Haim Eisenstein — APPELLANT.

vs

Zirel Liberman — RESPONDENT.

Proof that document is mortgage not lease — Proof of authority of attorney — Presumption of continuing authority of attorney.

Appeal from the judgment of the Land Court of Jerusalem dated 23rd May, 1927.

JUDGMENT.

The majority of the Court have no doubt that on the facts found by the Land Court, the Appellant is entitled to succeed in his appeal.

The transaction between the Appellant's father and the

Respondent's husband differs only in one respect from the ordinary mortgage in the form of an absolute registered transfer to the lender accompanied by an unregistered admission by the lender.

The difference in this case is that as the borrower was not registered as owner the transfer to the lender was made by the registered owner, Eliachar, at the direction of the beneficial owner.

On the facts as found therefore, we have no doubt that the transaction was a mortgage.

The Respondent has pointed out however, that the document described in the Land Court's judgment as a lease was not signed by the Respondent but by her husband and argues that there is no evidence that the husband had authority to sign this document.

But as the husband acted as the Respondent's attorney in the registered transfer on sale, and has been described as her attorney in the pleadings, it is for the Respondent to prove that his authority did not extend to this particular transaction and this she has not attempted to do.

One other point remains. The Respondent, realising that this Court was not disposed to draw from the contract of lease the inference in her favour which was drawn by the Land Court, has argued that the document has never been proved.

With regard to this all that need be said is that the Land Court was entitled to find on the facts before it that the document was authentic, and it has clearly so regarded it as it has made this document part of the basis of its judgment.

The appeal must be allowed, the judgment of the Land Court set aside and judgment entered that the Appellant upon payment to the Respondent of all moneys due under the mortgage, is entitled to be registered as owner of the property in claim.

The costs including £P.10 advocate's fees to be paid by Respondent.

Delivered in presence, the 23rd day of May, 1928.

In the District Court of Jaffa.

C.E.O.Ja. No. 5506/27.

BEFORE:

The Chief Execution Officer, Jaffa.

IN THE CASE OF:

Lazarous Paul — APPLICANT.

vs

Silberstein and Slonim — RESPONDENTS.

Redemption by one mortgagor of his share of mortgage debt disallowed — Discharge of mortgage — Pledge received from two persons is pledge for whole of the claims from both — Articles 721, 740, Mejelle.

JUDGMENT.

This is an application by Messrs Silberstein to be permitted to redeem their share of a mortgage debt by paying one half of the amount of the debt into Court, and asking that one half of the property secured by the mortgage should then be released.

The mortgagors are owners in common of the property comprised in the mortgage which is undivided. There is a special condition that the mortgagors may partition the mortgaged property with the consent of the mortgagee into 5 parts and that they may then release any of the parts on paying the proportionate amount of the mortgage debt. In fact no such partition has been made but in effect the mortgagors now ask me to make a partition into two equal parts and to release one of these parts on payment of half of the mortgage debt. To this the mortgagee objects.

I have carefully considered the arguments on both sides and by consent both parties have put in written pleadings. I am of opinion that I have no power to do what the mortgagor requests. Article 721 of the Mejelle is in point that a pledge received from two persons becomes a pledge for the whole of the two claims and Article 740 states: "a person who has taken a pledge from two debtors can hold the pledge until what he has to receive from both has been paid in full". This latter article exactly fits the case. The land owned in common by two debtors is mortgaged for a sum of money. The land must therefore remain subject to the mortgage until what is due from both mortgagors has been paid in full. And this is quite logical, because if I were to allow one

mortgagor to redeem his share of the mortgage debt then I should impair the value of the security which would be wrong.

I must, therefore, decline to grant the petition of Messrs. Silberstein for permission to redeem one half of the mortgage debt and execution must proceed.

Delivered the 20th day of October, 1928.

In the High Court of Justice.

H.C. No. 38/28.

BEFORE:

The Senior British Judge and Frumkin, J.

IN THE APPLICATION OF:

Chaya Tenenbaum — PETITIONER.

vs

The Chief Execution Officer, Haifa,
Aziz Mikati — RESPONDENTS

Application to set aside order for sale of mortgaged premises made by Chief Execution Officer — Necessity of notice of sale to be served on mortgagor — Art. 10, Provisional Law of Mortgage of Immovable Property — Irregular service of documents — Arts. 19, 40, 41, 105, 108, Execution Law — Arts. 26, 29, 32, Civil Procedure Code.

Application for an Order to issue to the Chief Execution Officer in the District Court of Haifa to show cause why an order should not issue setting aside his order for sale of the plot of land known as Megharet Shahin, the property of the Petitioner, in satisfaction of mortgage money claimed by Aziz Mikati of Haifa. Application based on the following grounds:

(a) The order of sale was made without notice to the Petitioner;

(b) Though the Chief Execution Officer at the instance of the mortgagee took proceedings for official notification to her at her address in Egypt, viz. 2 Rue Canope, Camp Césai, Alexandria, on or about the 1st of January, 1928, forwarded by the President of the District Court, Haifa, to the Superintendent of the Law Courts Jerusalem for service on the Petitioner in Alexandria, the Chief Execution, Officer Haifa, without evidence at all that the said service had proved abortive or impossible, nevertheless ordered the sale to be advertised on the 1st of April, 1928, the said

procedure being in violation of Article 19 of the Execution Law, Article 10 of the Provisional Law for the Mortgage of Immovable Property, and also the provisions of the Code of the Civil Procedure, 26, 29 and 32 with regard to service, Section 40 and 41 of the Execution Law, and 105 and 108 of the Execution Law.

(c) The amount of the mortgage debt is in dispute, the Petitioner contending that the real mortgage principal was £P.1600 and not £E.2000, as set out in the mortgage deed, the balance of £E.400 representing illegal and usurious interest.

ORDER.

The Court upon hearing Mr. H. B. Samuel for the Petitioner orders and it is hereby ordered as follows:—

That the Chief Execution Officer in the District Court of Haifa do appear before this Court, if he so wishes, to show cause why an order should not issue setting aside his order for the sale of the plot of land known as Meghret Shahin, the property of the Petitioner, in satisfaction of mortgage money claimed by Aziz Mikati of Haifa.

That notice of the application and this order be given to the creditor Aziz Mikati of Haifa.

That the order for sale be stayed pending final decision of this application.

That the return day for the further hearing and final decision of this application be Friday the 6th of July, 1928.

Given in presence of the Petitioner this 18th day of June, 1928.

In the High Court of Justice.

H.C. No. 50/28.

BEFORE:

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

IN THE APPLICATION OF:

Petro Abella — PETITIONER.

VS

The Chief Execution Officer, Haifa — RESPONDENT.

Properties mortgaged by separate mortgage deed to be separately sold by Chief Execution Officer — Properties to be advertised separately and separate bids allowed — Effect of defective advertisement for sale — Provisional sale of mortgaged properties cancelled by High Court.

ORDER.

After perusing copy of the notice advertising the sale of the mortgaged properties, we are satisfied that the four mortgaged properties were advertised in such a manner as to cause any reasonable person reading the same to form the impression that all the properties were being put up for auction as a single property.

In every case where there are properties mortgaged by several separate mortgage deeds, there being no law in this country of consolidation of mortgages, the said properties must be advertised separately and separate bids allowed and taken for each and every mortgaged property.

Accordingly, the provisional sale of the said mortgaged properties must be cancelled and the same put up for sale in the manner hereinbefore prescribed after first complying with the law relating to the sale of mortgaged properties if this has not already been carried out.

Delivered the 25th day of January, 1929.

In the High Court of Justice.

H.C. No. 79/28.

BEFORE:

Baker, J. and Frumkin, J.

IN THE APPLICATION OF:

Shalom Uzeiri — PETITIONER.

vs

The Chief Execution Officer, Jaffa,
Shlomo Ben David Cohen — RESPONDENTS.

Mortgage described as made according to Jewish Law made outside the Land Registry — Exemption from sale in execution of debtor's dwelling house if unmortgaged — Art. 90, Execution Law.

ORDER.

Petitioner, by virtue of a document, borrowed from second Respondent, Shlomo Ben David Cohen, the sum of £P.150 in consideration for which he mortgaged his house therein more particularly described. The mortgage was described as made according to the Jewish Law and Petitioner covenanted therein to repay the principal moneys at the expiration of one year from the date thereof when the before-mentioned Shlomo Ben David Cohen would give up the said premises to Petitioner.

The alleged mortgage was made outside the Land Registry.

Respondent having obtained judgment for the sum secured by the mortgage, Petitioner now applies that the Respondent be prevented from executing by way of sale of the premises in that the document was not a mortgage within the meaning of Article 90 of the Execution Law, which said Article allows the sale of debtor's house if it is encumbered or mortgaged.

We are of opinion that the words contained in Article 90, i.e., free from incumbrance or mortgage, must be interpreted to include the document we have before us, although made outside the Land Registry. The parties intended it to be a mortgage and the premises to be a security for the debt, which in fact they were, and we are satisfied that the deed prevents the house or security being excluded from sale in satisfaction of the debt. Accordingly the application must be dismissed, and the order of the Chief Execution Officer of Jaffa confirmed.

Petitioner to pay costs and advocates' fees assesed at £P.2.

Delivered the 24th day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 45/30.

BEFORE:

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

IN THE CASE OF:

Elias Andoni 'Azar
Ibrahim Issa Bacleh — APPELLANTS.

vs

Abdo Juries El Habash — RESPONDENT.

Machinery pledged as security for loan — Bei' bil istighlal — No interest payable under bei' bil istighlal — Right of mortgagee to profits of property mortgaged — Usurious Loans (Interest) Ordinance not applied by Court of its own motion.

JUDGMENT.

The transaction between the parties was bei' bil istighlal of 12 out of 24 shares in certain machinery, as security for a loan of LE.100.

Under such a transaction, the mortgagee is not entitled to interest but takes the profits (if any) of the property mortgaged in lieu of interest.

The Respondent is therefore entitled to judgment for the sum of LE.100, but not to interest thereon.

No claim to have the Usurious Loans (Interest) Ordinance, 1922, applied was made by the Appellants in their Statement of Appeal, and the question therefore does not arise.

Upon payment of the sum of LE.100, the Appellants will be entitled to recover possession of the property mortgaged.

The judgment of the District Court is varied accordingly.

No order is made as to costs.

Delivered the 16th day of June, 1931.

In the High Court of Justice.

H.C. No. 16/31.

BEFORE :

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

IN THE APPLICATION OF :

George Bishara Kirdahi — PETITIONER.

VS

The Chief Execution Officer, Haifa,
Ibrahim Sahyoun — RESPONDENT.

Art. 7, Provisional Law of Mortgage of Immovable Property — Right of creditor under mortgage to assign rights in mortgage — Effect of assignment of mortgage.

ORDER.

The Order Nisi granted on the 28th April, 1931, is made absolute. In the original Turkish text of Article 7 of the Provisional Law of Mortgage of Immovable Property the word used is "Creditor" which is wrongly translated in the English version as "Mortgagee."

In the case of a mortgage to order the creditor for the time being, whether he be the original mortgagee or his heirs, may, in our opinion, assign his rights under the mortgage in virtue of Article 7 cited above. In consequence of such assignment the assignee acquires the same status as the assignor.

The second Respondent is ordered to pay the costs of this application with advocate's fees assessed at £P.4.

Delivered the 2nd day of January, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 98/31.

BEFORE:

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

IN THE CASE OF:

Kamel Esh-Shanti	APPELLANT.
vs	
Yaqoub Saliba Delal	RESPONDENT.
and	
Y. Khankin	THIRD PARTY.

Refusal by District Court to admit third party — No right to enter as third party in Court of Appeal — Interest not provided for in mortgage — Privileged debt secured by mortgage.

INTERLOCUTORY JUDGMENT.

The decision of the lower Court dismissing his application is pointed out to Mr. Benshemesh and the Court decides that he cannot now enter as a third party, that his only remedy would be to appeal against the decision of the lower Court refusing to admit him.

JUDGMENT.

In view of oath taken by Respondent before us, we are satisfied that the document was properly admitted in evidence by the lower Court, and the judgment of the said Court, in so far as it relates to the payment of interest, must be affirmed.

With regard to the second part of the appeal the mortgage deed not containing any provision for the payment of interest the interest payable under the document of the 5th December, 1927, cannot and is not a privileged debt secured by the property the subject of the mortgage, and accordingly Appellant must succeed in this part of his appeal. The provisional attachment is hereby removed, and subject to this amendment, the judgment of the lower Court is affirmed.

No costs.

Delivered the 4th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 2/32.

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

IN THE CASE OF:

Abraham Shlomo Nahmias	APPELLANT.
vs	
Ibrahim Shawki el Kharbutli	RESPONDENT.
and	
Ishaq Shemuel Awadis	THIRD PARTY.

Discharge of mortgage indebtedness — Transfer by mortgagee of assets and liabilities — Right of transferee to sue mortgagor.

Appeal from the judgment of the District Court of Jaffa, dated the 22nd November, 1931.

JUDGMENT.

We hold that the Appellant accepted the transaction whereby Awadis gave bills to Anton Jabrieh in satisfaction of the mortgage debt to the extent of £P.250.

It follows that he is not now entitled to recover the sum under the mortgage.

The Respondent has taken over the assets and liabilities of Awadis jointly and severally with Aaron Arotshas, and he is therefore entitled to sue for the whole amount in claim; and as the property mortgaged is now, under the deed of compromise, vested in the Respondent and Aaron Arotshas jointly and severally, the Respondent is clearly a proper party to the action.

The appeal must be dismissed with costs.

Delivered the 3rd day of November, 1932.

In the High Court of Justice.

H.C. No. 37/32.

BEFORE:

The Acting Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:

Habib Elias Salem — PETITIONER.

vs

The Director of Lands, Jerusalem

Sa'ad el Din Taha — RESPONDENTS.

Discharge of mortgage — Payment of interest under mortgage in lieu of notice — Mortgagor's right to discharge before date of termination of mortgage.

Application for an Order to issue to the Director of Lands to show cause why his order dated the 19th April, 1932, should not be set aside.

JUDGMENT.

The application is governed by the third condition in the printed mortgage which in our opinion can bear only one interpretation, namely that the mortgagor may during the term of the mortgage discharge the same by paying the principal and interest due up to the date of repayment, provided that he serves on the mortgagee three months' notice in writing of his intention so to do.

We are of opinion that the payment of three months' interest in lieu of notice cannot be deemed to be a part of the conditions of the mortgage.

Accordingly, the Rule must be made absolute, the mortgagor only being able to be discharged by payment of principal and interest when evidence is produced to the Registrar that the notice provided for has been given.

The Petitioner is awarded costs and advocate's fees assessed at £P.1.500 mils.

Delivered the 13th day of May, 1932.

In the High Court of Justice.

H.C. No. 38/32.

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

IN THE APPLICATION OF:

Bank Lehaklaut Uletaasiah
Bnei Brak Co-operative
Society Ltd. PETITIONER.

vs

The Chief Execution Officer, Jaffa
Estate of Shaoul Ash RESPONDENTS.

Validity of mortgage of movable property — Mortgage purporting to be a mortgage of immovable property together with machinery affixed thereto — Jurisdiction of High Court.

Application for an order to issue to the Chief Execution Officer, directing him to show cause why his order dated the 11th March, 1932 should not be set aside.

JUDGMENT.

We are asked to decide whether the document purporting to be a mortgage of immovable property together with machinery affixed thereto is a lawful and proper mortgage of the said machinery and whether the same can be seized and sold by the Execution Officer in satisfaction of the mortgage debt.

It is clearly a cause within the jurisdiction of some other Court and not one upon which an application to the High Court will lie.

The application is accordingly dismissed.

Delivered the 6th day of June, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 167/32.

BEFORE:

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

IN THE CASE OF:

Bnei Brak Co-Operative Society Ltd. APPELLANT.

vs

Rabbi Shlomo Halprin RESPONDENT.

Assignment of mortgage — Art. 7, Law of Mortgage of Immovable Property, 25th February, 1328 A.H. — Necessity of consent of mortgagor to transfer of mortgage — Effect of payment to mortgagee of interest on mortgage after transfer by mortgagee — Claim of excessive interest.

JUDGMENT OF THE DISTRICT COURT.

(Translated from Arabic)

The Plaintiff Bank claimed that the Defendant agreed to advance to the Plaintiff the sum of LP.364 in consideration of mortgages assigned to him, but paid the Plaintiff only LP.236.400 and the balance of LP.127.400 was retained by him. Defendant collected 8 percent on LP.364 although Plaintiff did not receive the LP.127.400. Plaintiff requested the return of the 8 percent interest collected on LP.127.400 from the 29th January, 1931, to the 2nd November, 1931. The Bank was called upon by the District Court to prove its claim but was satisfied to rely upon the evidence of the Defendant. The Court was satisfied on hearing the evidence of the Defendant that it did not support the claim of the Plaintiff since the Defendant testified that he had purchased from the Bank the equity in the mortgages amounting to £P.364 for the sum of LP.236.600. It thus became the duty of the Court to decide whether the transfer of the mortgage from the Plaintiff to the Defendant was of the nature of an ordinary payment in advance or of a sale or transfer of mortgage. It was clear from the admissions of both parties that the mortgages were made to the order of the Plaintiff.

In accordance with Article 7 of the Law of the Mortgage of Immovable Property, published on the 25th February, 1328, A.H. we find that such mortgages are transferable to others without the consent of the mortgagor, and the transfer is treated as a sale

of rights in the mortgage. The mortgagee has the right to sell for any price whatsoever, for the purchaser himself assumes the risk of non-payment or any other liability. The Plaintiff is therefore not entitled to claim from the Defendant the return of any amount whatsoever because it has sold its rights in the mortgage for the sum received by it.

But since the Plaintiff paid interest to the Defendant after the transfer of the Deed, the Plaintiff's attorney argued that such payment showed that privity continued to exist between the parties and thus the transfer could not have been by way of sale. This argument is held by the Court to be untenable in view of the express evidence of the Plaintiff that it had taken interest at 8 percent twice after the contract,—the Plaintiff being guarantor for the mortgagors and receiving similar interest from them.

For these reasons it is decided to dismiss the Plaintiff's claim with costs and advocate's fees of LP.5.

Delivered the 15th day of November, 1932.

JUDGMENT OF THE COURT OF APPEAL.

This is an appeal against the decision of the District Court of Jaffa wherein they dismissed the Appellants' claim for LP.127.400 which Appellants claimed to be excessive interest paid by them when they transferred two securities for the sum of LP.364 to the Respondent in consideration of LP.236.600. The Lower Court after hearing evidence decided that when the LP.236.600 was paid to the Appellants it was paid in full consideration for the transfer to the Respondent of the two securities for LP.364 and that they were not now entitled to claim anything further.

After hearing counsel for Appellants and Respondents we are satisfied that the decision of the Jaffa District Court was correct and that when Appellants received the sum of LP.236.600 from the Respondent they assigned in consideration of the said sum two mortgages to the Respondent no doubt considering at that time that LP.236.600 was the value the securities were worth.

The judgment of the Lower Court is accordingly confirmed and the appeal dismissed with costs and advocate's fees assessed at LP.2.

MORTGAGE—

See also Execution.

MUKHTARS.

In the High Court of Justice.

H.C. No. 70/27.

BEFORE:

The Senior British Judge and Khayat, J.

IN THE APPLICATION OF:

Khalil Ibrahim Bayyud
Ahmad Kheir — PETITIONERS.

vs

The District Officer of Jaffa — RESPONDENT.

Order of District Commissioner declaring election of mukhtars sought to be set aside — Qualification of mukhtars — Discretion formerly vested in Kaimakam to refuse or confirm election now vested in District Commissioner — Arts. 55, 62, 64, Vilayet Law of 1281.

ORDER.

The Petitioners Khalil Ibrahim Bayyud and Ahmad Kheir are seeking an Order setting aside an Order of the District Commissioner of Jaffa whereby Diab Hussein Abu Ibrahim and Hassan Hussein were declared to be duly elected as Mukhtars of the village of Kafr 'Ana for the current year and declaring the Petitioners to be duly elected as Mukhtars.

At the election which was held in the village the votes cast for the various candidates were as follows:

Diab Hussein Abu Ibrahim . . .	59 votes
Ahmad Kheir	54 ,,
Khalil Ibrahim Bayyud	52 ,,
Mohammad Hammoudeh	36 ,,
Hassan Hussein	11 ,,

The Petitioners object to the appointment of Diab on the ground that he is less than 30 years of age and therefore has not the qualifications for election required by Article 64 of the Vilayet Law of 1281.

No evidence, however, has been submitted in support of this objection, and in the absence of such evidence the objection cannot be sustained.

With regard to Ahmad Kheir, Khalil Ibrahim Bayyud and Mohammad Hammoudeh, the District Commissioner has submitted a statement of his reasons for passing them over. We have first to decide whether the District Commissioner has the discretion which he claims to exercise.

Article 55 of the Vilayet Law provides that the election of Mukhtars "is notified to the Kaimakam and confirmed by him."

We hold that the confirmation by the Kaimakam was not merely a formality but implied a discretion on his part to refuse to confirm the election.

In the absence of any legislation, it is a matter of great difficulty to determine by whom, if at all, the powers conferred by Ottoman Laws upon Ottoman officials can now be exercised, but we think that the power for confirming the election of Mukhtars must be exercisable by the District Commissioner, who is responsible for administration within his District.

The ground upon which the District Commissioner has refused to confirm the election of Ahmad Kheir is twofold. He is illiterate and he is a member of the same Hamouleh as Diab Hussein Abu Ibrahim. Khalil Bayyud and Mohammad Hammoudeh (who is not a party to this Petition) have been passed over on the ground that they held office as Mukhtars last year and were dismissed in accordance with Article 62 of the Vilayet Law, for failing to carry out their duties.

We hold that in the case of all these three persons the grounds stated for passing them over are grounds upon which the District Commissioner could reasonably exercise his discretion, and such being the case, his decision is not open to question.

The Petition must be dismissed.

Delivered the 30th day of September, 1927.

In the High Court of Justice.

H.C. No. 4/30.

BEFORE:

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

IN THE APPLICATION OF:

Anis Al-Bustani — PETITIONER.

vs

The District Commissioner of Haifa — RESPONDENT.

Order of District Commissioner refusing to accept nomination of mukhtar sought to be set aside — Qualification of mukhtars — Manner of confirmation of election of mukhtar — Art. 55, Vilayet Law.

ORDER.

The Petitioner, Anis Bustani, is seeking an Order setting aside an order of the District Commissioner of Haifa dated the 29th December, 1929, whereby he refused to accept the nomination of the Petitioner for re-election to the post of Mukhtar in the town of Acre.

Article 55 of the Vilayet Law provides that the election of Mukhtar is notified to the Kaimakam and confirmed by him. This Court, in the case of Khalil Ibrahim Bayyud and Ahmed Kheir, and the District Officer of Jaffa, H. C. No. 70/27, held, that confirmation by the Kaimakam was not merely a formality, but implied a discretion on his part to confirm the election of a Mukhtar and that the power of confirming the election of Mukhtars must be exercisable by the District Commissioner who is responsible for administration within his District.

Mr. Moghannam on behalf of Petitioner argued that the Turkish text of the Article does not state that an election is confirmed by the Kaimakam but that the Kaimakam will comply with the election. With this interpretation we do not agree.

We are satisfied that there were grounds upon which the District Commissioner of Haifa could reasonably exercise his discretion and the Petition must be dismissed.

Delivered the 31st day of May, 1930.

In the High Court of Justice.

H.C. No. 20/31.

BEFORE:

Baker, J. and Jarallah, J.

IN THE APPLICATION OF:

Ismail Ahmad Muhammad — PETITIONER.

vs

The District Officer, Gaza — RESPONDENT.

Dismissal of mukhtar — Refusal of District Officer to accept nomination of mukhtar — Mukhtar as public officer — Duties of mukhtar — Art. 54, Vilayet Law of 17th Rabi El Akhar, 1333 — Kaimakam as District Governor.

Application for an Order to issue to Respondent to show cause why his order dated the 9th December, 1930, whereby Petitioner was discharged from the post of Mukhtar should not be set aside.

JUDGMENT.

The Petitioner, Ismail Ahmad Muhammad is seeking an order setting aside two orders of the District Officer of Gaza whereby the District Officer (1) dismissed the Petitioner from the office of Mukhtar of the village of Masmiya, (2) refused to accept the nomination of the Petitioner for re-election to the post of Mukhtar of the said village.

1. A considerable number of letters addressed by the District Officer to the Mukhtar of the said village have been put in all more or less of the same purport i.e. warning the Mukhtars that failing the completion of the repairs of the village school by a certain date they would be dismissed from their offices.

The letters most material to this application are the following ones:

No. GE/5/22

Office,
Sub-District Officer,
Gaza.
10.11.30.

To Mukhtars:
Masmieh el Kabira.

Reference to my letter of the 28.10.30.

I regret that no reply is forthcoming to prove that you have completed the requirements of the school.

You are hereby notified again that unless I receive a letter intimating that you have completed the construction of the school by the 15th inst. you should deem this letter as an order of your discharge.

(sgd) Abd er Razzaq Qlebo,
Sub-District Officer,
Gaza.

No. GE/5/22.

District Offices,
Gaza.
9.12.30.

To Mohd. Ali Yaghi and
Ismail Ahmad Hussein Mihna,
Mukhtars of Mismieh el Kabireh, village.

I confirm my previous information to you that you are dismissed of the office of Mukhtars as from the date of this letter for your continuous abuse in your duty and for not carrying out the orders of the Government in time.

Regards.

District Officer,
Gaza.

SV/1/39.

District Offices,
Gaza.
5/3/31.

To Ismail Ahmed Mihna and
Mohd. Ali Yaghi,
of Mismieh Kabireh.

In reply to your letter dated 24.2.31 I inform you that your names cannot enter nomination of Mukhtars, which is vacant, in the Nismieh El-Kabireh.

Regards.

District Officer,
Gaza.

The Government advocate who appeared to oppose the application argued that the Mukhtar being a Public Officer held office at the will of the executive and has no remedy if dismissed; alternatively that by virtue of Article 61 of the Vilayet Law of

1329, the Kaimakam may dismiss any subordinate officer whom he has power to appoint under the said Article.

The Vilayet Law of 1281 and the Vilayet Administration Law of 1287, have been repealed by the Vilayet Law of the 17th Rabie El Akhar 1333, (Fiscal year 13th March, 1329). The latter Law does not specifically prescribe the duties of a Mukhtar which the old Law does, but in the special chapter dealing with the duties of a Kaimakam and the Officers of a Quada (District) rules and regulations which do not affect this application he has power to warn, reprimand, fine, reduce the rank of, or remove any subordinate official of the various departments of the Quada.

Article 54 of the before-mentioned Vilayet Law of 17th Rabie El Akhar 1333, prescribes that the Kaimakam is in charge of education within the district and "he shall notify the Mukhtars of duties to be performed by them". The District Officer, we are satisfied, notified Petitioner to see to the carrying out of repairs in the village school. This notification Petitioner chose to disregard, and the District Officer was obliged after first issuing a warning to exercise his powers of dismissal.

We are satisfied that the Petitioner failed to carry out the repairs of the village school in compliance with the instructions issued by the District Officer and that the District Officer under all the circumstances was justified in ordering Petitioner's dismissal. We are also of opinion that in the absence of any express provision allowing for the re-election of a Mukhtar who has been dismissed the District Officer in his capacity as such, has a discretion and we are satisfied that it was a reasonable exercise of such discretion in disallowing Petitioner's nomination for re-election.

The Order Nisi must be discharged and the petition dismissed with costs.

Delivered the 24th day of December, 1931.

In the High Court of Justice.

H.C. No. 48/31.

BEFORE:

Baker, J. and Jarallah, J.

IN THE APPLICATION OF:

Muhammad Jibrin
El Abd Abdallah Khalil
Abdallah Rashid Mahmoud — PETITIONERS

vs

The District Officer, Ramleh — RESPONDENT.

Election for Mukhtar ordered by District Officer to be annulled — Law applicable reelection of mukhtars — Art. 148 Vilayet Law, 1281.

Application for an Order to issue to Respondent to show cause why he should not be ordered to order the elections to be annulled which took place for the election of Mukhtars for the Yahudiyeh Village.

JUDGMENT.

This application is based on Article 54 of the Vilayet Law of 1281 and on the Law of 1287.

Article 148 of the Vilayet Law of 1281 relating to the elections are reserved by the provisional section of the Law of 1331 merely in so far as concerns the election of administrative councils and not of Mukhtars.

The rule nisi must, therefore, be discharged with costs.

Delivered the 31st day of March, 1932.

MUNICIPALITY.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 18/28.

BEFORE:

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

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Abraham Altshuler — RESPONDENT.

Sabbath observance in Tel-Aviv — Breach of bye-law imposing duties only on Jews and exempting Christians and Moslems—Bye-law held contrary to Art. 15 of the Mandate — Discrimination between inhabitants of Palestine on the grounds of race, religion or language — Sec. 5, Local Councils Amendment Ordinance, 1921 — Art 17 (1) (a), Palestine Order-in-Council, 1922—Art. 3, Palestine Order-in-Council, 1923. — Subordinate legislation not to override provisions of Ordinance to which it owes its existence — Unreasonable and ultra vires bye-law—Extent of legislative power of Local Council to issue bye-laws.

JUDGMENT OF MR. JUSTICE McDONNELL

In this case the Respondent was charged before the Municipal Court of Tel-Aviv with a breach of Municipal Bye-Law No. 17 of the Local Council of Tel-Aviv which was published in Municipal Notice No. 36 and which runs as follows:—

> "No shop other than a restaurant and no factory shall be opened on the Jewish Sabbath Day within the area of the Local Council of Tel-Aviv, provided that the prohibition shall not apply to a shop or factory owned by a Moslem or a Christian. Restaurants other than those owned by Moslems or Christians may be opened only at the following hours on the Jewish Sabbath Days:—
>
> On Friday eve till 8.30 p.m.
>
> On Saturday between 10 a.m. and 2 p.m.
>
> Dated 1.12.1926. (Sgd.) Township of Tel-Aviv.
>
> Approved by the High Commissioner."

The Municipal Court held that the Respondent's restaurant was opened after 8.30 p.m. on a certain Friday evening and

before 10 a.m. on a certain Saturday morning. The Court convicted the Respondent and sentenced him to pay a fine of £E.2 and costs.

The matter was appealed to the District Court of Jaffa and that Court set aside the conviction on the ground that the bye-law in question was invalid as being contrary to Article 15 of the Mandate for Palestine which lays down that "No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language."

The Attorney-General applied for and obtained leave to appeal from the judgment of the District Court of Jaffa under Section 4 of the Magistrates' Courts Jurisdiction Ordinance, 1924, on the point of law whether the said bye-law is contrary to the provisions of Article 15 of the Mandate for Palestine and is therefore void.

The bye-law in question owes its origin to the Local Councils Ordinance, 1921. Under that Ordinance an Order on page 5 of the Gazette of 1st June, 1921, constituting the Township of Tel-Aviv, was made. Section 3 of that Order which enables the Council to issue bye-laws for the internal administration of the Township was found to be ultra vires and, in consequence, there was passed Section 5 of the Local Councils' Amendment Ordinance, No. 2 of 1921, which gave the Local Council the power, with the approval of the District Commissioner, to issue bye-laws for securing good order in a village or group or quarter. The bye-law in question purports to be made under this Section, but we may observe in passing, though the point was not taken, that the necessary approval was given to it not by the District Commissioner as required by that Section but by the High Commissioner as stated at its foot.

The first part of Article 15 of the Mandate for Palestine runs as follows:—

> "The Mandatory shall see that complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, are ensured to all. No discrimination of any kind shall be made between the inhabitants of Palestine on the ground of race, religion or language. No person shall be excluded from Palestine on the sole ground of his religious belief."

The Attorney-General addressed to us an argument to the effect that Article 17 (1) (a) of the Palestine Order-in-Council,

1922, as amended by Article 3 of the Order-in-Council, 1923, provides that no Ordinance shall be promulgated which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion or language, and that Article 17 (1) (c) provides that no Ordinance shall be promulgated which shall be in any way repugnant to or inconsistent with the provisions of the Mandate, the implication being that legislative enactments other than Ordinances were not to be subject to this restriction.

We cannot, for one moment, listen to this argument which would enable the legislature by making provision for such enactments being made by subordinate legislation completely to stultify an express provision in the very instrument to which it owes its existence.

The Attorney-General cited to us Section 12 of the Palestine Legislative Council Election Order, 1922, and the Municipal Franchise Ordinance, 1926, as instances of legislation dealing with different religious communities which he suggested might b impugned on the same ground as is the present bye-law.

On the contrary we hold that in each of these cases special care has been taken to see that there should not be discrimination on the ground of religion.

In Article 12 of the Palestine Legislative Council Election Order, 1922, there is provision for separate electoral colleges for Moslems, Christians and Jews, but the very same Article goes on to provide that electors who do not belong to the Moslem, Christian and (sic) Jewish community shall opt for any electoral college in their area. Again, Section 17 (3) (c) of the Municipal Franchise Ordinance, 1926, which provides for separate registers for the members of different communities, contains an express proviso that a person who is not a member of one of the three communities of Moslems, Christians or Jews shall elect upon which register he shall be placed.

Finally, the Attorney-General cited the Religious Communities' Organisation Ordinance, 1926, under which any religious community in Palestine may apply to the High Commissioner in Executive Council to make regulation for its organisation as a religious community and its recognition as such by the Government of Palestine.

We cannot agree that an Ordinance such as this which

enables any religious community to set the ball in motion by a mere application can be held to contain in it a germ of discrimination such as the Mandate prohibits.

The bye-law, on the other hand, limits the freedom of action on Jewish Sabbath of shop, restaurant and factory owners not merely if they are Jews but if they are not Moslems or Christians so that, as we pointed out to the Attorney-General, a Druze or Bahai shopkeeper comes within the prohibition.

Can it be said because the bye-law in question makes a distinction in favour of the minority (and the non-Jews are very small minority in Tel-Aviv) that there is, therefore, not a discrimination against the majority. A distinction is drawn between Moslems and Christians on the one hand, and persons of any different belief or of no belief on the other hand, and we cannot see how to hold otherwise than that it is just as much discrimination when the majority suffers as it is when a minority is discriminated against.

Even if there was not this express limitation imported from the Mandate by Article 17(1)(c) of the Palestine Order-in-Council, we should be compelled to hold the bye-law unreasonable on the ground laid down by Russell, C.J., in Kruse v. Johnson (1898), 2 Q.B. at p. 99, where, speaking of bye-laws made by a county council, he said: "I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn bye-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.'"

The bye-law under review is clearly partial and unequal in its operation as between different classes, and hence it is, in the words of the judgment just quoted, "unreasonable and ultra vires."

This disposes of the only question upon which leave to appeal has been granted.

It should, however, be pointed out that even if the bye-law

had been so framed as not to discriminate between the inhabitants on the ground of religion, there would still remain grave doubt as to its validity.

The legislative power of the Local Council is restricted to the issue of bye-laws "for securing good order"; and in view of decisions of the English Courts in similar cases, it would seem difficult to maintain that a bye-law of the kind under consideration is made for securing good order.

The appeal must be dismissed and the judgment of the District Court affirmed.

JUDGMENT OF MR. JUSTICE CORRIE.

I concur.

JUDGMENT OF MR. JUSTICE FRUMKIN.

I concur in the judgment of my learned brethren in that "Ordinance" in Article 17 (1) (a) and (c) of the Palestine Order-in-Council, is meant to include all sorts of enactments made by subordinate legislature as well as Ordinances proper.

I do, however, dissent from that part of the judgment declaring that municipal bye-law No. 17 of the Local Council of Tel-Aviv made discrimination between the inhabitants of Palestine on the ground of religion and was therefore invalid as being contrary to Article 15 of the Mandate.

I am drawing a line between discrimination, and privileges exceptionally granted, on grounds of religion. The main feature of discrimination is to deprive a certain class of inhabitants from rights granted to, or to bring such class under duties and obligations not imposed upon, the public at large. Generally, although not necessarily, minorities are the subject of discrimination, and as a rule we find a difference of religion or race between the ruler and the people discriminated against. On the other hand, when a law is made to be binding on the public at large, but for some reason or other, a certain class is exempt from the operation of such law on the ground of religious belief, that would be a privilege exceptionally granted to it on the ground of its religion and in no way would it be a discrimination against the public at large. Thus, when at Public Examinations held in England, candidates of the Jewish Faith are allowed to take at another time subjects set on Fridays after sunset or on Saturdays,

a concession not granted to candidates of other Faiths, it is a privilege exceptionally granted to the former on the ground of their religion, and no one would suggest that by that rule Christian candidates are discriminated against on the ground of their religion.

When we come to the bye-law at issue, we could not consider it without having regard to the circumstances and conditions of the locality for which it was ruled.

The Township of Tel-Aviv is, if not one hundred per cent, nevertheless a Jewish locality. The Official Census of 1922 shows that Jews constituted over 99 per cent, of the population, Moslems about ½ per cent and Christians less than ¼ per cent (or in exact figures: 15,065 Jews; 78 Moslems; and 42 Christians). There is nothing to show that the proportion has since been changed.

As to the Sabbath, it must be emphasized that the Sabbath Day for the Jewish people is more than an ordinary day of rest. It forms not only an inseparable part of the Jewish religion, but is a fundamental institution of the national integrity of the people; and it has rightly been said that more than Israel observed the Sabbath, the Sabbath kept Israel alive. To my mind it is quite natural and in no way unreasonable that with the view of securing good order in this purely Jewish locality, provisions were made to prohibit individuals from hurting public feeling and disturbing public peace by publicly breaking the Sabbath.

The difficulty of this bye-law would appear to be due to the fact that whether out of respect to other religions, or out of hospitality and tolerance towards non-Jews resident in Tel-Aviv or perhaps for no good reason at all, the Local Council did not impose that duty of observing the Sabbath Day upon members of other religions, or rather upon Moslems and Christians only as mentioned in the bye-law. This is a privilege granted to Moslems and Christians on the ground of their respective religions so that they should not have to close on the Jewish Sabbath Day in addition to their own day of rest, and not a discrimination against the Jewish inhabitants on the ground of their religion.

Moreover, there could be no discrimination without intention or tendency to discriminate. Article 17 (1) (a) of the Palestine Order-in-Council, in introducing the proviso to Article 15 of the Mandate as to that point into the Legislation of this country, provides that "no Ordinance shall be promulgated . . . etc., which

shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion or language." I cannot see my way to say that a body composed exclusively of Jewish members, elected almost solely by Jews, tended to discriminate against Jewish inhabitants on the ground of their religion to the advantage of an almost non-existing minority.

Finally, it would not be amiss to mention that the party aggrieved has never taken the view that the bye-law is discriminating against him on the ground of his religion as a Jew. He stated before us that he instructed his counsel to appeal to the District Court on a point of fact only. Of course, we cannot listen to such a statement at this stage. But even counsel did not base his appeal on the ground of discrimination, and laid stress on another part of Article 15 of the Mandate, namely, that the bye-law is ultra vires as interfering with the freedom of conscience. This point, however, is not before us.

In my opinion the appeal should be allowed and the case remitted to the District Court for decision on the merits.

Delivered the 24th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 48/28.

BEFORE:

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

IN THE CASE OF:

Sadeq Hassan El Balawi
Abdel Latif Taji — APPELLANTS.

vs

The Mayor of Beisan — RESPONDENT.

Application to Municipality for refund of monies paid to it as Municipal Dues — Art. 55, Law of Tithe, 1326 — Loss suffered on contract in consequence of Government prohibition of importation of cattle.

Appeal from the judgment ot the District Court of Nablus dated 28th February, 1928.

JUDGMENT.

With regard to the Appellants' claim to a remission of £P.100 based upon the resolution of the Respondent, the Municipal Council, No. 168 dated 5th January, 1926, we confirm the judgment of the District Court.

It is not denied, however, by the Respondent that the provisions of Article 55 of the Law of Tithe of 1326 are applicable to Municipal Dues, for the collection of which a contract has been entered into. Hence we hold, if the Appellants prove that they have suffered actual loss on the contract in consequence of the prohibition of importation of cattle, they are entitled to a reduction from the amount payable by them to the Respondent.

The formal judgment of the District Court contains a recital of the fact that no loss has been incurred by the Appellants, but it appears that no evidence on this point was submitted by either side.

The judgment of the District Court is, therefore, set aside and the case remitted for evidence to be heard on the issue whether a loss was incurred by the Appellants on account of the Government's Proclamation or not, and judgment given.

Costs of this appeal are to be costs of the case.

Given the 23rd day of January, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 117/28.

BEFORE:

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

IN THE APPEAL OF:

Said Mustafa El Hindi
Hussein Murad
Khalil El Hindi — APPELLANTS.

vs

The Mayor of Safad — RESPONDENT.

Art. 55 Law of Tithe, 1321, applicable to Municipal Dues for collection of which a contract has been entered into — Loss suffered on contract in consequence of Government prohibition of importation of cattle.

Appeal from the Judgment of the District Court of Haifa dated 17th day of April, 1928.

JUDGMENT.

This appeal is similar to the appeal of Sadeq Hassan El Balawi and Abdel Latif Taji vs. The Mayor of Beisan No. 48/28 wherein judgment was given by the Court of Appeal on the 23rd January, 1929, deciding that the provisions of Article 55 of the Law of Tithe of 1321 are applicable to Municipal dues for the collection of which a contract had been entered into and therefore if Appellants could prove that they have suffered actual loss on the contract in consequence of the prohibition of importation of cattle, they would be entitled to a reduction from the amount payable by them to Respondent and the case was remitted for evidence to be heard on the issue whether a loss was incurred by Appellants on account of the Government Proclamation or not and judgment be given.

In the present appeal it is not denied that the importation of animals was prohibited during a certain period of the contract: also the importation of certain cereals and fodder and also that the Respondent deprived him of the collection of taxes on wood and petroleum all of which he was entitled to collect taxes upon by virtue of his contract.

We are of opinion that the facts are similar to those in the before mentioned Appeal No. 48/28 and the judgment in that case must be followed: accordingly the judgment of the District Court is set aside and the case remitted for evidence to be heard on the issue whether a loss was incurred by Appellants on account of the beforementioned prohibition and the restrictions on the collection of taxes on wood and petroleum and if proved a proportionate reduction made from the amount payable to Respondent and judgment given accordingly.

Costs to be costs in the case.

Delivered the 20th day of March, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 58/30.

BEFORE:

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

IN THE CASE OF:

The Township of Tel-Aviv — APPELLANTS.

vs

Samuel Moyal,
Jacob Shabati Moyal,
Shlomo Bahbut, and
Emmanuel Bahbut — RESPONDENTS.

Action by Municipality for land tax re undeveloped land — Sec. 5 (1) (b) Township of Tel-Aviv Order, 1921 — Exemption from taxation of land reserved for public utility — Inclusion of Ramath Hasharon within boundaries of Tel-Aviv — Tel-Aviv Local Council Validation Order, 1928 — Limits of powers of statutory corporation — Grant of exemption to certain classes of inhabitants — Discrimination between classes of tax-payers.

JUDGMENT.

The Appellants sued the Respondents in the Jaffa District Court for the sum of £P.118.217, being land tax for the period 1924-1928 in respect of a plot of undeveloped land situate in Ramath Hasharon quarter, Tel-Aviv, and owned by Respondents. The said tax was levied by Appellants under Section 5 (1) (b) of the Township of Tel-Aviv Order, 1921, which reads, inter alia, as follows:

> "The Council shall have power to levy the following taxes, rates and fees on property and persons within the area of the township (inter alia) a tax on land fit for building which has not been developed at a rate not exceeding one per cent of the market value of such land and at a rate not exceeding three per cent in respect of plots situated along a street already paved".

The said provision was amended by an order dated the 23rd February, 1926, which provided, inter alia:—

> "the tax on undeveloped building land may be levied at a rate not exceeding 10 per cent of the market value of the land.

2. The Council, with the consent of the District Commissioner, may exempt from the tax any land reserved for the purpose of public utility or common benefit or some approved society."

II. By an Ordinance known as the Tel-Aviv Local Council Validation Ordinance No. 28 of 1928, it was enacted, inter alia, that since 11th May, 1923, the boundaries of the Township of Tel-Aviv shall be deemed to be such that Ramath Hasharon is included in the Township and that all rates, taxes and fees levied in accordance with the provisions of the Tel-Aviv Township Order, 1921, within the said area shall be deemed to be and always to have been validly imposed and charged.

III. Respondents claimed that they were exempt from the tax in question in that an agreement was made between their quarter of the Township of Tel-Aviv and the said Township on the 7th June, 1923, whereby, in consideration of the said quarter raising no objection to being included within the boundaries of Tel-Aviv, the Township would not levy on the said quarter a tax on undeveloped land.

IV. The particulars of the agreement we are not concerned with for we are satisfied:

Firstly, that when any corporation is created by statute or order its powers are limited and circumscribed by the statute or order creating it and extend no further than is expressly stated therein and what a statute does not expressly or impliedly authorise is to be taken to be prohibited.

Accordingly there being no provision in the order creating the Township enabling the Township to grant exemption to one class of its inhabitants or discriminate between a class of taxpayers other than that contained in the hereinbefore-mentioned amendment order of the 23rd February, 1926, which does not apply to Respondents, we are satisfied that in the absence of such express authority, the agreement between Respondents and the Township was outside the scope of the Township Constitution as defined by the order and is ultra vires and void.

Secondly, that the hereinbefore-mentioned Validation Ordinance, No. 28 of 1928, Section 3, which enacts that all rates, taxes, etc., levied by the Township of Tel-Aviv in accordance with the provisions of the Tel-Aviv Township Order, 1921, and the amendment thereto within the area (which includes the land of Respondents) shall be deemed to be and always to have been

validly imposed clearly renders Respondents liable to pay the said taxes.

Accordingly, the appeal must be allowed, the judgment of the lower Court quashed and judgment entered for Appellants for the sum claimed with costs here and in the Court below, £P.3 being allowed as advocates' fees in this Court.

Delivered the 24th day of December, 1931.

NATURALIZATION.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 26/24.

BEFORE:

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

IN THE CASE OF:

Henry Robinson — APPELLANT.

vs

Yeshiah Press and Others — RESPONDENTS.

Question of nationality at death — Naturalization of Russian national in Turkish territory at outbreak of the War — Ottoman Administrative Order requiring all Jews in Palestine who were nationals of the Allied Powers to accept Ottoman nationality or to leave the country — Acquisition by woman of Ottoman nationality of foreign nationality by marriage — Art. 7, Ottoman Law of Nationality, 1869.

JUDGMENT.

The question which this Court has to decide is the nationality of the Appellant's mother Hannah Lewis (originally Hannah Shtarashklovsky, a Russian subject) at her death.

The District Court has held that this case is governed by the judgment of the Court of Appeal in the case of Habbas v. Sheinfinkel (C.A. 76/22), which decided that the naturalisation of a Russian national under the Ottoman Administrative Order which required all Jews resident in this country at the outbreak of the War who were nationals of one of the Allied Powers either to leave the country or to accept naturalisation as Ottoman subjects was to be regarded as valid.

In that case naturalisation was not contested, the question for the Court was whether such naturalisation was valid or not.

In the present case naturalisation is disputed, but an Ottoman Census Certificate has been produced describing the deceased as an Ottoman subject and from this and from the fact that she continued to reside here it must be inferred that she complied with the requirements of the Ottoman Authorities. On the other hand there is evidence before the Court, which is not rebutted, that Hannah Shtarashklovsky had previously acquired British nationality by marriage with I. J. Lewis. There is no evidence or her husband's death, or that he ever acquired Ottoman nationality, or that the marriage had been dissolved.

Now by Ottoman Law a woman who had acquired foreign nationality by marriage could not be naturalised apart from her husband. This is evident from Article 7 of the Law of Nationality of 1869, which provides for the resumption of Ottoman nationality by an Ottoman woman who has married a foreigner, only after widowhood.

It follows that Hannah Shtarashklovsky could not validly become naturalised as an Ottoman subject apart from her husband during his lifetime: and any procedure of naturalisation that she may have fulfilled was invalid.

If, on the other hand, her husband had previously died, or the marriage had been dissolved, this case would be governed by the decision in the case cited.

The judgment must therefore be set aside and the case remitted for evidence to prove whether I. J. Lewis had died before the date when his wife obtained naturalisation, or had himself acquired Ottoman nationality, or the marriage had been dissolved.

Costs to follow the event.

Delivered the 20th day of February, 1925.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 220/26.

BEFORE:

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

IN THE CASE OF:

Nahum Razkovsky — APPELLANT.

vs

Leonine, Adele, Rachel, Marie, Esther and Hanna Razkowsky — RESPONDENTS.

Question of nationality at death — Foreigner within meaning of Art. 59, Palestine Order-in-Council, 1922 and Succession Ordinance, 1923 — Acceptance of Ottoman nationality — Ottoman Administrative Order requiring all Jews in Palestine who were nationals of the Allied Powers to accept Ottoman Nationality or to leave Palestine — British Subject cannot become naturalized in beligerant State — Contracts between citizens of belligerant states held void — Trading with alien enemy — Rule in Habbas vs. Sheinfinkel distinguished.

JUDGMENT OF MR. JUSTICE BAKER.

This is an appeal from a decision of the Jaffa District Court whereby it was decided, inter alia, that Bernard Razkovsky (deceased) at the time of his death was a French citizen and a foreigner within the meaning of the Palestine Order-in-Council, 1922, and the Succession Ordinance, 1923. The rest of the District Court's judgment we are not concerned with, the appeal being only against the decision with regard to Bernard Razkovsky's nationality.

The facts are not denied and are shortly as follows:—

Bernard Razkovsky was born in Russian Poland on the 17th March, 1841. On the 24th September, 1890, he became a naturalized French citizen. In 1895 he came to Palestine and was registered as a French citizen with the French Consul here. During the War he would appear to have been naturalized as an Ottoman subject, a Turkish kushan having been put in dated 4th May, 1331, stating that he had renounced his former nationality and accepted Ottoman Nationality.

Subsequent to the War, i.e. on the 9th February, 1922, Bernard Razkovsky renewed his inscription at the French Consulate in Jaffa and continued its yearly renewal up to the time of his death.

The question for us to decide, therefore, is, what force can we give to the letter of naturalization which the deceased obtained under an Administrative Order of the Ottoman Government which required all persons who were residing in Palestine at the outbreak of the War and who were nationals of one of the Allied Powers either to leave the country or accept Ottoman naturalization?

There is no doubt that the deceased up to the time of his death considered himself a French citizen as also did the French Government, whose Consular Authorities here registered him as such.

The English Law on the point is laid down in the case of R. v. Lynch (1903) 1 K.B., p. 744, wherein it was held "that a British subject cannot become naturalized in a foreign country during a state of war between that country and Great Britain."

It is also a well-established rule of International Law "that War has the effect of rendering void all contracts between the Citizens of one belligerent State and those of the other belligerent if they were entered into in time of War." See also Hallak's "International Law," Vol. I, Cap. XII, where it is said: "It seems to be a well-settled principle of international law that during the existence of hostilities (flagrante bello) no subject of a belligerent can transfer his allegiance or acquire a foreign domicile so as to protect his trade either against the belligerent claims of his own country or against those of a hostile power."

The ground of this doctrine no doubt being "that there rests upon every subject or citizen a moral obligation not to abandon his country in time of war without the express sanction of his Government. The personal services and the property of each separate individual are a component part of the national resources on which the Government relies in declaring a war and to withdraw these when his country may require their aid is a breach of the duty that springs from the necessary relation that each individual bears to the political society of which he is a member".

Thus in Janson v. Driefontein Consolidated Limited (1902) A.C. 484 at page 499 Lord Davey said "it is a rule well established in Common Law that the King's subjects cannot trade with an alien enemy, i.e., a person owing allegiance to a Government at war with the King, without the King's licence and every contract made in violation of this principle is void."

The force of a declaration of war must therefore be equal to a statute prohibiting intercourse with the enemy except by the King's licence and I am therefore of opinion that a citizen of a belligerent nation cannot enter into a contract to divest himself of his naturalization with a nation his country is at war with, whatever his circumstances might be, and that if he does so his fresh naturalization must be null and void.

This ruling must be distinguished from the case of Habbas v. Sheinfinkel (Civil Appeal No. 76 of 1922) wherein the question of the validity of a similar naturalization was considered and held to be valid, and I am of opinion that it must be distinguished on the following two grounds:

1. The Court of Appeal which gave the judgment in the said case was a Court set up by the Occupying Power pending the grant of a Constitution to the Government of Palestine and the judgment is expressly based on the fact that the change of nationality would have been undoubtedly recognized by the Ottoman Courts. This Court, however, which sits under the Palestine Order-in-Council, 1922, is evidently not bound to follow the view that an Ottoman Court would follow with regard to Ottoman regulations.

2. Mrs. Sheinfinkel did not die until 1920, yet she made no attempt after the cessation of hostilities to resume or reassert her original nationality.

The judgment of the District Court of Jaffa, I am of opinion for the above reasons, must be confirmed, and the appeal dismissed.

Costs to be paid out of the estate.

JUDGMENT OF MR. JUSTICE FRUMKIN.

I concur.

JUDGMENT OF MR. JUSTICE KHAYAT.

I concur in the judgment of the learned President and hold that when the capitulations were in force Ottoman Laws were not applied to foreigners except with the consent of their respective Governments. Article 46 of the Palestine Order-in-Council, 1922, provides that the Civil Courts shall not apply Ottoman Laws enacted after 1st November, 1914. Whereas the Orders of the Turkish Government referred to in the judgment of the learned President were issued after the said date, I therefore hold that the

deceased was entitled to revert to his French nationality and that he must be regarded a French citizen.

Delivered the 23rd day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

C. A. No. 62/28.

BEFORE:
The Chief Justice, The Senior British Judge and Frumkin, J.

IN THE CASE OF:

Henry Robinson — APPELLANT.

vs

Yeshayahu Press & Others — RESPONDENTS.

Question of nationality at death — Naturalization of Russian national in Turkish Territory at outbreak of War—Ottoman Administrative Order requiring all Jews in Palestine who were nationals of the Allied Powers to accept Ottoman nationality or to leave Palestine—Acquisition by woman of Ottoman nationality of foreign nationality by marriage — Article 7, Ottoman Law of Nationality, 1869 — Confirmation of will — Article 64 (3) Palestine Order-in-Council, 1922 — Grant of letters of administration — Change of nationality.

Appeal from the judgment of the District Court of Jerusalem dated 16th day of January, 1928.

JUDGMENT OF THE DISTRICT COURT.

The above deceased, a Russian Jewess, died at Jerusalem on the 21st of November, 1921, leaving a will dated the 10th of November, 1921, duly signed by her and attested by 3 witnesses and legalised by the Notary Public, Jerusalem, whereby, after appointing the Defendants executors of the said will, she bequeathed, after the payment of her funeral expenses, £E. 2000. for the foundation of an Asylum for the poor and LE.40. for religious services.

Subsequent to the death of deceased, certain people appeared before the Sharia Court purporting to be the heirs of deceased and applied for a certificate of inheritance.

After hearing witnesses, the said Court decided inter alia that deceased was an Ottoman subject and that Plaintiff was not one of the legal heirs and that applicants were.

On the 21st November, 1921, the Defendants appeared before the Rabbinical Court who, after satisfying themselves that deceased was a member of the Jewish Community, confirmed the said will.

The Plaintiff, an alleged son of deceased, has applied to the Court by virtue of Article 64 Section 3 of the Palestine Order-in-Council for all proceedings to be quashed on the grounds that deceased died a British subject and that Sharia Court and Rabbinical Court had no jurisdiction. He also applies for the District Court to grant letters of administration to him as the son of deceased.

It is not denied that Plaintiff was the lawful issue of deceased and one Robinson, a British subject, and that subsequent to Plaintiff's father's death, deceased married one I. J. Lewis, also a British subject, and that in the year 1904 I. J. Lewis was alive and married to the deceased.

The question, therefore, for the Court to decide was: What was deceased's nationality at the time of her decease?

Upon the first hearing of this case, the District Court decided that in view of an Ottoman Administrative Order promulgated upon the outbreak of war between the Ottoman Empire and Great Britain and her Allies, it was enacted that all persons residing in the country at the outbreak of war and being nationals of one of the Allied Powers, must either leave the country or accept Ottoman naturalisation. There is reliable evidence that the deceased took out letters of naturalisation as an Ottoman subject and died as such. The Court, therefore, decided that deceased died an Ottoman subject and dismissed Plaintiff's claim. The judgment was appealed and the Appellate Court held that "as there was evidence that deceased had previously acquired British nationality by marriage with I. J. Lewis and there was no evidence that Lewis had ever acquired Ottoman nationality or that the marriage had been dissolved, therefore, in view of Section 7 of the Law of Nationality of 1869, which provides that a woman who had acquired foreign nationality by marriage could not be naturalised apart from her husband, also that upon the death of her husband she would resume Ottoman nationality", it necessarily followed that deceased could not validly become naturalised as an Ottoman subject apart from her husband during his lifetime and any procedure of naturalisation that she may have fulfilled was invalid.

If, on the other hand, deceased's husband had previously died, or the marriage had been dissolved, the case would be

governed by the case of Habbas v. Sheinfinkel, No. 76 of 1922, cited by the District Court and upon which they based their judgment.

The judgment was, therefore, set aside and the case remitted for evidence to prove whether I. J. Lewis had died before the date when his wife obtained naturalisation or had himself acquired Ottoman nationality or the marriage had been dissolved.

A considerable time was allowed to the parties to produce whatever evidence they could obtain, and after hearing the same, I am satisfied that there is sufficient evidence for this Court to presume that I. J. Lewis was dead at the time the deceased acquired Ottoman nationality, and therefore, in accordance with the ruling of the Appellate Court in Habbas v. Sheinfinkel the deceased died an Ottoman subject.

I have then to consider what force I can give to a British subject taking out letters of naturalisation under the before mentioned Administrative Order of the Ottoman Government which required all persons who were residing in Palestine at the outbreak of war and who were nationals of one of the Allied Powers either to leave the country or accept Ottoman naturalisation in view of the decision in the case of Nahum Razkovsky v. Leonine Razkovsky and Others, Civil Appeal No. 220/26, which decided that the said Administrative Order did not divest a French National of his French nationality. I am of opinion that this case must be distinguished from it for the following reasons. In that case the deceased, prior to his naturalisation under the Ottoman Administrative Order, was registered as a French citizen with the French Consul and subsequent to the cessation of hostilities he renewed his inscription with the French Consul as a French citizen and continued its yearly renewal up to the time of his death.

Hanna Starashklovsky died in 1921, some considerable time subsequent to the cessation of hostilites, yet during the whole of the time between the cessation of hostilities and her death there is no evidence that she made any attempt to revert to her previous nationality, and I am of opinion that a broad distinction must be made between a person who having taken out letters of naturalisation in an enemy country during the War, at the cessation thereof makes any attempt to revert to his previous nationality and one who does not. The latest English Law on the point appears to be the judgment of the Court of Appeal in Fasbender v. Attorney-General, (1922) 2 Ch. 850, in which it

was held that the German nationality acquired by an English woman by marriage with a German subject before the conclusion of peace should be regarded as a valid change in nationality, and the Master of the Rolls in that case said there was a wide distinction between a British national seeking to take advantage of an enabling provision of the English Nationality Act to escape his liabilities under the English Law and a British national doing an act which brings a provision of the English Law down upon him against his will.

I am, therefore, of opinion that the Ottoman naturalisation of Allied subjects in Palestine during the war, if there is no evidence of a desire to escape their liabilities to their Government and no evidence of a desire to revert to their previous nationality, they must belong to the latter class mentioned in the Master of the Rolls' judgment and not the former class of acts.

I therefore, decide that the deceased Sara Starashklovsky died an Ottoman subject and that Plaintiff's case must be dismissed with costs assessed at £P.20.

Given at Jerusalem the 16th day of April, 1928.

JUDGMENT OF THE COURT OF APPEAL.

The judgment of February 20th, 1925*, was remitted by the Court for proof that the date of the death of I. J. Lewis preceded the date on which his wife was naturalised, and laid it down that if it were proved to be so this case would be governed by the decision in Habbas vs Sheinfinkel. The District Court after hearing evidence found as a fact that Lewis did die at a date earlier than that on which his widow acquired Ottoman nationality. Since the date of the decision of 20th February, 1925, in this Court, the Court has had before it the case of Razkowsky vs Razkowsky with reference to the naturalisation of a French subject during the war under the same Ottoman law. It has been argued that the judgment in that case is binding on the Court in this case.

All we need to say to that is that in the Razkowsky case a distinction was to be drawn on the facts between it and Habbas vs Sheinfinkel.

In this case the Court of Appeal has held that Habbas and Sheinfinkel governs the facts and there is no more to be said for that argument.

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* See ante, p. 1325.

With regard to the Respondent's application for removal of attachment he may apply to the President of the District Court for this.

Appeal dismissed with £P.5 advocate's fees and costs.

Given the 14th day of March, 1929.

NEGLIGENCE.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 8/26.

BEFORE:

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

IN THE CASE OF:

Daniel Wexler — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Death caused by negligence in construction of building — Negligence held not to be the direct cause of the injury — Conviction under Art. 182, Ottoman Penal Code set aside.

JUDGMENT.

There is evidence that the correct way to carry out such a construction as was contemplated was to build the pillars before the upper floor was begun. Nevertheless, had the lower floor remained as it was no accident would have happened. It was dangerous to interfere with the lower front before the pillars were built and that was the direct cause of the accident The architect is not shown to have been responsible for that direct cause and if not so responsible is not guilty under Ottoman Penal Code, Article 182.

Appeal allowed and Judgment of District Court convicting the Appellant set aside. Appellant to be discharged.

Delivered the 17th day of May, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 172/23.

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

IN THE CASE OF:

Levy Geller — APPELLANT.

vs

Osher Segal — RESPONDENT.

Permanent injury under Art. 183 Penal Code — Surgical expenses recoverable for incapacity — Diyet — Loss of earnings by brother of claimant — Jurisdiction of Courts — Sec. 52, Palestine Order-in-Council, 1922 — Jurisdiction of Sharia Courts in awarding diyet.

Appeal from the judgment of the District Court, Haifa dated 8th May, 1923, in action No. 100/23.

JUDGMENT.

This action arises out of a claim for damages for injury to the Respondent inflicted upon him by the Appellant, in respect of which the Appellant has been convicted under Article 183 of the Penal Code.

The District Court has awarded damages under four headings:

1) for loss of earnings during the period when the Respondent was incapacitated from working,

2) for compensation for the permanent injury to a limb,

3) for surgical expenses, and

4) for loss of earnings by Respondent's brother.

The Appellant maintains that he is only liable for surgical expenses and diyet, to be calculated by the Sheri Court in accordance with the rules of Sheri law.

The parties are both Jews and either by origin or by naturalization during the war had become Ottoman Subjects at the time of the British Occupation.

It is clear that had this action been brought before the British Occupation, the only claim that could have been heard by the Civil Court would have been for "surgical expenses" that is, for actual expenses incurred for medical treatment of the injured

person and for loss of earnings by him during the period of total incapacity.

The question of compensation for permanent injury to a member lies within the jurisdiction of the Sheri and not of the Civil Court.

It is for the Respondent to show that this rule has been amended by Legislation since the British Occupation.

In this connection he relies upon the Proclamation of the 24th June, 1918, and the Palestine Order-in-Council.

Neither of these deal expressly with the question of diyet nor does the Proclamation contain any provision which can be regarded as amending by implication the law of diyet. It has been argued however that Section 52 of the Order-in-Council limits the jurisdiction of Sheri Courts, so that any matter which does not come within the terms of that section now lies outside the Sheri jurisdiction, and if not expressly assigned to another Court, is within the jurisdiction of the Civil Courts.

Even if this were the case, there has been no amendment of the previously existing rules as to assessment of diyet, which would thus have to be applied by the Civil Courts.

But it has already been held by this Court that the jurisdiction of the Sheri Courts in awarding diyet for homicide is unaffected by the Order-in-Council, and there is no reason for holding otherwise in regard to diyet for injury to a member.

On this point therefore the appeal must succeed.

The Appellant has also objected to the amounts awarded by the District Court under headings (1), (2) and (4). Items (1) and (3) involve only questions of fact and there is no ground for altering the District Court's findings with regard to them. Item (4) however appears to require amendment.

The court has held "that the plaintiff should be given judgment for P.T.300 in respect of his brother's delay from work for 15 days considering the hospital fees for every day for a patient to be P.T.20.

Clearly the Respondent cannot have judgment for any loss occasioned to his brother.

The judgment of the District Court is amended by disallowing

the award of P.T.5000 compensation under heading (2) and of P.T.300 under heading (4).

Costs of this appeal are to be paid by the Respondent.

Delivered the 22nd day of December, 1923.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 2/27.

BEFORE:

The Senior British Judge, Khaldi, J. and Daoudi, J.

IN THE CASE OF:

Hanokh Rosenberg — APPELLANT.

vs

Ismail Said Zeidan — RESPONDENT.

Action against driver of motor-car—Civil responsibility of acquitted person for expenses for medical treatment of victim — Section 6, Jurisdiction of Civil and Religious Courts Ordinance, 1925—Power of Criminal Court to award compensation in lieu of diyet—Recovery of diyet governed by Moslem Religious Law — Civil liability to make good any damage caused—Arts. 92, 913, 923—940, Mejelle.

JUDGMENT.

The Appellant sued the Respondent in the Magistrates' Court of Tel-Aviv for the amount of the expenses incurred by the Appellant for medical treatment in consequence of the Respondent having knocked him down while driving a motor-car. Judgment was given in favour of the Appellant.

The Respondent appealed to the District Court which held that as the action arose out of a criminal charge of which the Respondent had been acquitted, the Respondent was not civilly liable, and dismissed the action.

Leave to appeal against this judgment has been given.

Some confusion appears to have arisen as to the effect of Section 6 of the Jurisdiction of Civil and Religious Courts Ordinance, 1925.

The latter part of that section empowers a Criminal Court to award compensation in lieu of diyet "in any case in which a prosecution for homicide or injury to a member is brought."

The wording of the section does not limit the power of the Court to award compensation to cases in which the accused is convicted: and though the ordinary practice in the case of an acquittal is for the Criminal Court to refuse to award damages, leaving the injured party to apply for diyet to the competent Court, there is nothing in the section which would prevent the Criminal Court from awarding compensation in any case in which a diyet is payable by Moslem Religious Law.

Moreover, where one of the parties is not a Moslem the competent Court in claims for diyet is the Civil Court, which thus is bound to decide, either when trying the criminal charge or when sitting in a civil capacity, whether in the circumstances of the case a diyet would be payable by Moslem Religious Law.

Where, however, the claim is for damages other than compensation in lieu of diyet, Section 6 of the Jurisdiction of Civil and Religious Courts Ordinance, 1925, has no application, and reference has to be made to the general law as to damages for injuries.

The general principle of the Mejelle is clear. Article 92 lays down that,

"A person who does an act, even if he does not act intentionally, is responsible." And the burden is upon such person to prove that there were circumstances which negative his liability.

Articles 923 to 940 contain examples of the application of this principle.

Thus Article 913 provides an example of the general rule:

> "If anyone's foot slips and he falls and destroys the property of another, he is responsible."

The question of liability for damage caused by an animal on the public road is dealt with in Section 932 and the following section:

Article 932 lays down that:—

> "Everyone has a right to pass with an animal on the public road.
>
> Therefore while anyone is going on a public road riding on his beast, he is not liable for loss or damage which it was not possible to guard against.

For example: If the clothes of another are spotted by the scattering of dust or mud by the feet of an animal, or if he does harm with his hind feet, or striking with his tail, there is no liability.

But if harm or damage takes place by his coming into collision, or striking with his forefeet or head, the person who is riding is responsible."

Article 933:—

"A person driving or leading on the public road is like a person who rides. That is to say, they also are only responsible for damages which impose liability on a rider."

Article 937:—

"If the horse does not take the bit, and while the rider cannot hold his head, does damage, there is no liability."

Thus it is clear that apart from any criminal responsibility, and putting aside the special case of compensation for homicide or injury to a member, there is, in general, a civil liability to make good any damage caused, which liability may, however, be prevented from arising by the special circumstances of the case.

The judgment of the District Court must be set aside and the case remitted for the Court to determine whether. in all the circumstances of the case, the Appellant is liable to make good to the Respondent the expenses incurred by him.

Costs of this appeal will follow the event.

Delivered the 29th day of December, 1927.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 40/28.

BEFORE:

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

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Simha Menahem Goldman — RESPONDENT.

Necessity of both negligence and non-observance of laws to constitute offence under Art. 182, Ottoman Penal Code — Ottoman Penal Code adapted from French Penal Code — Translation of Art. 182, Ottoman Penal Code corrected.

JUDGMENT.

This is a case on the interpretation of Article 182 of the Ottoman Penal Code, the relevant parts of which in Bucknill and Utidjian's translation run as follows:—

> "If a person kills an individual by mistake or unintentionally becomes the cause of the destruction of his life he is .... punished with imprisonment for .... two years if this affair of killing has arisen from carelessness or unobservance of the laws."

The judgment of the District Court of Haifa was as follows:—

> "We have come to the conclusion that the case for the prosecution fails.
>
> "Article 182 requires negligence and non-observance of the laws. In our opinion the prosecution has failed to prove any non-observance of the laws, for the very good reason that there appear to be no laws on the subject of the carrying of electric power.
>
> "The prosecution having failed in discharging one half of the task thrown upon it we have no option but to find the accused not guilty."

The District Court based its judgment on the assumption that Article 182 has been wrongly translated from the Turkish and that both carelessness and unobservance of the laws are required.

We are informed by Zaki Bey Tamini that Rashid Pasha in

his commentary says that both elements need not be present, either negligence or non-observance of the laws being sufficient to create an offence.

Selim Baz again translates the words with "or" and not "and" combining them.

In Young the translation reads "inattention ou inobservation."

In a reported case in Cyprus, Theodore Ioannou and Another v. Michaelaki Triantaphyllides, C.L.R., Vol. V, at page 60, the Judges gave their own translation of Article 182 and it contained the phrase "if the death was occasioned by negligence or by disregard of the Police Regulations."

Again, at 537 of Ahmed Zia's "Commentary on the Penal Code," 2nd Edition, page 537, we find this passage:—

> "..... On first sight of Article 182 one would think that both negligence and non-observance of the laws are necessary in order to complete the offence; but the fact is not so, because the killing and wounding, as was explained by examples, may be either from one or the other: either negligence or merely non-observance of the laws. Therefore it is not necessary that both conditions should be present in order to prove those offences; the presence of either of them is sufficient to secure a conviction."

On these authorities we are bound to hold that "carelessness" and "unobservance of the laws" are elements which may alternatively be present and which need not be cumulatively present to constitute an offence under Article 182, unless the wording of the Turkish text is such as to render the translation "negligence or non-observance" impossible.

The literal translation of the text is "by negligence and by non-observance of the laws," and we have to satisfy ourselves that this phrase can bear the meaning "negligence or non-observance of the laws."

Now we find that Article 179 of the Code (as amended on 6 Jamadi, El-Akhir, 1329) is translated by Bucknill and Utidjian as follows:—

> "If the wounding or beating is of a lighter degree than that mentioned in the preceding Article the person who is the wounder or beater is imprisoned...."

Translated literally this phrase would run:

"If the wounding and beating....the wounder and beater is imprisoned...."

On referring to the preceding Article, however (Article 178), we find that the literal translation is:—

"If a person wounds or beats an individual...."

Hence, it is clear that in Article 178 wounding and beating are alternative offences and are not linked together as components of a single offence: and as Article 179 can only be understood by reference to Article 178, it follows that the wounding and beating mentioned in Article 179 must also be read as alternatives.

Again, the literal translation of the now repealed amendment to Article 180 issued in 1329 is:—

"If in a killing taking place during a quarrel, and in an injury to a member and in a death from the effects of wounding....",

but these are clearly alternative offences.

So again, Article 181 translated literally would read:—

"If the acts of killing and wounding and beating are committed together with any sort of disorder and pillaging and plundering of property...."

Here, killing, wounding and beating are obviously not elements in a single offence.

Hence, it is clear that in the Ottoman Penal Code the conjunction of which the literal translation is 'and' is frequently used with the meaning 'or', and we hold that in Article 182, the Turkish Legislators in adapting Article 319 of the French Code Penal "negligence ou inobservation des règléments" did not intend that both negligence and non-observance of the laws must be present to constitute an offence under the Article.

We therefore set aside the judgment and remit the case to the District Court for trial.

We make no order as to costs.

Delivered the 10th day of September, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 88/30.

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

IN THE CASE OF:

The Municipality of Haifa	APPELLANTS.
vs	
Dr. Caesar Khoury	RESPONDENT.

Negligence of Municipality in leaving unfenced trench in public road — Personal injuries sustained through lack of care of third persons — Material and moral damages not granted — Recovery of surgical expenses — Principal not liable for act of servant — Civil liability to make good damage caused — Recovery of diyèt — Arts. 171, 177, 178, 182, 183 Ottoman Penal Code — Sec. 6, Jurisdiction of Civil and Religious Courts Ordinance, 1925 — Jurisdiction of Moslem Sharia Courts — Jurisdiction of Courts re compensation in lieu of diyèt — Arts. 92, 93, 416, 888, 922 Mejelle.

JUDGMENT OF MR. JUSTICE BAKER.

The Respondent sued Appellants in the Haifa District Court for the sum of £P.500 in respect of material and moral damages caused to him by falling into an unprotected ditch or trench dug by the Appellants in a public road.

The Haifa District Court, after hearing evidence, found:—

1. That a trench or ditch had in fact been dug by Appellants in a public road, that such trench had been left unprotected and unguarded and that Respondent whilst using the said public road had unwittingly fallen into the same, thereby fracturing his right shoulder-blade.

2. That the Appellants' duty was to place a danger-signal or a warning to users of the road and having failed to do this they were responsible for the damage sustained to Respondent through their negligence which the Court assessed at £P.150.

Against this judgment the Municipality of Haifa have appealed, alleging in their appeal:—

1. That Dr. Khoury failed to prove that he fell in the ditch dug by the Municipality but one dug by an adjoining owner.

2. That according to Ottoman Law in the event of the negligent wounding of a person such person is only entitled to claim surgical expenses and not compensation for loss of wages he would have normally earned had he been in a fit state of health.

3. That unless the act was illegal no damage can be claimed.

4. That there was no evidence to show that the Municipality had committed an illegal act or had been guilty of negligence in that any negligence or omission committed by servants or employees does not render the principal liable.

5. That there was no evidence to establish the amount of damages actually suffered by Respondent in consequence of his falling into the trench.

Dr. Khoury also appealed alleging:—

1. That the District Court should have allowed the whole claim for £.500, no compensation having been awarded for the personal suffering of Dr. Khoury.

2. That since the judgment of the District Court complications have arisen. Dr. Khoury had been further incapacitated and had been medically treated for an additional period of six months.

3. Advocate's fees should have been allowed.

I propose to deal with both appeals.

The District Court found as a fact that the Municipality dug the trench and that Dr. Khoury fell into it. They also found that there was a liability upon the Municipality to make arrangements to protect the public from any danger, which they did not do.

There was evidence before the District Court upon which they could lawfully find the facts they did, and Appellants' appeal against these findings must fail.

The question for this Court to decide is the measure of damages, if any, Respondent is entitled to, and unfortunately for this purpose the Mejelle, as might be expected from a body of law created to meet the needs of an agricultural community, devotes considerable space to the subject of damages done by animals but in the main is silent with regards to injuries caused to the person.

(The Mejelle is a digest of opinion rather than a formulation of the law, the compilers thereof stating "For the clearer understanding of the fundamental principle we have added many examples which have been taken from the ancient fetwas", and the form the sections take is of enunciating a well established principle followed by one or more illustrative cases modifying or explaining the principle stated).

Prefaced to the whole compilation of the Mejelle is a book containing 100 general maxims, two of which deal with civil wrongs, namely, 92 and 93.

92 states:—

> "A person who does an act even if he does not act intentionally is responsible."

93 states:—

> "The person who does an act on one thing which leads naturally to the destruction of another thing as long as he does not act intentionally does not become responsible."

These two principles are illustrated by examples in Articles 888 and 922, but the examples deal with civil wrongs to property, destruction and disturbance of property rights.

In Rosenberg v. Zaidan—Civil Appeal No. 2 of 1927*—where Appellant claimed the amount of medical treatment he had undergone in consequence of the Respondent having knocked him down whilst driving and in charge of a motor car, the Court, after citing the above-mentioned Articles of the Mejelle, held that:—

> "It was clear that apart from any criminal responsibility and putting aside the special case of compensation for homicide or injury to a member there is in general a civil liability to make good any damage caused, which liability may, however, be prevented from arising by the special circumstances of the case."

With this judgment I cannot altogether agree and am of opinion that the Mejelle does not in fact deal with injuries to the person but is limited to damages to property and property only and cannot be intended to include injuries to persons.

The only law in my opinion applicable in this country relating to injuries to persons is that contained in Articles 171, 182

* see ante, p. 1337.

and 183 of the Ottoman Penal Code and Section 6 of the Jurisdiction of Civil and Religious Courts Ordinance, 1925, which has reference to Diyet which might be defined as the payment of compensation by an individual who had killed a person to the heirs of the person killed and also to the payment of compensation by an individual who had caused the destruction of a member of the body of another individual to the person so maimed.

Article 171 of the Ottoman Penal Code prescribes that the heirs of a murdered person may claim their civil rights or diyet or blood-money in the Sharia Courts.

Article 182 prescribes that in cases of homicide the person causing the death of deceased is liable for the Sharia rights, "Diyet", of the person killed.

Article 183 prescribes that a person unintentionally causing the loss of a member of another person is liable for the surgical expenses and the Sharia Diyet of such person.

Section 6 of the Jurisdiction of Civil and Religious Courts Ordinance, 1925, contains the following:—

> "The Moslem Religious Court shall have jurisdiction in cases of application for blood-money on account of homicide or injury to a member (Diyet) where all the parties concerned are Moslems. In other cases the Civil Court shall exercise the jurisdiction unless áll the parties agree to refer the application to the Moslem Religious Court.
>
> A Criminal Court may if it deems fit in any case in which a prosecution for homicide or injury to a member is brought, and at the request of a person entitled to Diyet, award any sum not exceeding £.250 as compensation in lieu of Diyet and shall not be bound in making such award by the rules of the Sharia Law. The amount awarded shall be recoverable as a civil debt. Where an order has been made under this provision no further claim of Diyet shall be brought before a Moslem Religious Court."

For the purposes of this appeal we can exclude the two before-mentioned 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.

Articles 177 and 178 of the Ottoman Penal Code, which provide for the payment of surgical expenses and loss of wages to the injured person by the wrongdoer, also prescribe the conviction of the wrongdoer as a condition precedent to such payments.

Article 183, however, provides that in cases of unintentional injury through carelessness or unobservance of the laws to an individual of such a nature as to render useless a member or limb of the body, surgical expenses and the Sharia Diyet of the injured person are payable by the wrongdoer independent of conviction: and I am of opinion that in cases of unintentional injuries to persons through carelessness or unobservance of the law similar to the case the subject-matter of this appeal, the only remedy the Law of Palestine in its present form allows is a civil action within the ambit of the before-mentioned Article 183 (in the absence of the loss of a member) for surgical expenses.

For the before-mentioned reasons, I am of opinion that both appeal and cross-appeal as presented must fail and the case be remitted to the District Court to determine the amount of surgical expenses expended by the original Plaintiff and the Sharia Diyet, if any, and to give judgment accordingly.

Both parties to pay their own costs of this appeal and cross-appeal.

JUDGMENT OF MR. JUSTICE KHAYAT.

I concur.

JUDGMENT OF MR. JUSTICE FRUMKIN.

The facts and other data are as stated in the judgment of my learned brother presiding: and I need not go into them again. But I prefer to deliver my opinion on the legal side of the matter in full detail, notwithstanding the fact that my judgment being earlier in date of drafting some parts of it have been adopted and already mentioned in the judgment just delivered.

In beginning first with the appeal of the Haifa Municipality, I am of opinion that on the first ground Appellant must fail. The Court below, upon sufficient evidence, found as a fact that the ditch into which Dr. Khoury fell was dug by the Appellant, and we cannot go behind this finding of fact. We also cannot go behind the finding that it was the duty of the Municipality to warn passers-by from possible danger by putting some signal round the opened ditch.

When we turn to the other grounds of appeal, I propose in the first place to analyse the law of Palestine as regards liability for injuries caused to the person.

In Rosenberg vs Zaidan (C.A. 2/27) this Court apparently took the view that certain rules of the Mejelle relating to compensation for damages caused may also be applied to compensation for injuries to the person, or rather to surgical expenses as was claimed in the case referred to.

But this is not the case.

What are the provisions of the Mejelle?

The keynote of the law of torts under the Mejelle is found in Articles 92 and 93 which read as follows in Tyser's translation:—

> 92. A person who does an act even if he does not act intentionally is responsible.
>
> 93. A person who does one thing which leads naturally to the destruction of another thing, as long as he does not act intentionally does not become responsible.

A more literary translation would read thus:—

> 92. The doer is liable even if he does not act wilfully.
>
> 93. The causer is not liable unless he acts wilfully.

"Liable" or "responsible" in Tyser's translation is used for the word "Damen." Liability (Daman) is thus defined in Article 416 of the Mejelle:—

> "416. 'Daman' is to give the like of a thing if it is a thing which can be matched (Misly defined in Art. 145) or to give the value of a thing if it is a thing which cannot be matched (Qeimi defined in Article 146).

The principal rules laid down as above are elaborated in two special Sections in the 7th Book of the Mejelle (on Wilful Appropriation and Destruction). The Section beginning with Article 912 deals with what might be called direct destruction and is built up upon the principle laid down in Article 92, and the Section beginning with Article 922 deals with indirect destruction and is based on Article 93. Two subsequent Sections deal respectively with damage caused on the public road and with damage caused by animals.

Reading Articles 92 and 93 together with definition of 'Daman' in Article 416, there seems to be no doubt that their

only object is to lay down the information for compensation in case of damage caused to property. All the Articles in the Book of Destruction are dead silent as regards any damage or injury caused to the person. Bearing in mind the scrupulous care which the draftsmen of the Mejelle have displayed in framing the Articles, it can hardly be assumed that the omission of reference to injuries to the person is only the result of an oversight or unthoughtfulness. The compilers of the Mejelle were fully aware for instance that a person might, as well as an animal, fall into the well referred to in Article 924, or that the sparks of the blacksmith in Article 926 might not only burn the clothes of someone passing by in the public road, but also burn his eyes or some other member of his body, and yet they did not make any provision for compensation or otherwise in such cases. We need not in this judgment look for the reasons, but it is a fact that the Mejelle in neither of the Articles referred to above nor in any other Article intended to deal or in fact dealt with injury caused to the person.

In holding as I am bound to hold that there is no authority under the Mejelle to impose any compensation on anyone who has injured the person of another or has caused such person to be injured, I do not mean to say that Moslem Law, the Mejelle being the codification of a part of it, does not provide for remedies in such cases. Suffice to the mention Diyet and Irth. But before we can apply in a Civil Court Moslem Law on a certain point, we have to look for a legislative authority enabling us to do so.

The Mejelle obtained its validity as a code of law applicable in the Courts of the Ottoman Empire on being sanctioned by the Sultan, as Sovereign of the Empire. As part of the Ottoman Law in force upon the Occupation of Palestine, it also became law applicable in the Courts of this country. But as stated before there is no provision in the Mejelle for the grant of Diyet or Irth or indeed compensation in any other form for injuries or damage caused to the person in any way.

Is there any provision on this point in other parts of the law applicable in Palestine?

Diyet is referred to in the Ottoman Penal Code, where it has been laid down:—

(1) In Article 171 that upon the request of the heirs of a murdered person a claim for their civil right is referred to the Sharia Court.

(2) In Article 182 that in case of unwilful murder the murderer is, upon trial, liable for the Sharia rights (Diyet) of the person killed.

(3) In Article 183 that a person who has been the cause of cutting off or rendering useless a member of another person is liable for the Sharia Diyet of such person.

The Jurisdiction of Civil and Religious Courts Ordinance, 1925, introduced two novelties in the matter of the application of the provisions of the Sharia Law as regards Diyet in the Courts of Palestine.

(a) Section 6 (1) restricts the jurisdiction of the Moslem Sharia Courts to cases where all the parties concerned are Moslems or else agree to its jurisdiction. In other cases of application for blood-money on account of homicide or injury to a member (Diyet) the Civil Courts were vested with jurisdiction.

(b) Section 6 (2) of the said Ordinance introduces a new form of indemnity for injuries against the person in the form of compensation in lieu of Diyet, but not without a few restrictions of great importance: namely, that the person claiming such compensation must prove that he is entitled to Diyet (I suppose under any formal legislation such as in the Ottoman Penal Code); that a Criminal Court may award such compensation and only in the case in which prosecution for homicide or injury to a member is brought.

It follows that in application for Diyet proper, jurisdiction lies with a Civil Court even if not a Criminal Court, but when it comes to applications for compensation in lieu of Diyet, only the Criminal Court has jurisdiction. But in both cases it is my opinion that the Court will have to be satisfied that not only is the person claiming Diyet or compensation in lieu of Diyet entitled to Diyet under Moslem Law, but also that there is reference to such liability in some legislative enactments such as the Articles of the Ottoman Penal Code referred to above.

Apart from the provisions for Diyet, the Ottoman Penal Code provides for another means of indemnity in connection with injury to the person and that is the form of compensation for surgical expenses and for loss of profits and wages. Under Articles 177 and 178 such compensation can only be awarded in consequence of a conviction under those Articles. But under Article 183 surgical

expenses in cases of unintentional beating or wounding or unintentionally becoming the cause of a person being wounded may (similar to Diyet under the same Article) be awarded even if there be no conviction and indeed although there is no provision for conviction. It is only where such wounding has arisen out of carelessness or unobservance of the Law that the Article provides for punishment in addition to surgical expenses (or Diyet in case of cutting off or rendering useless a member).

Now when we come back to the case before us, we find that it is not an application for Diyet or compensation in lieu of Diyet, indeed it is not a case in which such an application could be made and maintained under the Law of Palestine. The only Law in favour of Dr. Khoury is Article 183 of the Penal Code, entitling him to claim surgical expenses from the Haifa Municipality which unintentionally was the cause of his being wounded or bruised.

The appeal of the Haifa Municipality is, therefore, allowed, the cross-appeal of Dr. Khoury dismissed, and the judgment of the District Court set aside and the case remitted to determine the amount of surgical expenses incurred, and give judgment accordingly.

No order as to costs.

Delivered the 21st day of June, 1932.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 1/32.

BEFORE:

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

IN THE CASE OF:

Faiz Musa ed Diab — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Conviction under Art. 182, Ottoman Penal Code — Motor-Car accident — Accused ordered to pay compensation in lieu of diyet although acquitted on criminal charge.

Appeal from the judgment of the District Court of Nablus, dated 1st November, 1931, whereby the Appellant was convicted

under Article 182 of the Penal Code and sentenced to six months imprisonment.

JUDGMENT.

The evidence is that the boy was struck not by the front, but by the middle of the right side of the car.

It is difficult to see how this could have occured without some act on the boy's own part after the front of the car had passed him.

The prosecution suggest that the car swerved: but there is no evidence in support of this. The statement of the witness Saleh Musa Abdel Hadi that the accused did not blow his horn and that he was driving fast, is denied and is not corroborated.

We therefore hold that the conviction cannot be sustained and the accused is acquitted.

As regards the compensation in lieu of diyet, which the accused has been adjudged to pay, the appeal is dismissed.

The order that the accused should pay the costs of the trial is set aside.

Delivered the 24th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 25/32.

BEFORE:

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

IN THE CASE OF:

Israel Band — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Conviction for negligence under Art. 182, Ottoman Penal Code — Road Accident — Overloading vehicle — Contravention of Regulations under Road Transport Ordinance.

Appeal from the judgment of the District Court of Nablus dated the 23rd November, 1932, whereby the Appellant was convicted under Article 182 of the Ottoman Penal Code and sentenced to eighteen months' imprisonment.

JUDGMENT.

We find that the Appellant was driving in the centre of the road when the collision took place. The Appellant was undoubtedly carrying a load of hay in excess of the amount allowed; but this in no way contributed to the collision.

The appeal against the conviction under Article 182 of the Ottoman Penal Code must be allowed and the conviction quashed. Appellant, however, must pay a fine of LP.5—in that he contravened the Road Transport Ordinance Regulations by over-loading his vehicle and allowing the said load to protrude.

Delivered the 18th day of January, 1935.

NEWSPAPERS.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 12/26.

BEFORE:
The Chief Justice, The Acting Senior British Judge (Seton) and Khayat, J.

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Ittamar Ben-Avi
"Doar Hayom" Newspaper — RESPONDENTS.

Prosecution for libel — Liability of editor of newspaper — Duty of prosecution to establish that accused is responsible editor — Arts. 11, 25 and 29, Ottoman Press Law — Art. 214, Ottoman Penal Code —Articles in newspaper repetitions of previous libellous articles.

Appeal from the judgment of the District Court of Jerusalem dated 13th January, 1926, whereby the Respondents were acquitted from charges alleged against them under Articles 11, 25 and 29 of the Ottoman Press Law, and Article 214 of the Ottoman Penal Code.

JUDGMENT.

The first question, whether the Defendant Ben-Avi was responsible editor, so as to be liable under the Press Law, was one of fact for the Court and it is not shown that the Judges arrived at a negative conclusion by any misunderstanding of any legal point necessary to be decided. It was for the prosecution to bring Ben-Avi within the necessary description and it did not succeed.

The second question as to the Defendants' liability as owner of the paper is disposed of by the Press Law itself which regards an owner as criminally liable only when he also performs the functions of editor of the paper.

Thirdly the Appellant raised an objection on the ground that the Defendant, when under examination before trial, by making a delusive statement, tricked the Public Prosecutor into relying on what he regarded as a conclusive admission, and induced him to frame his charge upon it, when that statement was made in such a form as to admit of a mental reservation.

This is a complaint against the conduct of the Defendant which may be or may not be justified, but is not a matter in respect of which an appeal would lie.

Then we come to certain articles published by the newspaper at a time when Ben-Avi was the responsible editor. Those articles are not said to be themselves libellous, but to be repetitions of former libellous articles which appeared in the paper at a time when some other person was directing it. The District Court held that the articles in question were not repetitions of the former libels. This was a question of fact. If they were repetitions they would be publications of libels. If not themselves libels, they were not publications of libels. All this question was one of fact for the District Court to decide.

The objection raised by Mr. Samuel for the Respondent that the judgment of the 14th December was a separate judgment and that an appeal in respect of it would be out of time, is not necessary to be decided because we are of opinion that there is no substance in any part of the appeal.

The appeal is dismissed.

Delivered the 19th day of April, 1926.

In the High Court of Justice.

H.C. No. 10/30.

BEFORE:

The Chief Justice and Baker, J.

IN THE APPLICATION OF:

The Attorney-General — PETITIONER.

vs

Shalom Schwartz, responsible editor of the "Palestine Bulletin" — RESPONDENT.

Contempt of Court by newspaper — Reprint by newspaper of libellous article appearing in other newspaper — Article referring to judicial proceedings pending calculated to prejudice proceedings — Prejudice of proceedings in Court of Appeal.

JUDGMENT.

This is a return to a rule nisi calling upon Mr. Schwartz to show cause why he should not be punished under Section 4 (1) of the Contempt of Court Ordinance No. 12 of 1929 for having published in the "Palestine Bulletin" of February 9th, 1930, an article with reference to judicial proceedings pending in the Courts of Justice calculated to prejudice such proceedings and to bring into contempt the Court before which such proceedings are pending.

It is not necessary for us to deal with this at great length in view of our judgment in A. G. vs Rubashoff.*

The Article under the general heading "Without Prejudice" is headed "Injustice to Jews:" below this "From the Hebrew daily the 'Davar.'"

The heading "Injustice to Jews" is a novelty introduced by the "Bulletin." For the rest the article with some slight omissions is a very fair translation of that in the Hebrew "Davar" with which we have been dealing.

We have dealt in our judgment in the "Davar" case with the only point of law raised by Mr. Horowitz, namely that, as the Hinkis case is pending in the Court of Appeal, the article is not calculated to prejudice proceedings there. We need only repeat that the Court of Appeal has full power to call or recall witnesses

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* see ante p. 369.

on the hearing, and for this reason the article is calculated to prejudice those proceedings.

We need not, therefore, stop to consider further Mr. Horowitz's point that he knows of no case in England where a contempt was held to be committed by pedjudicing proceedings where there was no jury but only a Judge. We will only note in passing that there is cited, in Skipworth's case (1873) 9 Q.B. at p. 235, a case called Lechmere Charlton's case in which it was held to be a contempt to attempt to interfere with the course of justice in the Court of Chancery by letters threatening the master in Chancery, and Lord Cottenham said in that case, as we might well say in this,

> "If I consulted my own personal feelings upon the subject, I should pass by these letters as a foolish attempt at undue influence, but if I were to adopt that course, I should consider myself guilty of a very great dereliction of my high duty."

Mr. Horowitz has not been able to address any argument to us on the question of scandalising the Court. In our view, very properly, he stated, to use his own words, that his clients "wish to apologise humbly, abjectly and absolutely for any contempt they may have committed." We will take this duly into account. We will also take into consideration the fact that the article did not originate in the columns of the "Bulletin," but at the same time we must mark our dissaproval of the fact of the editor of an English paper falling into the error of giving further currency to matter such as this.

We make the rule absolute in this case. We order the Respondent to publish within 8 days in the "Palestine Bulletin" the apology which he has offered through his advocate, and in the same issue to publish a complete certified copy of this judgment and of that in the proceedings in A.G. v. Zalman Rubashoff (without which this judgment cannot be understood), and we further order that Schwartz pay a fine of £P.10 and be detained, and, if necessary, lodged in the Jerusalem Central Prison until this sum be paid.

Delivered the 27th day of February, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 66/32.

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

IN THE CASE OF:
The Palestine Telegraphic Agency — APPELLANT.
vs
Adel Jaber — RESPONDENT.

Newspaper right of copyright in news — Ownership of copyright — Right to sue for infringement — Jurisdiction of Magistrate to grant injunction for infringement — Hypothetical point of law not answered by Court of Appeal.

Appeal on the following three points of law from the District Court sitting in its appellate capacity.

JUDGMENT.

In this case, as it has been found that the news received by the Palestine Bulletin from the Palestine Telegraphic Agency was put by the editorial staff of the Bulletin into the language and literary style of that newspaper, it comes within the passage of North J.'s judgment in Walter v. Steinkopff (1892) 3 Ch.D., at page 495, where he says: "There is or may be copyright in the particular forms of language or modes of expression by which information is conveyed, and not the less so because the information may be with respect to the current events of the day". This being so, we hold that the owner of the copyright in question is the Palestine Bulletin which alone has a right of action. In consequence of the Appellant's appeal being dismissed on the first two grounds of appeal, the question of an injunction which it is sought to direct against the Respondent Adel Eff. Jaber does not arise and the third question upon which leave to appeal is granted becoming purely hypothetical it is not within our competence in this case to give an answer thereto.

We therefore dismiss the appeal with costs to include £P.2 advocate's fee.

Delivered the 4th day of January, 1933.

NOTARY PUBLIC.

In the High Court of Justice.

H.C. No. 31/27.

BEFORE:

Baker, J. and Frumkin, J.

IN THE APPLICATION OF:

Dr. Moses Smoira — PETITIONER.

vs

The Notary Public, Haifa — RESPONDENT.

Registration of wakaleh dawrieh refused by Notary Public — Issue by High Court of Order to Notary Public — Legislative act under Art. 74 (1), Palestine Order-in-Council, 1922 — Circular letter from Legal Secretary addressed to Presidents of District Courts and Magistrates — Registration of power of attorney

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ORDER.

The Notary Public, Haifa, refused to register the Power of Attorney on the ground that by an Order of the Legal Secretary all Notaries Public were prohibited from registering Powers of Attorney in the nature of Wakaleh Dawrieh.

We have now before us the document on which the Notary Public apparently relied.

It is a circular letter in Arabic originating from the Legal Secretary's Office under L/gen/587, dated 2. 10. 1920, addressed to the Presidents of the District Courts and Magistrates and signed by the Legal Secretary. It reads in English as follows:—

> "The Notaries Public are allowed to do all the transactions for which they are authorised such as preparing and registering powers of attorney and so on, provided that transactions relative to immovable property are authorised by the new Law dealing with Land Transfer Ordinance. The Wakaleh Dawrieh cannot be prepared or registered.

We do not consider this document to be of the nature of an Order, Rule of Court or other legislative act under Article 74 of the Order-in-Council, but merely an instruction to certain

officers of the Court relating to the performance of their duties with no legislative effect.

Respondent is therefore directed to register and certify the powers of attorney in question.

Delivered the 18th day of May, 1927.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 3/29.

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

IN THE CASE OF:

Abdel Fattah Abu Seoud Samuel Sides	APPELLANTS.
vs	
The Attorney-General	RESPONDENT.

Prosecution for collection of fees not properly chargeable by Notary Public — Attestation of powers of attorney — Recovery from Government of fees improperly charged — Rule 3, Rules of Court (Notary Public) 4th July, 1918 — Abuse of office — Bribery of official — Arts. 67, 68, 82, 102, Ottoman Penal Code — Arts. 20, 101, Notary Public Law — Conditional discharge of offender — Sec. 2, Probation of Offenders Ordinance, 1928.

Appeal from the judgment of the District Court of Jerusalem dated 20th December, 1928, whereby both Appellants were convicted under Articles 68, 82 and 102 of the Penal Code and the first sentenced to five years and the second to three years and a half imprisonment, with costs.

JUDGMENT.

With regard to Charge 1, Counts (a) (c) and (d), relating to the sums obtained by the accused upon attestation out of the office of powers of attorney, we have no doubt that where the person executing the document asks that his signature may be attested at some place outside the Notary Public's Office, the fees properly chargeable by the Notary Public are to be paid to the Treasury under Rule 3 of the Rules of Court (Notary Public) of the 4th of July, 1918.

In none of the four cases, however, to which these Counts relate was there a request by the party to have the documents drawn up outside the Notary Public's Office and the accused had no right to collect the sum of 400 mils or any other additional allowances either for themselves or for the Government. If in each case the sum of 400 mils had been paid by the accused to the Treasury, the executing party could have recovered such sum from the Government as an improper charge. There was, therefore, no embezzlement of Government money and Article 82 of the Penal Code does not apply. The conviction under this Article must be set aside.

In all four Counts, however, there is a graver offence than "A charge of more than the amount fixed by law", within the meaning of Article 20 and Article 101 of the Notary Public Law: as all the evidence goes to show that the executing parties were purposely kept waiting until the expiry of office hours, and made to execute their documents in the private houses of officials, with the deliberate intention of overcharging for the work done.

This is an abuse of office within the meaning of Article 102 B. Addendum and the conviction under this Article of Abdel Fatteh on all four Counts, and of Sides on Counts (a) and (b) must stand.

CHARGE II.

In Count (a) the District Court has found that "Wilner went to the Notary Public Office after closing time."

It is thus clear that the accused were not bound to attest his document that day, and that the money taken in excess of the proper fee was taken for attesting the document after office hours.

In Count (b) there is no similar finding by the Court, and from the evidence of Hamburger, "I paid the extra money to accused Sides because he worked in the afternoon", it appears that his payments were also made for preparing documents for attestation out of office hours. In respect of both Counts, therefore, the question arises whether or not payment for doing out of office work hours that which the accused would be bound to do later in office hours is bribery.

Article 67 of the Penal Code provides that the money received by officials "in order to do, or not to do the thing which they are by law or regulation bound to do, or to do or not to do the thing which they are bound not to do, is a bribe".

With regard to Count (b) the view of the District Court is expressed as follows:—

> "The work Mr. Sides did for Mr. Hamburger was work which it was his duty to do. We are of opinion that the money paid by Mr. Hamburger to accused (2) Sides, was a bribe given to expedite such transactions".

In this there seems to be some misapprehension. It is true that it was the duty of the accused to prepare the document for attestation, but what Hamburger paid for was not having the documents attested, but having them attested expeditiously out of office hours. Now it was clearly no part of the duty of the accused Sides to do this work, after office hours. He cannot, therefore, be held to have received money for doing "the thing which he is by law or regulation bound to do".

By so doing the accused undoubtedly gave a preference to the documents lodged by Hamburger over other documents. We are not, however, aware of any regulation which forbids this. The Notary Public Law contains detailed provisions as to the registers to be kept of documents lodged for attestation. Article 28 requires that each document shall be numbered consecutively; but neither in that law nor elsewhere does there appear any rule that documents are to be dealt within the order in which they are lodged.

As the law stands, if a person presenting a document for attestation asks that it shall be given priority there is no illegality in granting his request provided that the Notary Public does not receive any remuneration for so doing. The service, therefore, for which the accused Sides was paid by Hamburger was not "a thing which he was bound not to do". And hence his conduct in receiving payment was not an offence within Article 68 of the Penal Code.

The same reasoning applies to Count (a). In that case, however, there are two further questions. It has been agreed that the conviction rests upon the uncorroborated evidence of the process server Muhi El Dine. Such, however, is not the fact. The witness Wilner states:—

"I knew that the fees were 113 piastres besides the revenue stamps; I should have received the change. I asked Abdel Fattah to give me the balance. He did not reply."

The silence of Abdel Fattah is sufficient under the circumstances to dispose of the possibility that the balance of the 150 piasters have been kept by Muhi El Dine.

As regards the accused Sides, the conviction on this Count is based by the District Court on the following ground:—

The accused 1 (Abdel Fattah) "retained the balance of 37 piastres, which he divided between himself and accused 2 (Sides) according to the working arrangement in the office".

There is no evidence that Sides received any part of this sum of 37 piastres, and the only evidence of any arrangement for the division of illicit profits between the two accused is that of Muhi El Dine.

We hold, therefore, that the accused Sides, must be acquitted on this Count.

On behalf of the accused Abdel Fattah an argument has been addressed to us based upon the Probation of Offenders Ordinance, 1928.

By Section 2 (1) of that Ordinance it is provided that where "the Court is of opinion that having regard to the character, antecedents, age, health or mental condition of a person convicted it is expedient to release the offender on probation the Court may in lieu of imposing a sentence make an order discharging the offender conditionally".

The defence argue that the District Court was bound to hear the evidence which the accused Abdel Fattah was prepared to submit with regard to his state of health in order that it should be in a position to determine whether or not it should exercise the power conferred upon it by this Section.

It is clear, however, that the power conferred upon the Court is purely discretionary and that it is within the discretion of the Court do decide whether, in view of the nature of the offence proved, it could properly exercise the power.

In the present case, the District Court has taken the view that the offence is of such a nature that it would not be prepared to exercise its discretion in favour of accused on consideration of

health and accordingly the Court was entitled to refuse to hear evidence as to the accused's physical condition. A series of offences has been proved against the accused, and this Court is not prepared to apply the Section in his favour.

The accused Abdel Fattah is convicted under Article 102 B of the Penal Code on Charge I., Counts (a), (b) (c) and (d) and on Charge II., Count (a).

The accused Sides is convicted under Article 102 B on Charge I., Counts (a) and (b), and on Charge II., Count (b) and the judgment of the District Court is varied accordingly.

The accused Abdel Fattah is sentenced to serve a term of 9 months' imprisonment and the accused Sides a term of six months, and to pay the costs of this appeal.

Delivered in presence the 6th day of May, 1929.

In the District Court of Jerusalem.

C.D.C. Jm. No. 346/30.

BEFORE:

De Freitas, J. and Abdel Hadi, J.

IN THE CASE OF:

Nederl. Sucade in Vruchterconfijfabriek — PLAINTIFFS.

vs

Emanuel Fridman & Co. — DEFENDANTS.

Necessity of service of Notarial Notice—Claim for damages for breach of contract — Art. 106, Civil Procedure Code.

JUDGMENT.

In this action lodged on 21st October, 1932. the Plaintiffs claim 2500 Dutch florins (£P.280.333) from the Defendants as damages for breach of contract.

Mr. Eliash, the advocate for Defendants, has argued in limine, that this action must fail because Plaintiffs omitted to serve an official notice on the Defendants to fulfil their contract (Vide Article 106 of the Civil Procedure Code).

Dr. Joseph for Plaintiffs, per contra, has argued that in the circumstances, Plaintiffs were not bound to serve a notice on Defendants and, alternatively, notice Ex. D.J.1. served on Defendants fulfils the requirement of Article 106 of the Civil Procedure Code.

After considering the written pleadings filed by both parties and the documents in support of their claim filed by the Plaintiffs, we hold that Plaintiffs should have served an official notice as required by Article 106 of the Civil Procedure Code, before they filed the action and further, we hold that Ex. D.J.1. does not fulfil the requirements of Article 106 of the Civil Procedure Code.

We, therefore, give judgment for Defendants with costs and 500 mils advocate's fees.

Delivered the 10th day of November, 1932, subject to appeal.

In the District Court of Haifa.

C.D.C. Ha. No. 30/33.

BEFORE:

Sherwell, J. and Aziz Daoudi, J.

IN THE CASE OF:

Marco and Yousef Chelouche — PLAINTIFFS.

vs

Ibrahim Sahyoun
Dr. Gabriel Abyad — DEFENDANTS.

Sufficiency of notarial notice — Agreeement for transfer of lands — Lands not transferred into purchaser's name due to default of vendor — Revocation of written agreement — Arts. 80, 108, 111, Civil Procedure Code — Arts. 1606, 1817, Mejelle.

JUDGMENT.

This is an action by Plaintiffs (as purchasers or transferees against the Defendants (as vendors or undertakers) based upon a contract in writing dated 1st May, 1925 and made between the Plaintiffs of the first part and the first Defendant of the second part, which contract was "renewed" in writing on 30th January, 1926, by mutual consent of the said parties and duly signed by them with the second Defendant who was joined and who signed the agreement as one of the vendors or undertakers therein.

According to the terms of this agreement of 30th January, 1926, which refers to the contract of 1st May, 1925, the Defendants undertook to "transfer" into the names of the Plaintiffs 30 dunams of the musha' land at Saadeh locality at the agreed price of £E.17 per dunam -- i.e. for the sum of £E.510 in all — the receipt of which sum is acknowledged therein by the Defendants; such transfer to be effected when the original vendors of the lands in question transfer the same into the names of the Defendants. It was further agreed that in case of default by the Defendants, they must pay £E.1000.— liquidated damages to the Plaintiffs.

On 15th February, 1933, the Plaintiffs caused to be served upon the Defendants a Notarial Notice calling upon them to transfer the lands in question within 30 days with the usual warning in case of default. The Defendants have not fulfilled the terms of the agreement in question in that no transfer has been made and they therefore now claim from the Defendants the return of the said £E.510 and £E.1000 the agreed damages in these proceedings which they commenced 1st April, 1933.

The Defendants filed separate answers to the claim on the 26th May, 1933, from which, with the oral arguments submitted to the Court on their behalf, it is to be gathered that the following are the only substantial points for the consideration of the Court:

FIRSTLY, whether or not the Notarial Notice was a good and sufficient one having regard to the circumstances of the case.

SECONDLY, whether or not having regard to the terms of the written agreement of 30th January, 1926, the action has not been prematurely brought seeing that the lands in question have not yet been transferred or registered in the names of the Defendants; and

THIRDLY, whether or not the agreement of 30th January, 1926, was revoked by the verbal agreement of the parties and their conduct, i.e. by an "exchange" of other lands in Bat Galim to the Plaintiffs from the Defendants instead of 30 dunams referred to in the agreement of 30th January, 1926.

In addition to these questions it was finally submitted on behalf of the 2nd Defendant that on the evidence the £E.510 was paid to his Co-Defendant and not to him and that in any event his liability, if any, is joint and not a several one.

Both the Plaintiffs have given evidence here, also the two Defendants whom Plaintiffs called as their witnesses. Moreover,

certain documents have been submitted also by the parties to the Court.

So far as the verbal testimony is concerned, the Court feels that it must weigh and consider this with the very greatest caution having regard to the circumstances of the case and interests of the parties. The Court has come to the conclusion that the verbal testimony on the whole cannot be relied upon except and unless it is materially corroborated by documentary evidence submitted.

The Court therefore feels bound to turn to the documentary evidence and to the oral admissions of the parties in order to ascertain, if possible, the true facts of this case.

After considering the whole of the relevant evidence here the Court has come to the following conclusions of facts:

That for some considerable time after 30th January, 1926, neither the Plaintiffs nor the Defendants troubled, for reasons best known to themselves, to take any definite and decisive steps to define clearly or to execute entirely their respective legal obligations to each other, whatever the case may have been.

That subsequent to 30th January, 1929, there may have been rather ill defined negotiations or pourparlers for an "exchange" of land between the parties possibly about the early part of 1927, but which were never finally and legally completed and executed as is quite clear (inter alia) from the letter signed by the second Defendant and addressed to the Plaintiffs and dated 27th November, 1932, the contents of which letter do not agree with the oral testimony, in our opinion, of the second Defendant.

That, moreover, there is nothing in the documents before us to support the Defendants' contentions in regards to the revocation and exchange alleged and orally testified to by them.

That the oral testimony of the Defendants in this context is not materially corroborated by the evidence of admissions of the Plaintiffs or of either of them.

That, as Defendants themselves admit, the lands in question have been sold and transferred since 30th January, 1926 i.e. recently, about 1930, with the knowledge and consent of the Defendants, to persons other than the Plaintiffs. The first Defendant stating that his reasons for so doing being that he "was compelled to sell because of Government taxes". Further, that considerably more

than half of the said lands were transferred direct into the name of the second Defendant's wife.

In such circumstances we hold as follows:

So far as the alleged revocation and exchange is concerned, these have not been proved by the Defendants and this is in accordance with the judgments of the Court of Appeal, in Civil Appeal Nos. 82/25 and 106/32 and Article 80 of the Civil Procedure Code and Articles 1606 and 1817 of the Mejelle.

Therefore, the agreement of 30th January, 1926, still stands and is binding upon the parties.

That the admissions and statements of the Defendants in the circumstances do show and prove that they have wilfully abandoned any intention they may have had of fulfilling the terms of the said agreement. This is corroborated by their conduct since the service upon them of the Notarial Notice in question, which notice in our opinion was a good and sufficient one in the circumstances.

Further, that in so far as the second Defendant is concerned, there is nothing in these proceedings to destroy his written admission contained in the agreement of 30th January, 1926, in regard to the receipt of the £E.510.

But we do hold, however, that his liability in this respect is joint and not a several one.

In the result, therefore, and in accordance with Articles 108 and 111 of the Civil Procedure Code, there must be judgment for the Plaintiffs for the sum of £P. 1548.860 plus interest at 9% on the sum of £E.510 viz: as from the 14th February, 1933, with costs and advocate's fees £P.5.

Judgment subject to appeal.

Given the 25th day of July, 1933.

NUISANCE.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 68/27.

BEFORE:

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

IN THE CASE OF:

Hassan El-Budeiri — APPELLANT.

vs

Haj Amin El-Husseini on behalf of the Department of Waqfs — RESPONDENT.

Stopping of light by construction of wall near window of neighbour — Nuisance — Excessive damage — Finding of fact not disturbed by Court of Appeal—Art. 1201, Mejelle—Right of light.

JUDGMENT.

Three points were raised by the Appellant in this appeal.

* * * * *

The third point is one of fact, namely, whether the building of the wall by Respondent has caused excessive damage, within the meaning of Article 1201 of the Mejelle or not. The Court below has found that there was no excessive damage, and we cannot interfere.

The appeal is accordingly dismissed, and the judgment of the District Court affirmed with costs. No advocates' fees.

Delivered the 19th day of December, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 108/29.

BEFORE:

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

IN THE CASE OF:

Zalikha Shukra Hahhas — APPELLANT.

vs

Deab Haj Ibrahim el Nasry — RESPONDENT.

Construction of windows and balcony overlooking women's quarter of neighbour — Nuisance — Excessive injury—Art. 1207, Mejelle.

JUDGMENT.

The Court of Appeal in a judgment dated the 20th September, 1927, returned this case to the District Court of Jaffa for the said Court to consider:—

1. Whether the windows and balcony of which the Respondent complains are new or not.

2. Whether the place overlooked by the said window and balcony is a place frequented by women.

The Lower Court heard witnesses as to these facts and in each case came to decisions in favour of Respondent.

There was evidence on which the Court could lawfully find the facts necessary to support their judgment and accordingly it is hereby affirmed and the appeal dismissed with costs.

Delivered the 10th day of February, 1931.

In the District Court of Haifa.

C.D.C. Ha. No. 227/31.

BEFORE:

Seton, J. and Dajani, J.

Damage caused by collapse of property — Right of support — Nuisance—Comparison of English and Ottoman Law of nuisance— Excessive damage — Art. 1200, Mejelle.

JUDGMENT.

In this action the Plaintiff claims from the Defendant damages in respect of the collapse of his property which he alleges was due to excavations made by the Defendants on the property adjoining to his.

Upon the evidence, we find that the only excavations made by the Defendants on the adjoining property were the eight pits dug for the foundations of the Defendants' new building and we have come to the conclusion that these pits played no part in the collapse of the Plaintiff's property. Apart from the cistern pit which

involved no excavation, the nearest pit was six metres away which is a considerable distance, and, further, a month before the pits were ever begun, the Plaintiff was told by his own architect that his property would be in a dangerous condition if supports were not erected and repairs carried out.

We accept the evidence put forward on behalf of the Defendants that the fire in Simana's property at the time of the Riots had seriously damaged the building on which the Plaintiff's house was erected and also that this building was badly built upon insecure foundations. We incline to the opinion that what finally brought about the collapse of the Plaintiff's property was the effect of the wet weather in the winter of 1930-31 upon the walls of the building on which the Plaintiff's property rested, which walls had become exposed consequent upon the demolition of the buildings at the south western corner of the Plaintiff's property.

If we are right in this opinion, the Plaintiff would not appear to have any right of action against the Defendants in respect of the demolition of the buildings last mentioned. The English Law on the subject will be found stated in Halsbury Vol. iv, Sections 623, 627 and 628 and it would seem that there is no real difference between English Law and Ottoman Law on this subject for although according to the latter the question is to be decided by the presence or absence of "Excessive damage" it will be observed that six examples of "excessive damage" given in Article 1200 of the Mejelle are all cases in which the person injured would have a remedy in English Law.

In the result, the Plaintiff's action fails and is dismissed with costs including advocate's fees £P.10.

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

Dated the 3rd day of May, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 5/32.

BEFORE:

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

IN THE CASE OF:

Muhammad Abd El-Qader Qashash — APPELLANT.

vs

Rev. Herman Schneller and Spohn — RESPONDENTS.

Action to divert water ditch — Abatement of nuisance — Jurisdiction of District Court — Abatement of nuisance on land not an action involving ownership of land or any rights in or over land.

JUDGMENT.

The District Court erred in holding that it had no jurisdiction in the case.

This is a claim for abatement of nuisance and does not involve the ownership of land or any rights in or over land.

The judgment of the District Court is, therefore, quashed and the case remitted for the said Court to go into the merits of the case and give judgment accordingly.

Costs to follow the event.

Delivered the 8th day of June, 1932.

OATH.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 269/23.

BEFORE:

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

IN THE CASE OF:

Omar El-Bitar — APPELLANT.

vs

Hanna Butros — RESPONDENT.

Effect of failure to appear to take oath — Summons to appear in Court not obeyed — Refuse to take oath.

JUDGMENT.

The Court holds that the Appellant's failure to appear before the District Court when duly summoned for the purpose of having an oath administered to him constitutes a refusal on his part to take the oath and accordingly that the Appellant is liable for the whole amount due on the bills in suit.

The appeal is dismissed with costs.

Delivered the 3rd day of January, 1924.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 37/24.

BEFORE:
The Senior British Judge, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Wardeh Bint Daoud Taweel — APPELLANT.

vs

Sousou Bint Bishara Odeh — RESPONDENT.

Refusal to administer oath in court of first instance — Production of evidence — When oath not to be tendered in Court of Appeal.

JUDGMENT.

The Court holds that by the judgment of this Court delivered on the 16th January, 1923, the Appellant was precluded from tendering any further evidence, and that as she has refused to ask for the administration of an oath in the Land Court in accordance with that judgment, she has not now the right to ask that an oath shall be administered.

The appeal is dismissed with costs including advocate's fees and travelling expenses.

Delivered the 3rd day of November, 1924.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 132/26.

BEFORE:

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

IN THE CASE OF:

Eliyahu Goldstein — APPELLANT.

vs

Shimon Hamdi
Yekhiel Austerlitz — RESPONDENTS.

Notice of withdrawal of appeal given by Appellant — Time for appeal as against Respondent — Copy of judgment appealed from not served on Respondent — Continuation of cross-appeal on withdrawal of appeal — Effect of failure to appear to take oath — Judgment by default for failure to appear to take oath subject to right of opposition.

JUDGMENT.

Upon hearing Mr. Mizrahi, advocate for the Respondents, there being no appearance for the Appellant, who has given notice of withdrawal of his appeal,

The Court holds:

(1) That as no copy of the judgment under appeal has been served upon the Respondents the time for appeal has not run against them, and accordingly their cross-appeal can be accepted although the appeal of the original Appellant has been withdrawn, but subject to payment into Court of the sum of £E.10 in lieu of security for the costs, damages and expenses arising out of the hearing of the cross-appeal.

2) That the Respondents are at liberty to administer an oath to the Appellant in the following form:

That it is not the fact that the agreement between me and Messrs. Hamdi and Austerlitz was that the land, the subject of the agreement between us dated the 27th day of August, 1925, should be sold to them at the price which I paid for it to Mr. Hoghglober.

(3) That the Respondents are further at liberty to administer to the Appellant an oath:

That it is not the fact that under the agreement between me and Messrs. Hamdi and Austerlitz, I am liable for all expenses of the mortgage and also for the sum of £E.13.630 expenses incurred.

(4) That as the Appellant has not appeared he must be held to have failed to take the oath in the forms prescribed, and accordingly that judgment be given against him thereon, subject to his right of opposition.

(5) The judgment of the District Court is to be amended by substituting £E.588 for £E.614 as the price of the land payable by the Respondents, and by giving judgment for the Respondents for the expenses of the mortgage £E.37.81 and for the sum of £E.13.63, and subject to this amendment the judgment of the District Court is affirmed.

(6) This judgment is given in the absence of the Appellant and subject to his right to oppose and take the oaths in the forms prescribed therein.

Delivered the 30th day of November, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 16/28.

BEFORE:

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

IN THE CASE OF:

Andrawes Eid	APPELLANT.
vs	
Kustandi Hanna Habib	RESPONDENT.
and	
Iskandar Kassab	
Raja Rais	THIRD PARTIES.

Effect of refusal to take oath in court of first instance — Reservation of right to take oath in Court of Appeal — Collusive action to avoid attachment.

JUDGMENT.

The Court below was right in admitting Raja Rais as a third party.

The Plaintiff having refused, whatever may have been his reasons, to take the oath tendered in terms that the action was not brought by him as the result of collusion between him and the Defendant, in order to avoid the land attached being transferred in the name of third party and others, the conservatory attachment could not stand.

The offer of Appellant (Plaintiff) to take the oath now on appeal is of no avail as it has already been held by this Court that it is only when a party in the Court below has specifically reserved his right to take the oath on appeal that he may do so. This was not the case in the present action.

The removal of the conservatory attachment, however, can have no effect on the subject-matter of the action, the Appellant having admitted the debt claimed and only alleged excessive interest.

The judgment of the District Court will be set aside and the case remitted, for judgment to be entered against Respondent for the sums admitted. The conservatory attachment is to remain cancelled.

No order as to costs.

Delivered the 13th day of December, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 43/28.

BEFORE:
The Acting Senior British Judge, Frumkin, J, and Khayat, J.

IN THE CASE OF:

Sudki Kamal and Others — APPELLANTS.

vs

Joseph Rokach
Isaak Rokach
Israel Rokach — RESPONDENTS.

Action remitted by Court of Appeal to District Court to administer oath — Objection to form of oath prescribed by Court — No law of specific performance of contracts in Palestine — General power of attorney to sell land held to include implied authority to include penalty clause in contract of sale.

Appeal from the judgment of the District Court of Jaffa dated 14th December, 1927.

JUDGMENT.

By virtue of a judgment of the Court of Appeal, C.A. 22/27 * dated the 4th of July, 1927, the said Court, after deciding that Respondents were under a clear breach of contract, remitted the case to the Lower Court for Appellants to administer an oath to the Respondents, if they so desired, and ordered the lower Court to give judgment in accordance with the acceptance of the oath or not. The oath prescribed to be administered was "that at the time of drafting the contract, it was not agreed between Respondents and Appellants that the seven months mentioned in the contract should be extended".

At the hearing before the District Court on the 14th December, 1927, the Appellants objected to the form of the oath and refused to administer the oath in the form prescribed by the District Court. The form followed that prescribed by the Court of Appeal, and the District Court, upon Appellants refusal to administer the oath gave judgment against them for the amount claimed with the right of appeal.

Against this judgment the Appellants appealed objecting to the form of the oath prescribed by the District Court.

The appeal was heard on the 14th June, 1928, the Appellate Court deciding that the oath which the District Court had proposed to administer to Respondents, was correct in form and that Appellants were entitled to administer the oath (presumably in that form) if they so desired.

This before-mentioned judgment was delivered on the 18th September, 1928, by the Acting Senior British Judge and the Appellants were asked if they desired to administer the oath. Abdul Latif Bey on behalf of the Appellant Nazmi submitted that he was not bound by the defence submitted by Ragheb Eff. Imam before the District Court and that he now desired to present other grounds of appeal and that accordingly he did not desire his client to administer the oath. The Court decided that at the hearing of the case before the District Court, his client had stated that he endorsed all the arguments of Ragheb Eff. Imam, and that counsel

* See ante, p. 314.

had also not taken this point before the Court of Appeal at the last hearing, and therefore he could not take it now.

Ouni Abdul Hadi, on behalf of the Appellants Nassimeh and Aysheh, to whom the Court of Appeal at their previous hearing reserved the right to argue the question whether his clients were bound by the penalty clause in the contract, submitted that his clients were not responsible for damages in that his clients empowered one Nazmi to enter into a contract to sell all the land, but that in that Nazmi was not specifically empowered to enter into a contract containing a penalty clause, his clients were not bound by the said penalty clause.

The Power of Attorney given to Nazmi was a general power to sell certain lands of the donors and contained, inter alia, the following clause "to sign our signatures on every document necessary".

There being no Law in this country to enforce specific performance of a contract, it has been an established practice to include in all contracts for the sale of land a penalty clause rendering each party liable to a specific sum of money, should one or the other fail to carry out his part of the contract and the contract of sale in this case was no exception to the practice. I am, therefore, of opinion that Nazmi had an implied authority to agree to the inclusion of the penalty clause in the contract and to bind the donors of the power by so doing, it being within the scope of his power to sell, and necessary and incidental to the effective execution of the power to sell. Accordingly, I hold that Nassimeh and Aysheh are equally liable with other Appellants who signed the contracts.

The Respondents having taken the before-mentioned oath the judgment of the District Court is confirmed and the appeal dismissed with costs and advocate's fees assessed at £P.20.

The order of this Court staying execution by way of transfer of lands of Appellants, dated 6th July, 1928, is hereby cancelled.

Given the 16th day of January, 1929.

In the High Court of Justice.

H.C. No. 4/29.

BEFORE:
The Senior British Judge, Frumkin, J. and Khaldi, J.

IN THE CASE OF:
Leon Levy — PETITIONER.

vs

The Chief Execution Officer, Haifa
James Scott
John Scott — RESPONDENTS.

Procedure in default of appearance — Right of Defendant to take oath on opposition — Art. 18, Amendments to Code of Civil Procedure — Opposition dismissed for failure to show cause for non-appearance at original hearing.

Application for an order to issue to the first Respondent to show cause why an order should not issue directing him to stay the Execution of the judgment obtained by the last two Respondents against the Petitioner to allow Petitioner to take an oath and thereby be relieved from payment of the debt.

JUDGMENT.

The judgment of the Magistrate's Court dated 6th January, 1927, given in the absence of the Petitioner was expressed to be made in reliance upon Article 18 of the Law amending the Code of Civil Procedure.

It is clear that the oath to be taken under that Article is to be taken before the Court upon opposition.

The Petitioner's opposition was dismissed on his failure to show cause for non-appearance at the original hearing and the judgment of dismissal was confirmed by the District Court on appeal. Thereupon the right to take an oath conferred upon the Petitioner by the judgment under opposition determined.

The Petition must be dismissed with costs including £P.6 advocate's fees and expenses.

In presence, delivered the 22nd day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 91/29.

BEFORE:

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

IN THE CASE OF:

Issa Bedas — APPELLANT.

vs

Khalil Telawi — RESPONDENT.

Refusal to tender oath to Plaintiff in District Court although Plaintiff called as witness — Reservation of right to administer oath on appeal — Administration of oath in Court of Appeal disallowed.

JUDGMENT.

The Plaintiff (Respondent) having been called as a witness in the District Court, the Court holds that the Appellant has no right to administer the oath to him at this stage.

The appeal is dismissed with £P.2 advocate's fees and costs.

Delivered the 27th day of November, 1930.

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

IN THE CASE OF:

Britano-Roumain Co. — APPELLANT.

vs

Eliahu Mirzakandoff — RESPONDENT.

Proof of claim by administration of oath — Oath of foreign Company — Art. 1632, Mejelle — Provisions of Mejelle re administration of oath not applicable to bills of exchange.

Appeal from the judgment of the Magistrate's Court of Tel-Aviv dated 11th June, 1930, whereby the Appellant's claim for the sum of LP.100 was dismissed.

JUDGMENT.

This action is based on purely commercial documents. The Defendant did not produce any documentary evidence in support

of his allegations and contents himself to ask the administration of an oath upon the Plaintiff (Appellant) who is a Company registered in Roumania.

The question to be decided is whether the Defendant is entitled to have the Plaintiff put on oath or not.

We are of opinion that the provisions of the Mejelle on this matter do not apply to bills of exchange which are conclusively governed by the commercial law and custom. This seems to be the opinion of the Court of Appeal in case No. 84/22.

Further, modern trade requires clarity and exactitude and it would be a big hindrance to the development of an international trade if a Defendant, faced with a dishonoured bill of exchange would be allowed upon the most frivolous allegation to have the Plaintiff put on oath in a foreign country thousands of miles away and what is the use of putting upon oath a juridical personality, a company whose representatives may change every day.

The judgment of the Magistrate's Court is therefore set aside and judgment is hereby entered for the Appellant for the sum of LP.100 with costs, protest fees, interest as from the day of maturity and LP.4 advocate's fees.

Delivered the 31st day of July, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 57/31.

BEFORE :

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

IN THE CASE OF :

Nazira Abu Khadra — APPELLANT.

vs

D. N. Tadros — RESPONDENT.

Form of oath once settled by Court not to be altered — Oath amended by Court on refusal of party to take.

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

JUDGMENT.

It would appear that both parties to the original action proposed different oaths for Respondent to take. The Court then decided on an oath for the Respondent to take. This the Respondent refused to take. The Lower Court then amended this form of oath.

This, we are satisfied, the Lower Court could not do, for having once decided the form of oath and put it, the Court cannot then change the form thereof and tender a new oath.

The case is therefore remitted for the oath to be put in the first form to Respondent and judgment given in accordance with law.

Costs to be costs in the cause.

Delivered the 5th day of November, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 145/31

BEFORE:

Corrie, J, Khaldi, J. and Frumkin, J.

IN THE CASE OF:

The Ossem Haklai Company, Ltd. — APPELLANT.

vs

Abraham Furman — RESPONDENT.

Purchase of goods — Oath to Company — Oath tendered to manager of Company to prove payment of price of goods delivered — Party requesting oath not entitled to appeal on ground that oath should not have been administered.

JUDGMENT.

In the Magistrate's Court, the Defendant, the present Respondent, asked that an oath be tendered to the Manager of the Plaintiff Company to the effect that Plaintiff Company paid the price of the goods to the Defendant. This oath was administered to and duly sworn by the Manager of Plaintiff Company.

We hold that the Defendant was thereby precluded from appealing on the ground that such oath should not have been tendered, and that the Plaintiff Company was entitled to succeed in its claim.

On this ground the judgment of the District Court is set aside and the judgment of the Magistrate's Court affirmed with costs here and below, including £P.4 advocate's fees and expenses.

Delivered the 26th day of September, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 1/32.

BEFORE:

Corrie, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Elena Klotzkova — APPELLANT.

VS

Yagumin Archimandrite Athanasi — RESPONDENT.

Action by domestic servant for wages — Right of Plaintiff to administer oath when unable to prove case — Where no agreement as to of amount remuneration Court to apply Art. 563 Mejelle — Hire of personal services.

JUDGMENT.

The Appellant should have been asked whether she desired an oath to be tendered to Respondent to prove:

1. that the Appellant worked for Respondent as a servant;

2. that Respondent promised to pay Appellant wages in addition to the sum of £P.100, which she admits she has received.

In the event of the Court being satisfied that Appellant did work for Respondent as a servant, but not being satisfied that any agreement as to the amount of her remuneration was made, the Court must apply the provisions of Article 563 of the Mejelle.

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

Delivered the 30th day of September, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 40/32.

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

IN THE CASE OF:
Atiyeh Ismail Isa Abu Matar and Others — APPELLANTS.
vs
Shimon Abraham, Administrator of Eliezer Liba Bernblum's estate — RESPONDENT.

Action by administrator for return of monies advanced by deceased as purchase price of land — Administration of oath to heirs of deceased — Effect of refusal to administer oath.

Appeal from the judgment of the District Court of Jerusalem, dated the 21st February, 1932.

JUDGMENT OF THE DISTRICT COURT.

Plaintiff Shimon Abraham the administrator of the estate of Eliezer Lipa Bernblum, sued Defendants each of Atieh, Ata, Saada, Alya, the children of Ismail and claimed they were advanced the sum in claim for the price of the land, which they all agreed and undertook to sell to the deceased Eliezer Lipa Bernblum; and that the other Defendants are the guarantors of these Defendants for the sum in claim. Plaintiff based his suit on a contract dated the 24th April, 1925, whereby the original Defendants admit having received the sum in claim. Plaintiff applied for orders to all the Defendants to return the sum jointly and severally.

All the Defendants - originals and guarantors - denied having received the sum in claim; but they admitted having received this sum in compliance with Plaintiff's proposal to them to produce a bail in order to guarantee non rescission of the sale to him.

Plaintiff's Counsel denied the allegation made by Defendant.

Court holds that Defendants are entitled to administer an oath on the heirs of the deceased Eliezer that they (heirs) do not know that these Defendants' admission was untrue.

Defendants refused to administer such an oath on the said heirs.

Therefore the Court orders all the Defendants, originals and

guarantors, do pay severally and jointly the sum of LE.300.- in Palestine currency, to Plaintiff, with a rate of interest running as from the date of this action, with costs and £P.2. advocate's fees.

Judgment given in open Court and is appealable.

JUDGMENT.

The only defence raised by the Appellants in this case was that they had never received the money repayment of which was claimed by the Respondent on behalf of the estate of Eliezer Lipa Bernblum, deceased. Accordingly, the Court had not to consider whether the conditions upon which such money became payable had arisen or not.

The Appellants refused to administer the oath to the heirs of Bernblum, and we therefore hold that the judgment of the District Court was correct.

The appeal must be dismissed with costs.

Delivered the 21st day of November, 1932.

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

C.A.D.C. Jm. No. 51/32.

BEFORE:

The President, Valero, J. and Toukan, J.

IN THE CASE OF:

I. Haikin — APPELLANT.

VS

Ismojik and Zisling — RESPONDENTS.

Form of oath set out in Mejelle held to have been modified by legislation — Objection to words "I swear by Almighty God".

JUDGMENT.

We hold that the form of oath set out in the Mejelle has been modified by legislation and must be modified by common sense.

We are of the opinion that if the Appellant's objection to say the words "I swear by Almighty God" when called upon to

take the oath was sincere and not merely vexatious, the Magistrate should not have insisted on the Appellant saying the said words. The Appellant was prepared to take the oath in a valid form and in a form which did not offend his religious belief.

We set aside the judgment of the Magistrate and return the case to the Magistrate with directions that he allow the Appellant to take the oath in the form the Appellant was prepared to do so, and to give a fresh judgment.

Judge Toukan dissented.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 92/32.

BEFORE:

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

IN THE CASE OF:

Hachaklai Agricultural Cooperative Society (Petach Tiqvah) Ltd. — APPELLANT.

vs

Nahum Perlman — RESPONDENT

Procedure re application for fixing of deposit in lieu of guarantee — Art. 23, Amendments to Civil Procedure Code — Practice of Court of Appeal to fix amount of deposit in cases where deposit not fixed by District Court — Delay of five weeks in filing of grounds of appeal — Refusal to tender oath on ground that right of appeal might be prejudiced — Fact of bills returned to maker held not to be conclusive proof that the bills had been paid.

PRELIMINARY JUDGMENT.

As to the first objection,—under Article 23 of the law amending the Code of Civil Procedure, it was for the District Court to fix the deposit in lieu of guarantee and application should have been made to the District Court to do so.

It is, however, the practice of this Court, in cases where the deposit has not been fixed by the District Court to fix the deposit. Accordingly we fix the deposit in lieu of security at £P.10.

As to the second objection,—the delay in this case was for a period of five weeks. The Respondent does not state that he has been prejudiced thereby; nor did he think fit to raise the question

in his reply to the appeal in which he deals only with the merits of the case. The objection is therefore overruled.

JUDGMENT.

This appeal arises out of an action brought by the Appellant, Hachaklai Agricultural Co-operative Society Ltd., against the Respondent, Nahum Perlman, claiming payment of a sum of £P.431.742, the balance of a loan of £P.600 with interest, and also claiming confirmation of a provisional attachment upon products of the Respondent's orange grove and the preferential right in the proceeds of sale with costs.

The District Court held that the Appellant's claim was not proved and as the Appellant refused to administer an oath to the Respondent dismissed the action.

The Appellant's case is based upon an agreement between the parties dated the 23rd April, 1929. By clause eleven of that agreement, "The member agrees to rely on the books of the Society as absolute proof of everything registered therein as expense or income and waives hereby all right of objection to the said books".

In view of the allegations that the books of the Society had not been kept in a regular manner, an auditor was appointed to audit the accounts relating to the Respondent.

The report of the auditor, Mr. Benzion Cohen has been filed. As a result of his examination of the accounts, he arrived at the following conclusion:—

"Apart from the differences amounting to £P.6.389 to the credit of Mr. N. Perlman's account, I consider the account of Hachaklai rendered to Mr. Perlman, as per schedule A, to be correct. I base this conclusion on the accounts examined by me, vouchers and documents checked and on the explanations given to me by both parties".

After this report had been submitted, the Appellant admitted in Court that two bills, one for £P.840 and the other for LP.280 in favour of the Appellant signed by the Respondent had been returned to him when he paid off the sum of £P.360 as shown by the Auditor's account. Upon this, the Court held that the claim was not proved and gave the Appellant the oportunity of administering an oath to the Respondent. Upon the Respondent declaring his readiness to take the oath, the Appellant refrained from tendering

it on the ground that by so doing he might prejudice his right of appeal.

Whilst the circumstances under which the two bills were returned to the Respondent have not been explained to our satisfaction we do not think that the fact that these bills were returned is conclusive proof that the Respondent's indebtedness to the Appellant's Society has been extinguished. The auditor Mr. Cohen, reported that subject to a small adjustment, the Appellant's claims were supported by their books and vouchers. It was open to the Respondent to have Mr. Cohen called and examined with regard to these two bills and he has not done so. Moreover he has produced no acknowledgment by the Appellant Society of receipt of the amount due from him under the agreement.

In our view, therefore, the evidence produced by the Appellant is sufficient to establish his claim, and there was no ground for the District Court to call upon him to tender an oath to the Respondent. The appeal is allowed and the judgment of the District Court is set aside. Judgment will be entered for the Appellant for the amount of his claim for £P.431.742 less £P.6.389 that is, for £P.425.353 with interest at 9 per cent from date of commencement of action and costs and advocate's fees, £P.3.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 94/32.

BEFORE:

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

IN THE CASE OF:

Alter Weissman — APPELLANT.

vs

The Mizrachi Bank Ltd. — RESPONDENT.

Reservation in Lower Court of right to administer oath — Case remitted for oath to be administered.

Appeal from the judgment of the District Court of Jaffa, dated the 9th June, 1932.

JUDGMENT.

We see no reason to interfere with the judgment of the Lower Court.

However the Appellant having reserved his right to administer an oath to Respondent, the case is remitted to the District Court for an oath to be administered to Respondent and fresh judgment to be given.

Costs of this appeal to be paid by the Appellant and advocate's fees and travelling expenses assessed at LP.3.

Delivered the 21st day of July, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 119/32.

IN THE CASE OF:

Romio and Another — APPELLANTS.

vs

Dubitsky and Bitar — RESPONDENTS.

Endorsement in blank of promissory note — Oath tendered on commission to Plaintiff resident in Damascus through District Court of Damascus — Failure to appear to take oath considered as refusal.

JUDGMENT.

Respondent in the Lower Court stated that the endorsement on the promissory note, the subject matter of the action, was in blank and that the note appearing above his signature was not written when he made the endorsement, and therefore asked that the Appellants be tendered the oath to that effect. This the Lower Court decided to do and ordered that the Plaintiffs be tendered the oath on commission through the District Court of Damascus. The Appellants do not appear to have taken the oath, and we cannot go behind the seal of the Damascus Court, the said Court stating above their seal that "Appellants did not appear before the Court to take the oath required in spite of the fact that they had been more than once informed". The judgment of the Lower Court must be affirmed and the appeal dismissed with costs.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 134/32.

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

IN THE CASE OF:
Anis Mahmud El-Musa
Faris Hamdan El-Haj Ahmad — APPELLANTS.
vs
Abdel Latif Mahmud Haj Assad, and Others — RESPONDENTS.

Administration of oath not requested in Lower Court — No right to request oath in Court of Appeal.

JUDGMENT.

The District Court was not satisfied with the evidence produced by the Appellants. The Appellants did not demand that an oath should be administered to the Respondents. They are therefore not now entitled to ask that an oath be administered.

The appeal is dismissed with costs, including £P.2.500 advocate's fees and expenses, and 500 mils travelling expenses for the Respondent Abdallah.

Delivered the 20th day of March, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 145/32.

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

IN THE CASE OF:
Salim Mughrabi and Others — APPELLANTS.
vs
Messrs. Berlin and Pacovsky — RESPONDENTS.

Action by architects for services rendered — Oath tendered by Plaintiffs who were unable to prove claim — Art. 1818, Mejelle — Refusal to take oath in form tendered — Inspection of buildings made by commission to determine their value — Refusal to take oath no bar to party refusing from producing other evidence — Objection made to form of inspection report submitted by Committee of Inspection — Committee of Inspection examined on oath — Proof of payment on account.

The Respondents, Messrs. Berlin and Pacovsky, brought an action in the District Court, Jaffa, against the Appellants, Salim Mughrabi and Others, claiming an account in respect of work done by the Respondents upon the instructions of the Appellants in connection with the building of an opera house and other buildings at Tel Aviv, and judgment for the amount found to be due to the Respondents.

The Respondents alleged that the instructions were given in correspondence which they were unable to produce and they applied to prove their claims by administering an oath to the Appellants under Article 1818 of the Mejelle.

This was allowed, and the oath in the following form was tendered to the Appellants:

"(1) That we made no request, directly, nor through another person, nor through one of us, for the making of plans by the Plaintiff, and we did not entrust to the Plaintiff the supervision over the construction of our buildings which are the Opera Building situated at Allenby Avenue and the house situated at Merkaz Mischari on the plots of land known as Nos. 40 and 41.

(2) That these plans were not submitted by us, nor through one of us, nor through a messenger to the Muncipality of Tel Aviv for approval, and they were not approved by the Municipality.

(3) That the buildings, viz., the Opera, and the house situated at Merkaz Mischari, were not constructed according to the plans and with the supervision of the Plaintiff.

(4) That we did not undertake to pay the plaintiff as consideration for his work 3.5 per cent of all the cost of the construction, of its materials and of its labour.

(5) That we neither ourselves, nor through one of us, nor through a messenger, entrusted to him the making of (Pessah and Saphir Theatre) plans, and those plans were not made by the Plaintiff. And neither did we ourselves sign, nor did we request another person to sign in our name and on our behalf, those plans with the intent of submiting them to the Municipality for approval. And they were submitted neither by us, nor through one of us, for approval by the Municipality."

The Respondents refused to take the oath in this form.

The Court thereupon proceeded to assess the amount due to the Respondent, and for this purpose ordered an inspection of the buildings.

A commission was appointed which inspected the buildings and made a report; and the three commissioners were subsequently heard as witnesses.

Upon the basis of this report and evidence, the District Court found that the total amount due by the Appellants was £P.1734.500, and after deducting £P.826.380 of which the Respondents admitted receipt, gave judgment for the Respondents for the balance, £P.908.120 with costs.

The Appellants' first ground of appeal is that their refusal to take the oath in the form tendered did not estop them from producing evidence to rebut part of the Respondents' claim.

We hold that this is a good ground of appeal. A Plaintiff cannot, by tendering to the Defendant an oath in which the Defendant is called upon to deny the whole of the Plaintiff's case, preclude the Defendant from calling evidence to rebut such parts of the Plaintiff's case as he contests.

Another ground of appeal is that, in preparing their report, the Commission of Inspection did not take into account the fact that the buildings inspected were not finished by the Respondents. We think that this is a matter upon which the Appellants were entitled to submit evidence.

The Appellants further object to the form of the inspection report.

The Commissioners found that the value of the buildings inspected by them was £P.34700.—. No particulars whatever are given in the report as to the basis upon which these figures are arrived at. All the three commissioners however, gave evidence and it was open to the Appellants to examine them and ascertain thereby the method of valuation; and questions for this purpose were put to the Commissioner, David Tovia.

This objection, therefore, fails.

The Appellants also claim that they were entitled to prove that they have made payments to the Respondents in excess of the amount of £P.826.380 admitted by the Respondents.

It would appear that the District Court took the view that the refusal by the Appellants to take the oath constituted a denial that they had ever incurred any liability to the Respondents, and that it would be inconsistent with this denial that the Appellants should be allowed to claim that they had made payments on account.

No reference, however to any payment by the Appellants was made either in the statement of claim or in the oath tendered to the Appellants; and we hold that they are entitled to call evidence to prove that they have paid more than the amount now admitted by the Respondents.

In our view, therefore, the judgment of the District Court must be set aside and the case remitted for further evidence to be heard and fresh judgment to be given.

The question of interest contained in the Respondents' Cross Appeal may be raised before the District Court and we express no opinion thereon at this stage.

Costs will follow the event.

OPPOSITION.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 40/24.

BEFORE :

Corrie, J, Frumkin, J. and Jarallah, J.

Liability of guarantor for amount of guarantee — Judgment against guarantor on failure of person guaranteed to appear in Court — Opposition by guarantor to be made to Court of First Instance and to be decided as preliminary objection.

JUDGMENT.

The Appellants have appealed the judgment issued by the District Court charging them to pay the amount of the guarantee whereas the man they have guaranteed has not appeared at the request of the Court before it.

The Court finds that when the guarantor is not presenting the man guaranteed by him and the Court decided to charge him with the amount mentioned in the guarantee, he had to oppose first, if he had what to say, before the Court gave the said judgment, and the Court has to issue its judgment concerning his opposition without hearing his pleadings, according to the provisions of Article 219 of the Code of Civil Procedure.

Whereas among the documents of the case there is no document proving that an opposition has been lodged to the Court by the guarantors in connection with their opposition to the judgment the judgment charged them in the amount of the guarantee and no judgment was issued concerning the matter.

Therefore it was decided to dismiss the appeal lodged by the guarantors, provided that they have the right to oppose before the District Court and the Court will consider it positively without giving its opinion whether such judgments are appealable now or not appealable.

Delivered the 27th day of March, 1927.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 4/27.

IN THE CASE OF:

Ali El Hamad — APPELLANT.

VS

Khalil Yousef Ruston — RESPONDENT.

Opposition to judgment by default — Failure of opposer to appear at second hearing of opposition — Application of Articles 158, 159, Civil Procedure Code.

Appeal from a judgment of the District Court of Haifa dated the 27th day of September, 1926.

JUDGMENT.

Appellant opposed a judgment given against him by default. At the first hearing of the opposition he appeared and the opposition was accepted in form. At a subsequent hearing, however, the opposer failed to appear although duly notified and the Court dismissed his opposition.

We are of opinion that under the above circumstances, Article 159 of the Code of Civil Procedure cannot be applied in that the opposer appeared in the first hearing of the opposition and that Article 158 of the said Code should be applied and the Court should have gone into the merits of the case and given judgment thereon.

Judgment of the District Court set aside and case remitted for the above to be complied with.

Costs will follow the event.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 40/28.

BEFORE:

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

IN THE CASE OF:

Bashir Ibn Yasin
Mudhiyeh Bint Issa Kashmar — OPPOSERS.

vs

Badawi Muhammad Hussein El-Natcheh — RESPONDENT.

Opposition made to judgment of Supreme Court — Opposition to dismissal of Plaintiff's action — Art. 161, Civil Procedure Code — Jurisdiction of Court of Appeal on appeal from Land Court of action on title to land held limited to decide questions of law only and not questions of fact — Sec. 6, Rules of Court for the Land Courts dated 15th May, 1921.

JUDGMENT.

The Applicants are opposing a judgment whereby the Plaintiff's action was dismissed. So far, therefore, as the Applicants are concerned, the position as regards title to the land claimed is precisely what it was before the Plaintiff brought his action; and it cannot be maintained that the judgment is prejudicial to the interests of the Applicants.

The Applicants, therefore, have no right to oppose within the terms of Article 161 of the Code of Civil Procedure, though there is nothing to prevent them from commencing a fresh action in the Land Court.

The opposition, moreover, which it is now sought to bring, involves the determination of a question of fact.

Now under Section 8 of Rules of Court for the Land Courts dated 15th May, 1921, an appeal lies from the Land Court to this Court "on a point of law." That is to say, in actions on title to land this Court is competent to decide questions of law only and

not questions of fact. Hence it cannot entertain an opposition by a third party unless such opposition involves only a question of law.

On both these grounds the application is dismissed.

Delivered the 26th day of June, 1928.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 92/29.

BEFORE:

Baker, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Hassan Abdallah Hamdan
Mi'rai Abdallah Hamdan — OPPOSERS.

vs

Abdel Hadi el Hassan
Muharrib Ali Hassan
Sabha Hassan Di'mis
Mudallaleh Hassan Di'mis — OPPONENTS.

Opposition made by Third Party against judgment of Supreme Court of Appeal — Right of third party opposition — Encroachment by Execution Officer in execution of judgment on stranger's land alleged.

Third Party opposition against the judgment of the Supreme Court sitting as a Court of Appeal, dated the 12th March, 1927, in Land Appeal No. 45/27.

JUDGMENT.

The Court holds that the ground upon which the Opposers base their opposition against the judgment of the Supreme Court of Appeal issued on the 3rd January, 1926, cannot be upheld.

The ground of opposition is that when the Execution Officer was executing the judgment of the Supreme Court of Appeal he encroached upon their (Opposers') lands, while the judgment of the Court of Appeal merely declares that the heirs of Hassan and Hussein Da'mas, the original Plaintiffs, are entitled to 11/12 of 2½ kirats in the share registered in Hussein Tayeh's name, inasmuch as Hussein Tayeh is the registered owner of one share

in all the lands of Faloujeh village which share is commonly regarded as 12 kirats.

It was proved in the Land Court that Hussein Tayeh owns only $2^1/_2$ of 12 kirats and that his ancestor Da'mas owned $2^1/_2$ kirats of the said whole.

It was stated further that the remainder of 12 kirats belonged to other persons inter alia Abdul Hadi Abu Hmeid and Muhammad Awad Shahin; each owning $2^1/_2$ kirats.

The Opposers allege that they bought from the heirs of the two said persons their share and deny their inheritance from 'Asi (one of Hussein Da'mas's heirs) and Jaber (one of Hussein Tayeh's heirs), alleging further that they have nothing to do with the property owned by either Hussein Tayeh or Hassan Hussein Da'mas.

Under such circumstances even assuming the truth of the allegation that the Execution Officer when executing the judgment did in fact encroach upon their lands, still they are not entitled to enter an opposition.

It is a condition in law that to enable a third party to enter an opposition against a judgment, such judgment must be prejudicial to the rights of the opposer. As a matter of fact the last judgment deals simply with two questions: 1. that Hussein Tayeh is entitled only to $2^1/_2$ out of 12 kirats of the village lands registered in his name; and 2. that the $2^1/_2$ kirats belonging to the heirs of Da'mas and alleged to have been sold by one of the heirs, 'Asi, to the Defendants were in fact his property and the property of the other Plaintiffs only.

Neither in the Lower Court nor in the Court of Appeal the rights of the other co-owners as to the manner of partition of the said share or as regards the other kirats were ever contested as they were not in issue in the case.

We therefore dismiss the opposition with costs.

Delivered the 15th day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 102/30.

BEFORE :

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

IN THE CASE OF:

Marie Bishara Bow
Shawakat Najib El Haj
Thuraya Najib El Haj — APPELLANTS.

vs

Salim Francis Bitar — RESPONDENT.

Judgment by default obtained against persons other than original debtor — No appeal brought from dismissal of opposition.

Appeal from the judgment of the District Court of Jaffa dated 28th May, 1930.

JUDGMENT.

Judgment was given by the District Court of Jaffa on 27th March, 1929, in favour of Salim Bitar against the Appellants personally. This judgment was given in the absence of the Appellants, who opposed it. On 23rd September, 1929, the District Court, Jaffa, dismissed their opposition. No appeal has been made against the judgment of the District Court.

Hence it is clear that the Appellants are personally liable for the debt, and that execution may issue accordingly.

The appeal is dismissed with costs including £P.5. advocate's fees and expenses.

Delivered the 11th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 73/31.

BEFORE:

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

IN THE CASE OF:

Raji and Bahjat El-Issa — APPELLANTS.

vs

Muhammad Sidky Abdel Majid as manager of the Tobacco Manufacturing Development Company, Ltd. — RESPONDENT.

Opposition to judgment of Magistrate made in District Court — Opposition to judgment of Magistrate where value of subject matter of judgment exceeds LP.100 — Third party opposition — Arts. 53, 54, Ottoman Magistrates' Law.

JUDGMENT.

The Respondent is seeking removal of attachments placed upon certain tobacco by the Magistrate's Court of Acre: and in view of the fact that his application was based on a claim of ownership of property worth more than £P.100, he took proceedings in the District Court.

It is laid down, however, by Articles 53 and 54 of the Magistrates' Law that opposition to a judgment of a Magistrate's Court by a person who was not a party is to be made to the Magistrate's Court which gave the judgment.

It follows that the District Court has not jurisdiction to hear such an application otherwise than on appeal from a judgment of the Magistrate's Court, even though the ground of opposition be a claim of ownership of property worth more than £P.100.

The judgment of the District Court is therefore set aside and the Respondent's action dismissed with costs here and below, including £P.4 advocates' fees and expenses.

Delivered the 24th day of March, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 8/32.

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

IN THE CASE OF:

Husen bint Abd er Rahman Haj Hussein — APPELLANT.

vs

Hafsah bint Hassan Abd er Rahman Haj Hussein — RESPONDENT.

Right of appeal given only to plaintiff or defendant in action — Right of third party to make opposition to judgment — Art. 180, Civil Procedure Code.

Appeal from the judgment of the District Court of Nablus, dated 19th November, 1931.

JUDGMENT.

We are satisfied that Article 180 of the Civil Procedure Code does not enable the Appellant to lodge an appeal in this case in view of the fact that Husen although an heir, her interest was independent of the other interest involved in the case. Nasra was not in a position to protect the interest of Hasna when the question of partition was raised in the Land Court.

We are therefore of opinion that Husen has a right of third party opposition in view of the fact that she was not represented before the Court, but that she has no right of appeal; and her appeal must be dismissed with costs and advocate's fees assessed at £P.1.

Delivered the 11th day of May, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 164/32.

BEFORE:

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

IN THE CASE OF:

Abdel Razzak Aggad and Another — APPELLANTS.

vs

Abdel Latif Khammash and Another, Syndics — RESPONDENTS.

Order obtained by Syndics for sale of house of bankrupt — Right of bankrupt to oppose — New action commenced to make opposition — Bankrupt entitled to be heard on opposition to Order to sell his house.

Appeal from the judgment of the District Court of Nablus dated the 19th November, 1932, refusing to hear an action in the nature of an opposition to an Order of the same District Court in another File (dated August 15th, 1932) for the sale of the house of Appellants who were bankrupts.

JUDGMENT.

The application by the Appellants to the District Court, dated October 27th, 1932, was by way of Opposition to the order of the Court, issued on August 15th, 1932.

The order was made without hearing the Applicants; and it is clear that they were entitled to be heard in support of their Opposition to that order.

The judgment of the District Court, dated the 19th November, 1932, is therefore set aside and the case is remitted for the Appellants' Opposition to be heard.

Costs will follow the event.

In the District Court of Jerusalem.

C.D.C. Jm. No. 238/32.

BEFORE:

De Freitas, J. and Valero, J.

IN THE CASE OF:

Abraham Haim Idagaroff	OPPOSER.
vs	
Raphael Ovesoff	OPPONENT.
and	
Benzion Eujahinoff	THIRD PARTY.

Action for return of promissory notes or their value — Third party opposition filed by party prejudiced by judgment — Judgment of District Court amended by District Court on opposition made by third party.

The Plaintiff brought an action against the Defendant for the return of four promissory notes or their value LP.203.600. The Defendant admitted having received the four notes from the Plaintiff and stated that he handed them over to Idagaroff who tore the notes up. He further admitted that he took no action against Idagaroff. He finally consented to judgment being entered in favour of Plaintiff for LP.60 and interest from 18th April, 1932. Obviously the Court could not give judgment for the return of the notes or LP.60 as agreed because Defendant had stated that Idagaroff had torn up the notes.

Idagaroff filed a third party opposition to the judgment, alleging that he is prejudiced by the judgment. Further he desires now to return the notes to Plaintiff as apparently the notes were not torn up as alleged by Defendant. Idagaroff alleges that the sentence in the judgment against Defendant which reads: "Liberty to Defendant to bring an action against the person who took the notes Abraham Haim Idagaroff is clearly prejudicial to him."

We see no reason to set aside that part of the judgment of the 18th April, 1932, which affects the Defendant but although in our opinion the sentence in the said judgment to which reference has been made does not prejudice Idagaroff in any way and is merely superfluous, yet we set aside that part of the judgment that is to say we order that judgment of 18th April, to be amended by the deletion of the sentence "Liberty to Defendant to bring an action against the person who took the notes, Abraham Haim Idagaroff".

We would observe that in the original action the Defendant could have applied for Idagaroff to be joined as third party Defendant.

We make no order as to costs.

Given the 20th day of April, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 50/33.

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

IN THE CASE OF:

Rashid El-Daqqaq — APPELLANT.

vs

Ibrahim Kamal — RESPONDENT.

Judgment by default — Opposition on the ground of illness — Adequacy of grounds justifying default in appearance — Possession or non-possession of medical report held immaterial.

Appeal from the judgment of the District Court of Jaffa dated 15th January, 1933.

JUDGMENT.

The District Court erred in refusing the application for opposition on the ground, as they state, that the opposer could not satisfy the Court that he was in possession of the medical report on the date of hearing. His possession or non-possession of the medical report on that date is immaterial. What is material is whether there were adequate grounds to justify his default in appearance. His omission to notify the Court that he had a medical report on the day of its issue was also immaterial.

We set aside the judgment of the District Court dismissing the opposition and remit the application for opposition for the District Court to hear relevant evidence and give judgment accordingly.

Costs to follow the event.

Delivered the 6th day of December, 1933.

ORTHODOX PATRIARCHATE.

In the High Court of Justice.

H.C. No. 1/32.

BEFORE :

The Chief Justice and Baker, J.

IN THE APPLICATION OF :

The Executive Committee of the Second Arab Orthodox Congress — PETITIONERS.

vs

The Right Reverend the Archbishop Keladion, Locum Tenens of the Orthodox Patriarchate, Jerusalem — RESPONDENT.

Application to stay elections to Greek Orthodox Patriarchate — Sec. 6 (b) Court Ordinance, 1924 — Jurisdiction of High Court in orders directed to public officers — "Public Officer" defined — Art. 43, Palestine Order-in-Council — Jurisdiction of High Court to hear matters not within the jurisdiction of any other Court — The Fundamental Law, 1875 — Constitution of Holy Synod.

ORDER.

This is a return to a rule nisi issued by this High Court on the 15th January, 1932, calling upon the Right Reverend Archbishop Keladion, the locum tenens of the Orthodox Patriarchate of Jerusalem, "to show cause why he should not be ordered to stay the present proceedings purporting to be elections to fill the existing vacancy in the Patriarchal Throne of Jerusalem and to carry out such elections in accordance with law."

The rule was obtained on the application of the Executive Committee of the Second Arab Orthodox Congress, a body which has registered itself in the Office of the District Commissioner of the Jerusalem District, in accordance with Article 6 of the Ottoman Law of Socities, as having for its aim "the welfare of the local Arab Orthodox Community and the preservation of its rights."

The rule nisi was granted by the High Court under Section 6 (b) of the Courts Ordinance, 1924, which gives the High Court exclusive jurisdiction, inter alia, in "Orders directed to public officers or public bodies in regard to the performance of their

public duties, and requiring them to do or refrain from doing certain acts."

The Court were satisfied that the locum tenens of the Greek Orthodox Patriarchate was a public officer and, in this connection, we need only quote from page 1610 of the second edition of Stroud's Judicial Dictionary the following passage:—

> "Everyone who is appointed to discharge a public duty, "and receives a compensation in whatever shape, whether "from the Crown or otherwise, is constituted a Public "Officer, e.g., a Bishop, Clergyman, or Lord of a Manor, "or a Corporation with a grant of lands which grant imposes "a public duty, and as such, is liable to an action for injury "to an individual arising from abuse of the Office, either "by act of omission or commission (Henly v. Lyme, 5 Bing. "107, 108)."

The performance of a public duty by a public officer being involved, the Court held that it had jurisdiction in virtue of the second paragraph of Article 43 of the Palestine Order-in-Council, 1922, which reads as follows:—

> "The Supreme Court, sitting as a High Court of "Justice, shall have jurisdiction to hear and determine such "matters as are not causes or trials, but petitions or applications "not within the jurisdiction of any other Court and necessary "to be decided for the administration of justice."

On the return to the rule, the Respondent—the locum tenens—failed to enter an appearance, but proof of service of the order nisi was given, culminating in exhibit G.F.S.1, letter No. 15, dated 7/20 January, 1932, addressed by Archbishop Keladion to the District Commissioner of Jerusalem.

We must express our surprise that a prelate in this position should not have appreciated the fact that a plea to the jurisdiction could not be maintained by his mere ipse dixit addressed to the District Commissioner, but should have been represented on the return to the rule by argument at the Bar before this Court.

We must also express our regret that the Respondent did not appear by Counsel to argue before us all the complicated and important issues affecting the spiritual headship of one of the great Christian communities in this country, which have arisen in the case, and in this connection we desire to express our appreciation of the ability with which Dr. Eliash, although, as will be seen

we do not adopt all his arguments, placed with much clearness and fairness his clients' case before us.

To come now to the merits of the case. The election of a Patriarch, it is admitted, is governed by the Ottoman Law, entitled the Imperial Regulations of 1875, to which we shall in this judgment refer as "The Fundamental Law." The translation into French of this law contained in our usual repository in a Western language of the laws of the Ottoman Empire—Mr. George Young's Corps de Droit Ottoman, Volume II, page 36, is admittedly faulty and incomplete. We have fortunately before us a translation by Mr. Ongley, formerly Land Court Judge in Jerusalem, on page 243 of the report of Sir Anton Bertram and Mr. Luke, who sat as Commissioners upon the affairs of the Orthodox Patriarchate and presented their report to the High Commissioner in March, 1921. For ease of reference we shall in this judgment speak throughout of this Report as "Bertram-Luke."

In 1925 certain controversies between the Orthodox Patriarchate of Jerusalem and the Arab Orthodox Community led to the appointment of a further Commission, again presided over by Sir Anton Bertram, with Mr. J. W. A. Young as a member, and this Commission reported in June of the same year.

In this report, to which we shall refer throughout as "Bertram-Young," there is printed, on page 292, a translation of the Fundamental Law which, on page 220 of the Report, is stated to be the same translation as was prepared by Mr. Ongley at the request of the Bertram-Luke Commission.

As we shall shortly see, the two translations are not in fact in exactly the same words.

The first of the grounds upon which the Petitioners rely is that the locum tenens was elected by a body, calling itself the Holy Synod, which was, in fact, improperly constituted inasmuch as it consisted of twelve Bishops and eleven Archimandrites instead, as the Petitioners allege, as is required by law, of six Bishops and nine Archimandrites.

In answer to a summons issued by the Court, in the course of the hearing, there attended before us a member of the Synod, the Archimandrite Epiphanios, who is the Chief Secretary of the Patriarchate.

We were informed by the Archimandrite that in fact at the meeting of the Synod which elected the locum tenens, although

it at that time consisted of 12 Bishops and 11 Archimandrites, only 10 Bishops and 11 Archimandrites were present, as two Bishops were abroad. This, however, does not affect the Petitioners' argument, which is that the numbers composing the Synod were not those laid down by law. To determine this point we must turn to Article 3 of the Fundamental Law.

In Bertram-Luke the relevant part of this article is translated as follows:

> "The Holy Synod is composed of six Bishops and nine "Archimandrites, and, in such a manner that the permanent "body of its members shall not be altered, the changing, "withdrawal, and addition, according to necessity, is referred "to the spiritual advice of the Patriarch."

In Bertram-Young the translation is slightly different, being in the following terms:—

> "The Holy Synod is composed of six Bishops and nine "Archimandrites, and, subject to the condition that the "permanent body of its members shall not be altered, the "increase, diminution and substitution of its members, "according to necessity, is left to the spiritual opinion of "the Patriarch."

The Petitioners' case is that the words prescribing "that the permanent body of its members shall not be altered" are the dominant words in this provision.

Dr. Eliash argued further that, as to the qualifying words, Bertram-Luke contains the correct translation, where it says "the changing, withdrawal and addition according to necessity is referred to the spiritual advice of the Patriarch."

His theory is that "changing" relates to members serving their turn in a roster for a period and then being replaced; "withdrawal" on the part of a Bishop must occur, so he alleges, when an Archimandrite is promoted Bishop, so as to retain the number of Bishops at the statutory figure of six: "addition," he argues, occurs when a new member joins the Synod, to replace one who has died or one who has withdrawn from the post of Archimandrite by promotion to a Bishopric, or who has withdrawn owing to the operation of the roster system.

It is peculiarly unfortunate that on the interpretation of this obscure section we did not have the benefit of argument from

counsel on behalf of the Patriarchate, but from the evidence of the Archimandrite Epiphanios we gather that the view of the Patriarchate is that the article merely means that the Patriarch cannot abolish the Synod but can increase or decrease its numbers. We are also told by this witness that at the end of 1925 or early in 1926, again, in August, 1929, and once more in November, 1930, actual numerical additions in some cases of Bishops and in some cases of Archimandrites, increasing the total membership of each class of members of the Synod, were made.

The interpretation of Article 3 has, moreover, in more than one place, been the subject of discussion by the two Commissions to which we are referred.

On page 106 of Bertram-Luke we find the following:—

> "The question then arises—is it possible to produce a "quorum by the addition of members to the Synod? Under "Article 3 of the Regulations of 1875 it is competent to the "Patriarch to increase the numbers of this Synod 'provided "that the integrity of the Synod is not impaired.' The meaning "of the last phrase is not very clear. Probably it means "simply that the Patriarch may not dismiss his whole Synod "and constitute an entirely new one."

It will be observed here that although on page 244 of the Report occurs in Mr. Ongley's translations "in such a manner that the permanent body of its members shall not be altered," the Commissioners, on page 106, without any explanation, use a totally different translation, viz.:—

> "provided that the integrity of the Synod is not impaired."

The interpretation of the provisions of the same article is considered on page 225-227 of Bertram-Young, which read as follows:—

> "THE POWER OF THE PATRIARCH WITH REGARD TO THE COMPOSITION OF THE SYNOD."
>
> "316. It is necessary that the power of the Patriarch "with regard to the composition of the Synod should be "clearly defined. At present it is very obscurely stated (see "Art. 3 of the Fundamental Law). This Article in its present "form was clearly drafted by a Turkish official, and not by "a Greek ecclesiastic. We have made careful inquiries as "to the meaning of the Turkish words used, and we understand

"that their meaning is that, 'subject to the condition that "the permanent body of its members (i.e., the members of "the Synod) shall not be altered, the increase, diminution, "and substitution of its members according to necessity is "left to the decision of the Patriarch.' These words have "been constructed as giving to the Patriarch a right of "changing the composition of the Synod at will. Four "members of the Synod, who were duly reconciled to the "Patriarch after the passing of the Ordinance of 1921, are "still excluded from the meetings of the Synod, and they "suppose that in so excluding them the Patriarch is acting "under this provision. We have carefully considered this "provision, and we do not think it means anything of the "kind. With regard to the increase or diminution of the "members, we think that the draftsman merely meant to "say that it was for the Patriarch to determine whether new "bishoprics should be created or vacant bishoprics filled up, "or what should be the number of Archimandrites on the "Synod. The explanation of the phrase 'the substitution of "members' is as follows: It is a common device of Turkish "legislation to require that elected bodies shall have a "continuous existence, and that they shall be renewed from "time to time by the retirement at fixed periods of a certain "proportion of their members, and by elections being held "to fill the vacancies thus created. This was the system in "force in all Turkish Municipalities; it was the system in "force in the Synod of the Œcumencial Patriarchate; it "was the system in force in the Mixed Council created by "the Turkish Order of 1910. All that the legislator meant "was that in the case of the Synod of the Jerusalem Patri-"archate the arrangement of such a rotation should be left "in the hands of the Patriarch. We trust that the revised "translation we have submitted will have now made this "meaning clear. But we wish to go farther. In our opinion "the composition of the Synod should not be left to the "Patriarch alone. It should be in the hands of the Patriarch "in Synod, as the constitutional governing body of the "Church. We have, therefore, submitted an amendment to "this effect. It will be for the Patriarch in Synod to say "whether that amendment should be adopted."

"317. But there is another matter in this connection "which requires to be made clear. The custom of the "Jerusalem Church has always been that a Bishop is ex-officio "a member of the Synod. A Bishop, on consecration, has "always automatically taken his place in the Synod. It has "never been considered that his membership in the Synod "requires a supplementary appointment. That this is so is "implied by Article 9 of the Fundamental Law itself, in "which the monastic section of the electoral assembly is said "to consist of the Synod, the Archimandrites, and the "Protosynkelloi of the Jerusalem Monastery. Here it is "clearly assumed that all the Bishops are members of the "Synod. It would be inconceivable that all Archimandrites, "and only some of the Bishops, should be among the electors. "In view of this principle it is clear that the reference to "'substitution of members' must be interpreted as applying "to Archimandrites only. We would, however, place this "question beyond doubt by adding words declaring that "Bishops are ex-officio members of the Synod."

The Commissioners clearly interpret the Article to mean:—

(a) that the Patriarch has no right, de jure, to exclude any Bishop from the Synod;

(b) that the Patriarch can increase the number of Bishoprics or omit to fill up vacant Bishoprics;

(c) that the Patriarch can determine the number of Archimandrites on the Synod and that these serve on a system of rotation, the rules as to which are left in the hands of the Patriarch.

In the light of this interpretation, in which we can put our finger upon no flaws, from a source as authoritative as is Sir Anton Bertram, the Chairman of the Commission, coupled as it is with the admitted practice for some years by which the Synod has not been confined to six Bishops and nine Archimandrites, we are unable so to interpret this ambiguous article as to hold that the Synod which elected the locum tenens was improperly constituted.

We come, however, now to the next stage, which is governed by Article 4 of the Fundamental Law.

By this article the election of a locum tenens is notified to the Mutessarif, who submits the matter to the Grand Vizierate,

which takes action by sending an Emirname ordering the confirmation in his office of the locum tenens and the election of a Patriarch in accordance with the law.

Before the British Occupation there were three Mutassarifs in this country, of whom one was over the Liwa of Acre and one over that of Nablus. These were responsible to the Wali at Beyrouth. The third Mutassarif, who administered the Liwa of Jerusalem, was, owing to the special importance of Jerusalem, responsible only to the Grand Vizierate.

Liwas were divided into Quadas, the Administrative heads of each of which was a Kaimmakam.

In High Court No. 70/1927, Khalil Ibrahim Bayyud and Another v. District Officer of Jaffa,* this Court has held that it is for the District Commissioner to perform the functions statutorily imposed upon the Kaimmakam.

This being so, we must hold that the mantle of the Mutassarif has fallen on the High Commissioner, for he alone is directly responsible to the Secretary of State for the Colonies, who alone, for his part, can be held to stand in the shoes of the Grand Vizier.

Upon this line of argument we are forced to the conclusion that, albeit the election of the locum tenens, as we have seen, complied with the law, he is still lacking confirmation in his office from the Secretary of State and, what is more, that it is not till the Secretary of State so orders that the first stage under Article 5, preparatory to the election of a Patriarch, can legally take place.

Upon either of these points alone we should be bound to make the order absolute, but in view of the importance of the issues involved and the necessity of preventing, if possible, in future, the regrettable necessity of a recourse to the Courts in such a matter, we feel bound to adjudicate upon the remaining points urged in support of the Rule.

We hold that Article 5, although it again is an example of bad draftmanship, must be held, by the use of the words "within the specified time," to import, into the notification to the people in each Metropolis and Bishopric to send a priest to the Council of Election, the same need for notice of 21 days as has to be given to the Metropolitans and Bishops when they are summoned to attend.

* See ante, p. 1307.

We further hold that under Article 6, while Archimandrites may be nominated for election, the Council of Election, which is in this article called "the said Spiritual Council," and which has the power of nomination, clearly consists only of all the Metropolitans and Bishops and differs entirely from a Synod in that no Archimandrite may take part in the nomination.

We hold that under this same Article the only sine qua non required of a nominee is that he be a Metropolitan, Bishop or Archimandrite subject to the Patriarchal Throne of Jerusalem.

There is nothing, so long as he has those qualifications, to prevent a prelate being nominated who is not possessed of the further qualifications required for election under Article 12.

This Article states that the person elected must be more than 40 years of age, must have served 10 successive years in a metropolis, and must both be the son of, and be himself a subject of, His Imperial Majesty (the Sultan).

We cannot agree that any of the qualifications in Art. 12 can be imported into the stage of nomination.

We can well conceive a case in which a person qualified under Article 6, but not having the qualification prescribed by Article 12, might, let us say, by way of compliment, be nominated to show respect to his age, his learning or his piety, with full cognizance of the fact that he was disqualified from election.

We finally come to the Official Communiqué No. 4/32 of 6th January, 1932, which publishes, for general information, official action by the Palestine Executive which clearly purports to be done in compliance with Article 8 of the Fundamental Law.

The effect of Article 8 is that the list of nominees is to be sent to the Mutessarif, who then transmits it to the Sublime Porte, which has power, if it thinks fit, to excise any of the names of nominees from the list. The Sublime Porte then issues an order for the election to be made from among the remaining names, and it is for the Mutessarif merely to notify such order to the locum tenens and the Synod.

The Communiqué of the sixth of January reads as follows:—

"ORTHODOX PATRIARCHATE.

"It is notified for general information that the list of "candidates which was submitted to Government by the locum "tenens of the Orthodox Patriarchate in accordance with "Regulation 8 of the Imperial Regulations, 1875, has now

"been considered by His Excellency the High Commissioner, "who has decided not to excise any name from those "contained in the list. The locum tenens has accordingly "been informed that the election should proceed from among "the names included in that list."

As to this, we need only say that by a parity of reasoning to that which we have applied to Article 4, we hold that His Excellency the High Commissioner in purporting to exercise a discretion as to the right of veto, and in giving an order to proceed with the election, has misconceived his powers and has, in fact, albeit obviously inadvertently, usurped functions which are expressly vested by law in the authority at the seat of the Imperial Government which can only be represented by the Secretary of State.

We cannot conclude without making one comment upon the matter as a whole.

The findings of the Bertram-Luke Commission were, at an early date, implemented by legislation relating to the control of the Finances of the Patriarchate.

In the forefront of the terms of reference of the Bertram-Young Commission was placed the question "whether any, and if so, what steps should be taken to revise the Ottoman Imperial Regulations of 1875," which we have called the Fundamental Law. Thirty pages of the Report are devoted to recommending that such revision should be effected, and the Commissioners went so far, in Appendix D, as to present a draft bill to effect the revision, and, in this connection, it must not be forgotten that the Chairman of the Commission was a distinguished Chief Justice who had very wide experience as a law officer and as a judge in no less than three colonies and was, in consequence, probably the best possible draftsman of such a law.

We know nothing of the reasons which, after the administration had gone out of its way to appoint the Commission, led apparently to the pigeon-holing of its Report and of its recommendations for nearly seven years, but we wish to make this concluding observation.

The Fundamental Law is a faulty, ambiguous, ill-drawn and barely intelligible instrument, hastily concocted fifty-seven years ago in the Turkish language to cover circumstances prevailing under the Ottoman regime. To this the Bertram-Young and Bertram-Luke Reports bear ample testimony.

We consider that a law such as this is calculated to lead to disputes and litigation in regard to the election of the Patriarch of what is, at present, the most numerous Christian community in this country, a community which, further, forms an important part of one of the great Churches of the Christian World. An indefinite continuance of such circumstances is a matter which all responsible persons would be bound to view with regret.

We make the order nisi absolute with costs to include £P.5 advocate's fee.

Delivered the 26th day of January, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 85/33.

BEFORE:

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

IN THE CASE OF:

Antoine Albina — APPELLANT.

vs

Commission on the Finances of the Orthodox Patriarchate — RESPONDENT.

Appeal from opinion of District Court on stated case — Sec. 16, Orthodox Patriarchate Ordinance, 1928 — Civil Procedure — Right of appeal from opinion on stated case — Sec. 8, Arbitration Ordinance, 1928 — Sec. 3, Third Schedule, Workmen's Compensation Ordinance, 1927 — "Judgment of the Court" within meaning of Art. 43, Palestine Order-in-Council, 1922 — Grounds of appeal filed too late — Good cause not shown for delay.

JUDGMENT.

The judgment which gives rise to this appeal is an opinion of the District Court upon a case stated by the Commission on the Finances of the Orthodox Patriarchate of Jerusalem, under Section 16 of the Orthodox Patriarchate Ordinance, 1928.

The Ordinance is silent upon the question of an appeal from an opinion given under this Section, and the first question that arises is whether such opinion is appealable or not.

Procedure by way of case stated had already been introduced into Palestine at the time when the Ordinance was enacted, pro-

vision having been made for such procedure under Section 8 of the Arbitration Ordinance, 1926, and also under Section 3 of the Third Schedule to the Workmen's Compensation Ordinance, 1927.

Now the Arbitration Ordinance while providing that an appeal against an order of a District Court under the Ordinance may be brought by leave of the Court or of the Court of Appeal, makes no provision for an appeal against an opinion of the District Court given under Section 8.

Again, Section 3 of the Third Schedule to the Workmen's Compensation Ordinance, provides that the decision of the President of the District Court given under that Section shall be final, unless he grants leave to appeal to the Supreme Court.

There is, however, an important distinction between an opinion of the District Court given under the Orthodox Patriarchate Ordinance and an opinion given under either the Arbitration Ordinance or the Workmen's Compensation Ordinance, namely, that under the latter Ordinances, the opinion of the District Court or of the President of the District Court is an opinion upon a point of law only, leaving the determination of the issues between the parties to be made by the award of the Arbitrator by whom the point of law was submitted.

Under Section 16 of the Orthodox Patriarchate Ordinance, however, any question arising in the course of the operations of the Commission may be made the subject of a case stated for the opinion of the District Court, and the opinion of the District Court thereon of itself determines any dispute between the Commission and any other party, without the necessity for the issue of any order or award by any other authority.

I hold, therefore, that an opinion of the District Court given under Section 16 of the Orthodox Patriarchate Ordinance, 1928, is a judgment of the Court within the meaning of Article 43 of the Palestine Order-in-Council, 1922, and hence that an appeal lies to this Court.

The next point that arises in this appeal is that no grounds of appeal were filed until July 11, 1933, the judgment appealed against having been given on March 31, 1933.

No good cause has been shown for the delay.

Hence in accordance with the judgment of this Court in Civil Appeal 76/27, (Fiyani v. Liberson)* the appeal is dismissed with costs. LP.2 advocates fees.

Delivered the 26th day of April, 1934.

* See ante, p. 149.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 136/33.

BEFORE:

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

IN THE CASE OF:

Habib Homsi — APPELLANT.

vs

Commission on the Finances of The Orthodox Patriarchate — RESPONDENT.

Resolution of Holy Synod of Greek Orthodox Patriarchate to pay pension — Application under Sec. 16 (2), Orthodox Patriarchate Ordinance, 1928 to state a case for opinion of the District Court — Mandatory Order issued by District Court to state a case — Resolution of Holy Synod held to be a nudum pactum — Unilateral undertaking not enforceable — Arts. 38, 50, Palestine Order-in-Council, 1922 — Past services of deceased servant as consideration for promise to pay—Measure of damages for breach of contract for sale of land—Objection to jurisdiction of lower Court made to Court of Appeal.

JUDGMENT.

The late George Homsi, on behalf of whose estate this appeal is lodged, bought in 1909 a plot of a land near the Jaffa Gate for a sum of 300 Napoleons. The land was never registered in the name of Mr. Homsi and was recently sold by the Commission on the Finances of the Orthodox Patriarchate to a third person for the sum of LP.1485.

For several years at the close of his life, the late George Homsi was a Judge of the Court of Appeal and he received during these years from the Patriarchate a pension of LP.10 a month in respect of the fact that he had been for many years previously Turkish Secretary of the Greek Orthodox Patriarchate.

On Mr. Homsi's death in 1921 the Holy Synod of the Patriarchate, on the 28th June, 1921, passed the following resolution:—

> "At last His Beatitude declared in sorrow the decease of George Homsi who served as a secretary for the Turkish language in the Convent for a period of thirty years and who rendered numerous services to the Convent. His death occurred to-day at 2 a.m., caused by heart disease. The Holy Synod prays for the rest of his Soul appreciating his

services to the Convent and decides that his funeral expenses be met by the Convent for the sake of his honour and that until a further decision a pension amounting to 10 pounds monthly be paid to his family. After this the meeting was adjourned".

Nothing has ever been paid in conformity with the resolution.

In consequence of the above two circumstances the estate claimed from the Commission on the Finances of the Patriarchate:—

(a) The value of the land sold or damages for the sale thereof, and

(b) the pension, payment of which, by the resolution of the 28th June, 1921, was to be continued to the family of the deceased.

On an application on behalf of the estate to the Commission, the latter offered to pay a sum of LP.300 in settlement of all claims which the estate had against the Patriarchate.

The estate then applied, under Section 16 (2) of the Orthodox Patriarchate Ordinance, 1928, to the Commission, asking it to state a case for the opinion of the District Court of Jerusalem on the matters in question.

The Commission having failed to state such case the present Appellant, a son of the deceased, on behalf of the estate applied to the District Court under the same section and subsection, for a Mandatory Order requiring the Commission to state a case, and such an order having been given on the 26th June, 1930, the Commission stated a case on the 21st February, 1931, upon which judgment was given by the District Court on the 19th July, 1933, to the effect that the Appellant was entitled on behalf of the estate only to the refund of the 300 Napoleons paid by his father in respect of the purchase of the land, and further that the resolution of the Synod was a "nudum pactum" and that hence the claim to a pension must fail.

A preliminary point was taken by the Respondent in the application for a Mandatory Order, and again before us, to the effect that the application for such an order was "a legal proceeding" which could not, under Section 17 (2) of the Orthodox Patriarchate Ordinance, 1928, be instituted against the Commission except with the previous sanction of the High Commissioner.

We cannot agree with the Appellant that this objection

having been overruled by the District Court on the application for the Mandatory Order it cannot be raised now, but should have been the subject of an appeal against the Mandatory Order. We hold that an objection such as this which, if valid, would completely oust the jurisdiction of the District Court must, if brought to our notice be dealt with even if it was not the subject of an express appeal from the decision in which it was originally embodied.

There is no doubt in our minds that the very wide words in Section 17 (1) "No action or legal proceeding" must include an application to a District Court for a Mandatory Order, but on the other hand we hold that Section 17 (1) is in conflict with Art. 38 of the Palestine Order-in-Council, headed "Judiciary", which runs as follows:—

> "38. The Civil Courts hereinafter described shall, subject to the provisions of this part of the order, exercise jurisdiction in all matters and over all persons in Palestine".

The provisions of Part V of the Order-in-Council, which limit the exercise of the jurisdiction of the Court in all matters and over all persons in Palestine, are contained in Article 50 which runs as follows:

> "50. No action shall be brought against the Government of Palestine or any Department thereof, unless with the written consent of the High Commissioner previously obtained.
>
> The Civil Courts shall not exercise any jurisdiction in any proceeding whatsoever over the High Commissioner or his official or other property".

If it had been desired to bring the Orthodox Patriarchate Commission within a similar privileged position it would have been necessary either by Ordinance to declare it, if that were possible, a Department of the Government of Palestine, or better still, an amending Order of His Majesty in Council should have been passed protecting the Commission from legal proceedings save with the written fiat of the High Commissioner.

The attempt to do the latter by Ordinance is clearly ultra vires as being in conflict with Article 38 of the Order-in-Council which, subject to the provisions of Part V of the Order, gives the Court jurisdiction on all matters and over all persons in this territory.

For these reasons we hold that the need for the previous sanction of the High Commissioner to the application for a Mandatory Order not having been legally imposed, the objection on this point must fail.

To deal now, first with the question of the pension. The Appellant was unable to quote to us any authority in the law of Palestine relating to the question of the consideration for the promise by the Synod to continue the pension of the deceased to his family after his death. The only consideration which one can find in the resolution refers to the past services of the deceased, as Turkish Secretary to the Patriarchate, and we know of nothing which can take the case out of the general rule of English law to the effect that acts done by the parties before the promise was made may constitute a motive for the promise but are not true consideration. For this reason we agree with the District Court that the resolution was a nudum pactum and dismiss the appeal on this point.

We come now to the question of the sale of land. It is clear that on the authority of L. A. 88/25 a purchaser of land by an unregistered deed can claim damages if the vendor, in breach of his contract with such purchaser, transfers the land to some other person. The measure of damages is the difference between the value of the property at the time of the sale to the deceased and its value at the present time.

The judgment of the lower Court must, therefore, be set aside and the Respondent must pay the Appellant the difference between the value of 300 Napoleons and LP.1485 and must refund the 300 Napoleons which were paid by the deceased or, in other words, must pay L.P.1485 to the Appellant.

As the Appellant has succeeded on one issue only and has failed to succeed upon the other, we make no order as to costs.

Delivered the 25th day of May, 1934.

OTTOMAN COMMERCIAL CODE.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 120/27.

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

IN THE CASE OF:
Bahiyeh Tadrus Farrah — APPELLANT.
vs
Khader Tarazi — RESPONDENT.

Sec. 5, Addendum to Commercial Code held not applicable to sale of property of solvent merchant.

JUDGMENT.

The Court holds that Section 5 of the Addendum to the Commercial Code does not apply. It therefore remits the case to the District Court for decision.

Costs in the event.

Delivered the 15th day of February, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 8/30.

BEFORE:
Corrie, J., Jarallah, J. and Frumkin, J.

IN THE CASE OF:
Taher Darwish El-Masri — APPELLANT.
vs
Syndics in the Bankruptcy of Abdul Mu'ti Ghnaim — RESPONDENTS.

Application of Art. 157, Ottoman Commercial Code — Liability incurred by bankrupt after date of cessation of payments — Annulment of transaction of bankrupt.

JUDGMENT.

The Respondents have argued that there was not evidence on which the District Court could make the finding that the sum of

£P.237 paid by the Appellant to Adib El-Daoudi was paid at the direction of Abdul Mu'ti Ghnaim, the bankrupt.

The District Court, however, had before it the evidence of both the Appellant and Adib, and we hold that this was sufficient to support the finding.

The judgment of the District Court is based on the finding that the Appellant paid £P.237 through Adib El-Daoudi to Abdul Mu'ti Ghnaim with the knowledge that he (Abdul Mu'ti) was insolvent, and the Court relied upon Article 157 of the Commercial Code. Article 157, however, while it affects payments made by and obligations incurred by the bankrupt, does not relate to payments made to the bankrupt.

Hence, if the bills of exchange in respect of which the sum of £P.237 was paid had been accepted before the date of cessation of payments, Article 157 could not have been invoked. The bills, however, were accepted after the date of cessation of payments.

The making and acceptance of the bills followed by their payment at maturity was a transaction to which would apply the provisions of Article 157 that "If between the date of cessation of payments and the date of the order of adjudication, the debtor has .... given any Sanad and received the value thereof, such transaction shall be annulled, provided that it shall be proved that the parties interested knew that the debtor had ceased payment."

Hence the Court must satisfy itself whether or not the Appellant knew that the debtor had ceased payment at the time of accepting the bills.

The judgment is set aside and the case remitted for the District Court to make a finding on this point and to give judgment accordingly. Costs to follow the event.

Delivered the 3rd day of November, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 65/30.

BEFORE:

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

IN THE CASE OF:

Wadi' Zareefeh
Farid Zareefeh — APPELLANTS.

vs

Advocates Subhi El-Ayoubi and Albert Chacron, Syndics in Bankruptcy of the two Appellants — RESPONDENTS.

Alimentary allowance to bankrupt to be fixed by Juge Commissaire — Right of bankrupt to appeal to District Court if dissatisfied with amount of allowance — Arts. 182, Ottoman Commercial Code.

JUDGMENT.

The Court holds that the order must be set aside and the question of the amount of alimentary allowance must be remitted for decision by the Juge Commissaire, the reason for this decision being based on Article 182 of the Commercial Code, by which the Juge Commissaire makes a provisional order for such allowance against which the bankrupt, if dissatisfied, may apply to the Court, whereas here the District Court made the order and the application to vary was made to and refused by the President of the District Court.

Delivered the 8th day of September, 1930.

PARTITION.

In the High Court of Justice.

H.C. No. 10/27.

BEFORE:

The Acting Chief Justice and Baker, J.

IN THE APPLICATION OF:

Muhammad Hussein Ali and Others — PETITIONERS.

vs

The Attorney-General, for the Director of Lands — RESPONDENT.

Order to Land Registrar to abstain from registering judgment — Judgment of Magistrate's Court ordering partition sent to Land Registry for information only and not for registration — Necessity of service of partition judgment through Execution Office — Art. 6, Law of Partition of Joint Immovable Property.

ORDER.

We hold that the meaning of Article 6 of the Law of Partition is that a copy of the judgment of the Magistrate's Court shall be sent to the Land Registry for information only and not for registration, and that the judgment should not be registered until a copy of it has been served through the Execution Office.

An order will, therefore, issue that the Land Registrar of Jaffa do abstain from registering the judgment of the Magistrate's Court until the same shall have been notified to him through the Execution Office.

Delivered the 2nd day of February, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 5/30.

BEFORE:

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

IN THE CASE OF:

Rashad Khalil Abu Yoh
Dalloul Yusef Sharaf — APPELLANTS.

VS

Mahboubeh Bint Muhammad Hallaq, as an heir of Ahmad Abu Yoh Hallaq and as guardian of her children Hassan, Latifeh and Dalloul — RESPONDENTS.

Partition of ancestor's land effected by consent of all the heirs — Possession by heirs of partitioned lands — Proof of lost deed of sale of land.

Appeal from the judgment of the Land Court of Jaffa, dated 2nd November, 1929.

JUDGMENT.

It has been proved by the evidence of the witnesses that twenty years ago a partition of the lands inherited from Muhammad Abu El Hallaq was effected by consent of all the heirs. This is supported by the possession of each of them, independently, since that date consequent upon the death of their ancestor, and that the sale took place eighteen years ago by virtue of a private deed which was lost but which was proved to have been written. The ancestor of the Respondent was in possession of the property in the lifetime of the ancestor of the Appellant.

In view of this we can see no reason to interfere with the judgment of the Land Court and we dismiss the appeal with costs.

Delivered the 13th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 41/30.

BEFORE:

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

IN THE CASE OF:

Abdel Fatteh Haj Daud Jayusi, and Others — APPELLANTS.

vs

Rashid, Abdel Latif, Taher and Ali, children of Haj Daud Jayusi — RESPONDENTS.

and

Ahmad Mahmud el Ahmad
Abd er Rauf Mahmud El Ahmad — THIRD PARTY.

Witnesses heard in proof of alleged partition — Claim of share in lands of deceased.

Appeal from the judgment of the Land Court of Nablus, dated the 26th February, 1930.

JUDGMENT.

The Land Court has heard witnesses called by the Respondents to prove the alleged partition.

The Appellants agree that part of Haj Daud's lands were transferred to some of his sons in his lifetime in consequence of a

partition, but they claim a share in such part of the lands held by him as have not been registered in the name of one of his children.

We hold that the Appellants and the Intervenents should have been given an opportunity of calling witnesses to prove the facts which they allege.

The judgment of the Land Court is therefore set aside and the case remitted.

Costs will follow the event.

Delivered the 25th day of July, 1931.

In the High Court of Justice.

H.C. No. 55/31.

BEFORE :

The Acting Chief Justice, and Jarallah, J.

IN THE CASE OF :

Hanne Katan and Another — PETITIONERS.

vs

The Magistrate, Jerusalem — RESPONDENT.

Action before Magistrate for partition of immovable property — Fee payable on partition action — Action for partition held to be one in which the value of the subject matter cannot be assessed — Rule 18, Rules of Court (Court Fees) 28th November, 1918.

Application for an order to issue to the Respondent directing him to show cause why his Order dated the 29th July, 1931, whereby he insists on collecting proportional fees from Petitioner in an action before him for partition of immovable property, should not be set aside and a fixed fee levied.

JUDGMENT.

The Court after hearing Mr. Kantrovitch, Acting Government Advocate, on behalf of the Attorney-General holds that an action for partition of immovable property is one in which the value of the subject matter cannot be assessed and that in consequence Rule 18 of the Rules of Court (Court fees) published in the Gazette of the 28th November, 1918, applies; and orders that the order dated the 19th July, 1931, of the Magistrate of Jerusalem be set aside.

Delivered the 16th day of November, 1931.

PARTNERSHIP.

In the District Court of Jerusalem.

C.D.C. Jm. 107/26.

BEFORE:

Baker, J. and Valero, J.

In Re:

The Companies Ordinance, 1921.

Application to wind up limited partnership — Partnership obliged by law to reconstitute itself into a Company — Sec. 79, Companies Winding-Up Ordinance, 1922 — Company struck off the Register cannot be wound up.

JUDGMENT.

This is an application made under Article 79 of the Companies Winding-Up Ordinance, 1922, for an Order to wind up the Limited Society of Advertising and Publication, by one Soloman Felman, an advocate, and also for an Order that he be appointed liquidator.

The Limited Partnership of Hassolel (A. Saphir & Company) was registered as such on the 7th June, 1920, under Ordinance No. 118 of 29th May, 1919.

By virtue of the Companies Ordinance, 1921, Section 3, it was provided that every partnership consisting of more than ten members which has been registered as a partnership under the said Ordinance No. 118 of 29th May, 1919, shall within three months of the date at which this Ordinance comes into force reconstitute itself as a Company upon complying with the provisions of the Ordinance.

The rights, duties and liabilities of a partnership reconstituted as a Company under the last preceding paragraph shall be deemed to be transfered to and to have vested in the Company.

Forthwith upon such reconstitution being effected or at the expiration of the said period of three months every such Partnership shall be struck off the Register of Partnerships under the said Ordinance.

On the 3rd day of April, 1923, a Certificate of Incorporation under the Companies Ordinance, 1921, of a Company known as Hassolel Limited was given by the Registrar of Companies and this

Certificate at the head thereof has the following: "Under Article 3 (1) of the Companies Ordinance, 1921". A Certificate to commence business was also given on the same day by the Registrar. The Memorandum of Association of the said Company states in para. (F) which relates to the objects of the Company—"To acquire and undertake the business, property, rights and duties, and liabilities of Hassolel (A. Sahpir & Company), a Limited Partnership having its registered Office at Jerusalem.

The provisions of Article 1 of Section 3 of the Companies Ordinance, so far as the time within which a partnership should reconstitute itself as a Company were clearly not complied with and by virtue of Section 3 Article 79 of the Companies Winding-Up Ordinance, No. 21 of 1922, the Partnership rendered themselves liable to be wound up.

However, Article 16 Section (2) of the Companies Ordinance provides: "That a Certificate of Incorporation given by the Registrar in respect of any Association shall be conclusive evidence that all the requirements of this Ordinance in respect of Registration and of matters relevant and incidental thereto have been complied with and that the Association is a Company under this Ordinance".

I am satisfied therefore by virtue of this Article that by the registration of Hassolel Company one of the objects of which was to acquire Hassolel (A. Sahpir & Company), Hassolel (A. Saphir & Company) ceased to exist and were duly reconstituted as Hassolel Limited and that Hassolel (A. Shapir & Company) from the time of the registration of Hassolel Limited became defunct and struck off the Register. The Register contains the words 'struck out' against Hassolel (A. Saphir & Company) and I have no doubt the Registrar did in fact strike out the partnership by virtue of Article 3 Section 3 of the Companies Ordinance when Hassolel, Limited were registered. It therefore follows that an action cannot lie to wind up a Company or partnership that is non-existant and the application must be dismissed with costs, including £E.3 advocate's fees for Defendant.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 83/27.

BEFORE:

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

IN THE CASE OF:

Pierre Hallaq and Others — APPELLANTS.

vs

Albert Pharaon and Others — RESPONDENTS.

Partnership agreement entered into by more than ten persons — Contribution in kind made by partner towards purchase of share in partnership — Partnership with more than ten persons registered under Registration of Partnerships Ordinance, 1919, but not under Companies Ordinance, 1921 — Action by partner against firm for return of goods invested in kind — Effect of non-registration of partnership — Partnership held not to be illegal because unregistered — Sec. 2 (1), Companies Ordinance, 1921, compared with Sec. 1 (2) Companies Consolidation Act, 1908 — Legal existence of unregistered partnership — Claim for repayment of a contribution to capital of Company not recoverable except by way of winding-up — Sec. 79, Companies (Winding-Up) Ordinance, 1922.

JUDGMENT.

On the 11th October, 1926, the Appellants and the Respondents entered into an agreement to constitute a partnership with the name of the Anglo Italo Palestine Marine Company for the purpose of transporting goods by sea.

By one clause of the partnership agreement it was provided that the Respondents Michael and Albert Pharaon should manage the business of the firm.

Another clause provided that in contributing to the capital of the partnership "any party can give barges or launches or other means of transport instead of money." In pursuance of this provision, the Appellants, on the 2nd November, 1926, handed over to the Respondents, Michael and Albert Pharaon, on behalf of the firm, a number of lighters and other vessels. These vessels were registered in the books of the Port of Haifa in the name of the firm and are now in the control of the Respondents, Michael and Albert Pharaon.

On the 11th October, 1926, the partnership was registered as a partnership, under the Registration of Partnerships Ordinance, 1919,

in the District Court of Haifa, but it has never been registered under the Companies Ordinance, 1921.

On the 18th May, 1927, the Appellants commenced action in the District Court claiming, inter alia, the cancellation of the registration of the vessels in the name of the firm and delivery of possession of the vessels to them.

The action was dismissed by the District Court on the ground that it was "in essence an action for winding-up the association" and that the Court had no jurisdiction in winding-up.

In support of their appeal, the Appellants are asking this Court to hold (as the District Court did hold) that the partnership, not having been registered under the Companies Ordinance, 1921, as required by Section 2 (1) of that Ordinance, is an illegal association, that the agreement constituting the association is also illegal, and hence that (as the District Court refused to hold) they are entitled to recover possession of the property which they have delivered to the Respondents in pursuance of such illegal contract.

In order to succeed in their appeal, the Appellants must satisfy us that the partnership does not exist in law and hence that the registration of the vessels in the books of Haifa Port is registration in a fictitious name, and that delivery of the vessels to the Respondents was in pursuance of an agreement which was totally invalid as being an agreement for the formation of an illegal association and hence impossible of performance.

The legal position of a partnership of more than ten persons is governed by Section 2 (1) of the Companies Ordinance, 1921 :—

> "No association or partnership (whether limited or un-
> "limited) consisting of more than ten members shall in Palestine
> "carry on any business which has for its objects the acquisition
> "of gain by such body or its members, unless it is registered
> "as a Company under this Ordinance."

It is to be noted that the provisions of this Section differ in one respect from those of the corresponding provisions of the English Statute, namely, Section 1 (2) of the Companies Consolidation Act, 1908, which provides that:

> "No Company, Association or Partnership consisting
> "of more than twenty persons shall be formed for the
> "purpose of carrying on any business (other than banking),
> "that has for its object the acquisition of gain by the Company,

"Association or Partnership or by individual members thereof, "unless it is registered as a Company under this Act or is "formed in pursuance of an Act of Parliament or of Letters "Patent or is a Company engaged in working mines within "the Stannaries and subject to the jurisdiction of the Court "exercising the Stannaries jurisdiction."

Thus, in the English Section the prohibition is against the formation of a partnership, whereas in the Companies Ordinance what is prohibited is the carrying on of business.

The distinction is of importance, for while under the English law, a partnership of more than twenty persons does not come into existence until it is registered under the Act, the position appears to be different under the law of Palestine. Under the Companies Ordinance, a partnership of more than ten persons can be formed, but until it is registered it cannot carry on business.

That such is the true meaning of Section 2 (1) is confirmed by Section 79 (3) of the Companies (Winding-Up) Ordinance, 1922, which applies the provisions of the Ordinance as regards the Winding-Up of Companies, with such modification as the circumstances may render necessary, to a winding-up by the Court of "any association or partnership which was required to be registered in accordance with the terms of the Companies Ordinance, 1921, but which was not so registered."

It follows that the Anglo Italo Palestine Marine Company, although it cannot lawfully trade, had and still has a legal existence, and thus it cannot be held that the registration of the vessels in the Port of Haifa in the name of the Company was registration in a fictitious name.

It is also to be noted that while the Partnership agreement makes no mention of registration under the Companies Ordinance, there is nothing in the agreement which would have prevented registration of the partnership under the Ordinance.

It is true that had the partnership deed been presented to the Registrar for registration, he would doubtless have required a Memorandum of Association in the form specified in Schedule A of the Companies Ordinance to be signed by all the partners and presented to him for registration; on the presentation of such memorandum, the partnership could have been registered and could lawfully have carried on business.

It cannot be held therefore that the partnership agreement is invalid as being impossible of performance.

It would follow that the title to the vessels has lawfully passed to the partnership, and as the ownership of the vessels has been vested in the partnership by way of contribution to its capital, a claim to recover the vessels is a claim for repayment of a contribution to capital and cannot be made except by way of an application to wind up the Company.

It is thus unnecessary that the partnership should be made a defendant to this action as would be the case if it were held that the present proceedings would lie.

Whether, in view of the terms of the final proviso of Section 79 of the Companies (Winding-Up) Ordinance, 1922, an application to wind up the partnership can be made by anyone other than the Attorney-General is a question which does not now arise.

The appeal must be dismissed with costs, and £P.10 advocate's fees.

JUDGMENT OF MR. JUSTICE CORRIE.

I concur.

DISSENTING JUDGMENT OF MR. JUSTICE KHAYAT.

(1) I am of opinion that Article 2 of the Companies Ordinance cannot be applied in general in view of the existence of the provisions of the Commercial Code with regard to the formation of collective and commandite companies without share capital. I also hold that such companies would be legal even if they consist of more than ten members if they commence their business and comply with the provisions of the law as stated in the Commercial Code. But the company now under consideration is mentioned as a joint adventure (société en participation); see Section 4 of the contract dealing with the formation and objects of the company; but the terms of the contract are not in conformity with the objects for which joint adventure companies are formed.

On the other hand, neither party has alleged that the company was formed in accordance with the provisions of the Commercial Code as a collective or commandite company without shares. Therefore the company has not complied with the provisions of the Companies Ordinance in that it did not register with the Registrar of Companies.

(2) What are the effects and results of wrong registration? I am of opinion that wrong registration is like non-registration and that the result is that there is no company in existence because juristic personality is created only by complying with the provisions of the law.

(3) I do not agree with the judgment of the District Court of Haifa that an application to recover property unlawfully handed to a non-existent juristic person amounts to an application for winding-up because the results of both applications differ; first, as between the contracting parties and second, as against the third parties.

(4) I hold that the judgment of the District Court of Haifa should be set aside and the case remitted for the Court to go into the merits of the case and grant the application of the Plaintiffs for the recovery of the property after hearing the defence of the Defendants with regard to their own personal rights and to their engagements, if any, to third parties.

Delivered the 16th day of December, 1927.

In the High Court of Justice.

H.C. No. 57/29 and 58/29.

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

IN THE APPLICATION OF:
Habab Brothers — APPELLANTS.
vs
The Chief Execution Officer, Jaffa — RESPONDENT.

Partners in firm declared bankrupt — Irregular advertisement in sale by Chief Execution Officer — Omissions in bidding list and newspaper advertisement of sale held in the absence of fraud or of substantial effect not to justify setting aside of sale.

JUDGMENT.

There are two petitions. — Numbers 57 and 58 of 1929.

No. 57 is on behalf of Ahmed El Habab and Mahmoud El Habab.

No. 58 is on behalf of Mahmoud El Habab as guardian of the 2 minor children of his deceased brother Hashem Mohamed El Habab who died in 1926.

By a notice on page No. 160 of Official Gazette of 1st March, 1930, it is proved that Mahmoud and Ahmad, partners in the firm Awad El Habab & Son were declared bankrupt on 13th February, 1930.

Mr. Shacron in case No. 58/29 claims to represent the minors but the guardian of the minors has informed us that he does not wish the sale set aside in view of the fall in prices.

In the petition No. 57/29 there is reference to a petition of the same date setting out irregularities of procedure committed by the Chief Execution Officer in connection with advertisement of sale but no such particulars are contained in the only petition before us of that date.

With regard to No. 58/29 even if we were to assume for the sake of argument that Mr. Shacron because he appears for two bankrupts who are partners (and who are declared bankrupt nominative and not as a partnership), can represent the children of a partner who died four years before the bankruptcy of his two brothers, we would hold that the omissions in the bidding list and the newspaper advertisement in the "Falastin" of certain details, in the absence of any evidence of fraud or of a substantial effect of such omissions on the purchase price did not go sufficiently to the heart of the transaction to justify the Court in setting aside the sale.

The two orders are therefore discharged with £P.5 advocate's fees and travelling expenses to Richardson, £P.2, to Benshemesh, £P.2 to Government Advocate and costs.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 128/29.

BEFORE:

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

IN THE CASE OF:

Morris Poller — APPELLANT.

vs

Jehuda Goldberg — RESPONDENT.

Incorrect signature on behalf of partnership—Liability of guarantor of contract improperly executed — Contract for lease of movable property — Leased movable property not returned to owner on termination of lease.

Appeal from the judgment of the District Court of Jaffa dated the 25th October, 1929.

JUDGMENT.

Before dealing with the merits of the case, there is a formal point to be decided as to the liability of a guarantor on a contract alleged not to be binding on the principal.

The contract in question is dated 29th June, 1927, and purports to be made between the Respondent on the one side and the Jaffa Spirit Industries on the other side. It is signed by the Respondent and by "Jaffa Spirit Industries — Morris Eisler".

The Jaffa Spirit Industries was registered as a partnership and notice to that effect was given in Official Gazette No. 165 of 1926. Under that notice both partners, — Ignac Dushnitz and Morris Eisler, were authorised to sign jointly and severally for the partnership. Under a notice published in Official Gazette No. 188 of 1927, however, notice was given "that with effect from 18th May, 1927, both partners will jointly administer and sign on behalf of the partnership".

It is argued that the contract, having been made after that date and signed by one partner only, is not binding on the partnership; and hence, as the principal is not bound, the guarantor is under no liability.

The guarantee of the Appellant which is the subject matter of this action, is not endorsed on the contract itself but forms a separate document bearing the same date. If it could be said that the Appellant never knew that the contract was not properly executed, it might be a good argument on his behalf that he intended to guarantee the partnership, and where there is no legal obligation on the part of the partnership, there is no legal obligation upon himself. But from the face of the deed of guarantee it appears that the contract was before the Appellant when signing it. Moreover, he considered that the contract was duly signed by the partnership. The guarantee starts as follows:—

"In connection with Clause 5 of the contract between Mr. Yehuda Goldberg and the Jaffa Spirit Industries which

was made in Tel-Aviv on the 29th of June, 1927, and which was signed by them."

Whatever his rights of redress against the partnership may be, the Appellant cannot escape liability as against the person in whose favour the guarantee was executed after having declared that the document was signed by the principal.

We now come to the merits of the case. The Appellant is sued on the basis of a deed of guarantee signed by himself and Morris Eisler jointly and severally. As this guarantee was made in connection with the contract already referred to above, it will be necessary to ascertain the intention of the parties in that contract. Under it the Respondent undertook to supply and did actually supply, the Jaffa Spirit Industries with a certain quantity of containers to be used by the partnership for a certain period, on payment of an agreed rent.

Clause 5 of the aforsaid contract reads as follows:—

"the second party (the Jaffa Spirit Industries) is responsible, in a sum fixed at £.300, for the return, at the expiration of the term of lease, of all the containers in full with all their appurtenances in the same condition as received according to the list mentiond."

For the said sum of £.300 the second party furnished the first party, prior to the delivery of the containers, with a full guarantee signed by Messrs. Moshe Eisler and Moshe Poller under which they undertake, jointly and severally, to be responsible towards the first party for the second party to the amount of £P.300 for the property given on lease, in case it will not be delivered in time and in full.

If part of the containers will be missing, the second party, or the guarantors in its place as above, are obliged to pay to the first party for every missing container of 10 kilos, £.2 and for every missing container of 20 kilos, £.4.

The guarantee is drawn in the terms of Clause 5 of the contract and reads as follows:—

"Deed of Guarantee.

In connection with Clause 5 of the contract between Mr. Yehuda Goldberg and the Jaffa Spirit Industries which was made in Tel-Aviv on the 29th June, 1927, and which was signed by them, we the undersigned take upon ourselves

to be guarantors jointly and severally to the amount of £.300, this being for the completeness of the property delivered on lease according to the said contract.

If at the time of delivery part of the containers will be delivered, then for every missing container of 10 kilos we are guarantors towards Mr. Yehuda Goldberg for the Jaffa Spirit Industries for the amount of £.2 and for missing containers of 20 kilos for the amount of £.4 in accordance with the said contract."

It concludes with the following paragraph to which no reference is made in the contract, viz:—

"We are in any event entitled to hand over to the said Mr. Yehuda Goldberg new containers of the same sizes as the missing ones."

In our opinion the court below was wrong in construing the first and second part of Clause 5 as concurrent obligations on the part of the contracting partnership. The first part was, to our mind, intended for a case of total non-delivery of the goods at the expiration of the period. The second part was intended as an alternative remedy in case of partial non-delivery of containers, in which case, out of the sum of £.300, fixed as the price of the whole of the goods, £.2 and £.4 respectively were to be paid for every missing container. To hold otherwise, the sum of £.300 will have already been provided for in Clause 6 of the contract, where it is laid down that in case of breach of contract on either side, £.50 shall be payable as liquidated damages. It follows that the guarantee of the Appellant was limited to the maximum amount of £.300 and no more.

As to the last paragraph of the guarantee under which the Appellant was entitled to substitute new containers for the missing ones, the Court below was right in holding that he ought to have made use of this option at the time of delivery or within a reasonable time thereafter, failing which he is debarred from offering this alternative now, after having deprived the Respondent of the use of his property for so long a time.

It is clear that the partnership could have kept all the containers by paying the fixed amount of £.300. They have not done so and have delivered part of the containers. They are therefore under an obligation to pay the agreed sum for every missing container. The same obligation now falls upon Appellant

as guarantor. But inasmuch as his liability is limited to £.300 we hold that the judgment of the District Court should be amended by ordering Appellant to pay the equivalent, in Palestine currency of £.300 with interest as from the date of action and that no order should be made as to costs.

Delivered the 18th day of November, 1930.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 50/30.

BEFORE:

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

IN THE CASE OF:

Basil Shiber — APPELLANT.

VS

B. Ben-Aharon, Administrator of the Estate of the late Shemtov Bengiat — RESPONDENT.

Effect on partnership of death of partner — Action by partner for possession of key to partnership premises.

Appeal from the judgment of the District Court of Jerusalem dated the 3rd April, 1930.

JUDGMENT.

The Appellant, Basil Shiber, commenced this action in the District Court claiming that the key of a certain shop should be delivered to him by the Respondent, and that an order should be issued restraining the Respondent from interfering in any way with the shop or the goods therein. The action having been dismissed by the District Court, the Plaintiff appealed, and in support of his appeal filed an agreement of partnership between the Appellant and one Bengiat, of whose estate the Respondent is the administrator, for the year 1924—25; and alleged that the partnership continued until the death of Bengiat.

If that be the fact, the Appellant is entitled only to his share in the partnership assets after liquidation of the partnership as defined by the agreement, and his claim for delivery of the premises and the goods must fail.

The appeal must be dismissed with costs.

Delivered the 18th day of September, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 64/30.

BEFORE:

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

IN THE CASE OF:

Mordechai Mottes — APPELLANT.

vs

Abraham Matzkin — RESPONDENT.

Sufficiency of notice of dissolution of partnership published in Official Gazette — Notification on dissolution to persons dealing with the firm — Application of English law and procedure to dissolution of partnership — When liability of debtor extinguished by conduct of creditor.

Appeal from the judgment of the District Court of Jaffa dated 27th May, 1927.

Application for leave to appeal to the Supreme Court Jerusalem was granted on the following points of law:

1. That under the Law of Palestine a notice of dissolution of partnership, when published in the Palestine Official Gazette constitutes a good and sufficient notice thereof to all concerned and it is not required by the law of this country that all customers of a partnership shall be individually notified thereof by circular.

2. That English law and procedure is not applicable in this matter concerning the dissolution of partnership since there is Palestine Law and established practice on the subject and that therefore the English Common Law was wrongly invoked by the District Court in determining this case.

3. That a retiring partner may be discharged from existing liability of the partnership if he can show that the conduct on the part of the firm's customer subsequent to dissolution was inconsistent with a continuance of such liability.

JUDGMENT.

We know of no rule requiring that notice of dissolution of partnership shall be given, as required by English law, to customers of the firm.

This disposes of the questions raised by the first and second grounds upon which leave to appeal has been granted.

With regard to third point, it is clear that, as a general principle, the liability of a debtor may be extinguished by conduct on the part of the creditor which is inconsistent with the existence of the debt, and this rule applies where the debt in question is one contracted by a partnership which has since been dissolved.

We are, however, at a loss to see how this question arises, as the judgment of the District Court does not disclose any conduct on the part of the Respondent which, in our opinions was inconsistent with the existence of the Appellant's liability.

We therefore, allow the appeal and set aside the judgment of the District Court and remit the case for the Court to determine whether or not the Respondent has acted in a manner that is clearly inconsistent with the liability towards him of the Appellant for the debt of the firm.

Costs will follow the event.

Delivered the 29th day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 39/31.

BEFORE:

The Acting Senior Puisne Judge, Jarallah, J. and Khayat, J.

IN THE CASE OF:

Mizrahi & Sons — APPELLANTS.

vs

Haim Rakover — RESPONDENT.

Partnership for buying and selling land — Nature of right of pre-emption — Right of juristic personality to exercise legal right of pre-emption — Sec. 11, Partnership Ordinance, 1930 — Certificate to hold land generally not required by firm registered under Registration of Companies and Partnerships Ordinance, 1919 — Documentary evidence may be produced at any time before final judgment.

Appeal from the judgment of the Land Court of Jerusalem, dated the 21st day of October, 1931.

JUDGMENT.

The judgment of the Land Court states that the Appellant partnership was formed for the purpose of buying and selling land and that as the right is according to the Mejelle clearly intended to be exercised only by an individual they were of opinion that a land company could not exercise the right of pre-emption.

A partnership is a juristic personality and I cannot find anything in the Mejelle to prevent a partnership as such exercising the right of Shufa, whether the same is a partnership formed to buy land or formed for any other purpose. Under the Partnership Ordinance of 1930, Section 11, it is prescribed that the Registrar shall not register any partnership which has one of its objects as the acquisition of land in Palestine unless the partners produce a certificate under the hand of the High Commissioner empowering the firm to hold land generally. The Appellant partnership have no such certificate but they allege having been registered before this Ordinance and so they do not require such a certificate and I am satisfied that such is the case in view of para. 3 of Article 6 of the said Ordinance, which provides "that a partnership registered in accordance with the provisions of the Registration of Companies and Partnerships Ordinance, 1919, shall be deemed to be registered for the purpose of this Section."

I am also of opinion that the production of Appellant's kushan proving that the property in which the right of shufa is claimed is not a condition precedent to the action, but may be produced at any time before final judgment. I am, therefore, of opinion that the appeal must be allowed and the judgment of the Land Court quashed and the case remitted for the Lower Court to complete. Costs to be costs in the case.

Delivered the 25th day of May, 1932.

In the High Court of Justice.

H.C. No. 73/31.

BEFORE :

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

IN THE APPLICATION OF :

The Syndic of the Bankruptcy
of Salem Najia and Mirza Jala — PETITIONER.

vs

The Registrar of Partnerships, Haifa,
Mikhail George Khury
Sallum Brothers — RESPONDENTS.

Jurisdiction of High Court re Registrar of Partnerships—Correction in Official Gazette of advertisement of partnership — Name of partnership incorrectly advertised in Official Gazette.

Application for an order to issue to the first Respondent to show cause why he should not publish a notice in the Official Gazette cancelling the notice he published in Offieial Gazette No. 289 of 16th August, 1931, whereby he omitted the name "Najia" from the partnership "Sallum, Najia and Khury" as advertised in the Official Gazette No. 152 of the 16th December, 1925.

JUDGMENT.

After hearing counsel for the Petitioner and for the second and third Respondents, the first Respondent having entered no appearance, the court orders to be made absolute the rule nisi issued on the 16th day of December, 1931, directing the first Respondent to show cause why he should not publish a notice in the Official Gazette cancelling the notice he had published in the Official Gazette No. 289 of the 16th August, 1931, whereby he had omitted the name "Najia" from the Partnership "Sallum, Najia and Khury" previously advertised in Official Gazette No. 153 of 16th December, 1925.

The second and third Respondents are ordered to pay the costs of this application including £P.3 advocate's fees.

Delivered the 20th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 140/31.

BEFORE:

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

IN THE CASE OF:

The Heirs of Ibrahim el Kudsi — APPELLANTS.

vs

Haj Abd es Samad Irani & Son — RESPONDENT.

Settlement by Court of date of dissolution of partnership—Evidence of date of dissolution of partnership.

Appeal from the judgment of the District Court of Jaffa, dated 2nd November, 1931.

JUDGMENT.

The only question decided by the judgment under appeal was the date of dissolution of the partnership between the Appellants and the Respondents.

By an interlocutory order given on the 30th July, 1931, the District Court postponed decision of the date of dissolution until after it had received the report of the accountant who had been appointed as liquidator of the partnership, and by another interlocutory order given on the 8th October, 1931, the Court directed the parties to adduce evidence as to the date of dissolution.

The liquidator rendered a report in which he stated reasons for regarding the 7th October, 1929, as the date of dissolution, and he attached two statements of account, the one showing profit up to that date and the other up to the 4th May, 1931, the date at which the Court appointed him to be liquidator.

The Court having perused the report and heard the evidence of the parties, held, in the judgment under appeal, that the Defendant (the Appellant) had not produced sufficient evidence to prove that the liquidation of the copper took place on the 7th October, 1929. Accordingly it fixed the date of dissolution of the partnership as the 4th May, 1931.

In this Court it has been argued that the correspondence which passed between the parties during the year 1930 proves conclusively that the partnership had already been dissolved, and that all that there remained to be done was to settle the accounts.

We are unable to accept this view of the correspondence. In particular, the letter dated 18th May, 1930, from the Respondent to the Appellants contained the phrase:—

> "Therefore will you be good enough to make an account showing the quantity of goods received and goods disposed of. Goods remaining unsold will then be liquidated . . . . ."

It is clear that when he wrote this letter the Respondendid not consider that the goods remaining unsold had been liquit dated on the previous 7th October; and no reply by the Appellants pointing out that this had been done is included in the correspondence.

We see no ground, therefore, for interfering with the judgment of the District Court, and hold that the appeal should be dismissed with costs.

Delivered the 28th day of April, 1932.

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

C.A.D.C. Jm. No. 160/32.

IN THE CASE OF:

Daoud Khalaf — APPELLANT.

vs

Blumenfeld, Cohen & Frank — RESPONDENTS.

Partnership may sue or be sued in firm name — Plaintiff partner obliged to disclose to Defendant the names of the partners in the firm — Right of partner Defendant to have co-partners joined as Defendants — Joint and several liability of partners for debts and obligations of the firm—Secs. 18, 61, Partnership Ordinance, 1930.

JUDGMENT.

We are of the opinion that the learned Magistrate was wrong in dismissing the Plaintiff's (Appellant's) action.

(1) Partners may sue and be sued in the firm name but if so suing can be compelled to disclose to the Defendant the names and addresses of every member of the firm.

(2) Partners may sue or be sued otherwise than in the

name of their firm and the action shall be deemed to be an action by or against the individuals named as Plaintiffs or Defendants. If sued, partners can apply for their co-partners to be joined as Defendants.

(3) The Court in giving judgment should consider the debt as a partnership debt and give its decision accordingly.

(4) Should a Plaintiff obtain a judgment against a partner sued as an individual, the provisions of Section 18 of the Partnership Ordinance, 1930, are applicable where the judgment creditor endeavours to execute the judgment.

We set aside the judgment of the Magistrate and return the case to him to try.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 194/33.

BEFORE:

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

IN THE CASE OF:

A. J. Stybel Publishing House, Limited Partnership — APPELLANT.

vs

Amanut Company, Limited, Dvir Company, Limited — RESPONDENTS.

Foreign partnership not registered in Palestine—Effect of incorrect registration under Registration of Companies and Partnerships Ordinance, 1919 — Unregistered foreign association may sue in Palestine Courts — Meaning of carrying on business in Palestine.

JUDGMENT.

This is an appeal from a judgment of the District Court of Jaffa, given on the 12th July, 1933, dismissing an application by by the Appellant, A. J. Stybel Publishing House, Limited Partnership, for confirmation of an award made in arbitration proceedings to which the Appellant and the Respondents were parties.

The Court held that the Appellant had not complied with the terms of Section 6 of the Registration of Companies and Partnerships Ordinance, 1919, and hence was not entitled to bring actions before the Courts.

The Appellant is an association of two members formed under German law on the basis that the liability of each of the two members is limited.

Registration of the association was effected in the District Court in accordance with Section 1 of the Registration of Companies and Partnerships Ordinance, 1919, (No. 118 of 1919); and notice to this effect was published in the Official Gazette of 16th July, 1930, at page 573; but the authorisation from the Government, required by Section 6 of the Ordinance as a preliminary to the commencement of business, has never been obtained: nor has the association been registered either under the Partnership Ordinance, 1930, the Companies Ordinance, 1921, or the Companies Ordinance, 1929.

If, therefore, the Appellant association was carrying on business in Palestine, it was doing so illegally, and it cannot take proceedings in the Courts of Palestine in respect of such illegal trading: see Zeev Hazine v. N. V. Algemeine and another, Civil Appeal No. 140/26,* Palestine Law Reports, page 99.

It does not necessarily follow, however, from the fact that the Appellant association was unregistered, that it cannot under any circumstances maintain an action in these Courts.

A foreign commercial association manufacturing goods abroad and having no place of business or agency in Palestine, and which sells its goods to a purchaser in Palestine, is not carrying on business in Palestine within the meaning of Section 6 of the Ordinance of 1919, and it can take proceedings in the Palestine Courts to recover the price of such goods without first registering as a foreign company or partnership.

On the issue whether the Appellant association was or was not carrying on business in Palestine, the District Court has made no finding; and the agreement which gave rise to the arbitration between the parties, upon which this issue depends, is not before this Court.

In accordance, therefore, with the case cited, we set aside the judgment of the District Court and remit the case for the District Court to make a finding upon this issue, with the direction that the burden of proving that the Appellant association was carrying on business in Palestine is upon the Respondent; and

* see ante, p. 342.

further that if, in view of the agreement between the parties, the Appellant association is found to have been carrying on business in Palestine at the time when its application was presented, the application must be dismissed.

Costs will follow the event.

Delivered the 17th day of May, 1935.

PEACE COURTS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 90/26.

BEFORE:

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

IN THE CASE OF:

Mordekhai Heifitz — APPELLANT.

vs

Nissim Sion Barhum — RESPONDENT.

Lease of orchard upon terms of cultivation — Waiver of rights arising out of breach of agreement — Notice sent through the medium of Jewish Peace Tribunal — Notarial notice unnecessary except as basis of claim for damages — Action for citrus crop.

Appeal from the judgment of the District Court of Jaffa dated 14th December, 1925.

JUDGMENT.

The Court holds that the agreement between the parties though not valid as a sale is good as a lease of the orchard for 2 years upon the terms as to cultivation therein specified.

The District Court has held that "assuming that the Plaintiff had committed a breach of agreement the same had been waived by the Defendant in that he had not served an official warning upon the Plaintiff calling attention to the breach and giving notice of his intention unless the same were remedied within a certain period to rescind the agreement".

The Appellant however, did serve notice calling upon the Respondent through the Jewish Peace Court calling his attention to breaches of agreement and informing him that in consequence

the agreement was null and void. Except as a foundation of a claim for damages, which was not in question in this case. There is no requirement of the law that such a notice shall be served through a Notary Public.

We therefore, hold that even if it be the case that waiver of rights arising out of breach of an agreement of this nature can be inferred from the silence of the party aggrieved, in the present case the Appellants did not keep silent. The District Court must therefore make a finding on the question whether or not the Respondent committed a breach of the agreement.

In the event of the Court finding that no breach has been committed the question of the value of the crop has to be determined. We are unable to appreciate the grounds upon which the District Court decided that the agreement for sale of the 12th July is not to be taken into account in determining the value of the crop.

The agreement was made by the Respondent during the litigation and was conditional upon the Respondent obtaining judgment giving him the crop. This action was brought by the Respondent for the crop and the agreement proves that the Respondent was prepared if he got the crop to part with it for LE.250, and the right of re-purchase of 300 citrons at 18 P.T. each. This agreement thus provides conclusive proof of the value of the crop to him. That the agreement was afterwards rescinded does not affect the matter in any way.

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

Costs to follow the event.

Delivered in presence the 30th day of November, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 35/28.

BEFORE:

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

IN THE CASE OF:

Mordekhai Heifitz — APPELLANT.

vs

Nissim Sion Barhum — RESPONDENT.

Lease of orchard upon terms of cultivation — Waiver of rights arising out of breach of agreement — Notice sent through the medium of the Jewish Peace Tribunal — Notarial notice unnecessary except as basis of claim for damages — Action for citrus crop — Cancellation of agreement by notice — Failure to reply to notice cancelling agreement held to be a waiver or abandonment of the agreement.

Appeal from the judgment of the District Court of Jaffa, dated 27th January, 1928.

JUDGMENT.

The Appellant in this case entered into a contract with Respondent to sell to him the crops of his citrus orchard for a period of two years whereby the Respondent undertook to pay certain sums of money at fixed intervals as rent therefor and to do certain work in connection with the trees in the said orchard.

The Appellant alleges that Respondent did not perform his part of the contract during the first year of the tenancy and that consequently he served upon him a notice through the Jewish Peace Court cancelling the agreement in that the Respondent had not complied with the contract.

The Court of Appeal in their decision in this case of the 30th November, 1926, held that the notice was good inasmuch as the notice was not the foundation for a claim for damages which was not in question and that there was no requirement by law that such a notice shall be served through the Notary Public and returned the case to the District Court to make a finding on the question whether or not the Respondent committed a breach of the agreement.

The District Court heard further evidence and found that Respondent had not committed a breach.

Respondent duly received the notice from Appellant cancelling the agreement to which he made no reply. It is also admitted that subsequent to the receipt of the said notice Respondent refrained from doing any work in connection with the trees in the orchard. Some nine months subsequent to the receipt of the Appellant's notice, i.e. in the late spring of 1925, at the time of the harvest of the second year's crop, Respondent served a Public Notary Notice on Appellant demanding the fruit of the second year otherwise he would hold Appellant liable for damages for breach of contract.

Appellant in the meantime had entered into a contract with another cultivator for the crop, and we are of opinion that Appellant was justified in doing so, and that Respondent having raised no objection to Appellant's notice and his failure to perform any of the work stipulated to be done on the trees in the orchard subsequent to the receipt of Appellant's notice amounted to an acceptance of the cancellation of the contract and a waiver or abandonment thereof, and accordingly that there was no breach on the part of Appellant.

The appeal is allowed and the judgment of the District Court is set aside.

Respondent to pay Appellant's costs here and in the Court below and advocate's fees in this Court assessed at LP.5.

The LP.50 deposited in the District Court by the Respondent are to be returned to him.

Delivered in presence the 3rd day of May, 1929.

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

C.A.D.C. Jm. No. 58/30.

BEFORE:

De Freitas, J., Abdel Hadi, J. and Baradey, J.

IN THE CASE OF:

Haim Rackov — APPELLANT.

vs

A. D. Saporta — RESPONDENT.

Fee for conducting case before the Jewish Peace Tribunal — Jewish Peace Tribunal not a Court within meaning of the Advocates' Ordinance, 1922 — Agreement by person not an advocate to conduct case before Court held unenforceable — Impossibility of performance of contract.

Appeal from the judgment of the Magistrate of Jerusalem, dated 17th December, 1929, (No. 6621/29.)

JUDGMENT.

We hold that the Jewish Peace Tribunal is not a Court within the meaning of the Advocates' Ordinance.

The agreement relied upon in this case is, however, for (1) conducting the case before the Jewish Tribunal and (2) for the execution of the Award of the Peace Tribunal.

The Appellant not being and advocate cannot carry out the second part of the agreement which is unenforceable.

The judgment of the Magistrate is confirmed. No costs.

Given the — day of June 1930.

PERJURY.

In the Supreme Court sitting as a Court of Appeal.

Cr.A. No. 26/31.

BEFORE:

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

IN THE CASE OF:

Mohammad Sa'adat Dajani — APPELLANT.

vs

The Attorney-General — RESPONDENT.

Perjury — False statement in judicial proceeding — False statement to be knowingly made — Sec. 3, Perjury Ordinance, 1929.

Appeal from the judgment of the District Court of Jaffa dated 27th February, 1931, whereby the Appellant was sentenced to six months' imprisonment under Section 3 of the Perjury Ordinance of 1929.

JUDGMENT.

We are not satisfied that there was sufficient evidence before the Lower Court upon which they could base a judgment to the effect that Appellant knowingly made a false statement.

The appeal must accordingly be allowed and the judgment of the Lower Court quashed.

Delivered the 13th day of April, 1931.

In the Supreme Court sitting as a Court of Appeal.

Cr.A. No. 49/31.

BEFORE:

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

IN THE CASE OF:

The Attorney-General — APPELLANT.

vs

Dib Issa Abu Diab — RESPONDENT.

False information to Police Officer as perjury — Oral statement made by accused to Police Officer and signed by accused — "written information" within meaning of Sec. 9, Perjury Ordinance, 1929.

JUDGMENT.

The Court holds that if it be established that a verbal statement made by the Respondent to the Police was taken down in writing by the Police, read over to the Respondent, approved by him and signed or sealed by him or marked with his thumb print, such written record of the Respondent's statement is written information within the meaning of Section 9 of the Perjury Ordinance, 1929.

The judgment of the District Court is therefore set aside and the case remitted for trial.

Delivered the 16th day of July, 1931.

PERJURY—

SEE ALSO CRIMINAL LAW.

PLEDGE.

In the District Court of Jaffa.

C.D.C. Ja. of 1926.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

The Zionist Executive — PLAINTIFFS.

vs

Apenzeller — DEFENDANT.

Action for judgment declaring ownership to property — Machinery pledged as security for loan alleged to be property of stranger — "Public body" defined — Right of unregistered public body to sue in its own name — Necessity of registration of public body — Zionist Organization as public body — Jurisdiction of Court to hear opposition by Third Party — Art. 164, Civil Procedure Code.

JUDGMENT.

The Plaintiffs have brought this action claiming that the Defendant is not the true owner of certain machinery, which has been pledged with them as security for a loan granted by them to the Defendant's husband.

When the Plaintiffs wanted to enforce their security, the Defendant brought an action in the Magistrate's Court claiming that the machinery belonged to her and won her case. The Magistrate's decision was confirmed on appeal by this Court.

Two preliminary objections have been raised by Defendant's counsel and those points must be disposed of before we can enter into the merits of the case.

The first objection is that the Plaintiffs are not capable of bringing this action because they are not registered in accordance with the Law. To determine this point we must find out exactly what the status of the Plaintiffs is.

Article 4 of the Mandate for Palestine reads as follows:— "An appropriate Jewish Agency shall be recognised as a public body for the purpose of advising and co-operating with the administration of Palestine.....

The Zionist Organisation, so long as its organisation and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency."

From this it will be seen that the Plaintiffs who are the agency recognised by the Mandatory, are described as "A Public Body". A Public Body is defined in Halsbury's Laws of England, Vol. 27, p. 480 as a body with powers to be exercised and duties to be performed for the benefit of the public.

I do not think that public bodies need to be registered. A Municipal Body which is a public body can certainly sue without being registered and I can see no reason for making any distinction in the case of the Plaintiffs. They are a public body and therefore they must be held to have all the rights and privileges of public bodies. The first objection therefore fails.

The second objection taken by the defence is that this action should have been brought in the Magistrate's Court, on the ground that the original action was decided in that Court. It is argued that an action of that nature must be entered in the Court which gave the decision to which exception is taken. The Plaintiffs argue that according to Article 164 of the Civil Code the action can be brought in either the Original Court or the Appelate Court. But the commentary on this Article by Paz is very clear on this point.

He says that when the Appellate Court confirms the decision of the Lower Court, opposition must be made to the latter and that it is only when the decision of the Lower Court has been reversed that opposition should be taken before the Appellate Court.

Applying these rules it is clear that the Court is not competent to hear this action. The case must therefore be remitted to the Magistrate's Court for trial.

Ordered accordingly.

Delivered the 19th day of December, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 130/26.

BEFORE:

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

IN THE CASE OF:

Hamanchil Company — APPELLANT.

vs

Municipality of Jaffa — RESPONDENT.

Business of warehousemen conducted by Municipality — Lien by warehousemen on goods stored in warehouse — No authority in agent to incur liability on behalf of principal.

Appeal from the judgment of the District Court of Jaffa dated 14th March, 1926, whereby Appellant was ordered to pay to the Respondent the amount of £E.112.700 with interest at the rate of 9% thereon as from the 7th December, 1925, together with costs.

JUDGMENT.

The basis of the case for the Respondent, the Municipality of Jaffa, is that it was carrying on, upon the land on which the Appellant's timber was stored, the business of warehousemen. The Municipality alleges that it pays watchmen to guard the goods stored on the land and that it made a charge at fixed rates, it being well understood by the merchants who are in the habit of availing themselves of the facilities provided by the Respondents, that all storage charges are to be paid before removal of the goods.

As regards the Appellant's claim that the Respondent has no lien on the goods for payment of its charges, it is clear that in Ottoman Law there is no such lien in favour of a warehouseman and that such a right must therefore be based on express agreement.

But between the Appellant and the Respondent there was no agreement and we hold that the Appellant is entitled to succeed.

As regards the counter-claim by the Respondent for £E. 112.700 storage charges, the evidence is that the Appellant paid storage charges amounting to £E.30 to the Jaffa Customs Authorities and that it was the Customs Authorities by whom the timber was stored on Respondent's land.

There is no evidence that the Customs Official had any authority from the Appellant to incur any liability for further storage charges. In our view the Respondent has no claim against the Appellant.

The appeal must be allowed both as regards the claim and the counter-claim with costs here and below.

Delivered in absence of Respondent the 30th day of November, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 29/27.

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

IN THE CASE OF:
Barclays Bank (D.C. & O.) — APPELLANT.
vs
Mr. Fetter, Liquidator of Raanan Co., Ltd. — RESPONDENT.

Machinery pledged to Bank as security for loan — Deed of pledge made by Company registered with Registrar of Companies—Date of cessation of payments of Company fixed by Court—Application of Commercial Code to winding-up of insolvent Company—Arts. 155-160 Ottoman Commercial Code—Registration under Ottoman Law of claims secured by mortgage — Validity of transaction effected after date of cessation of payments — Failure to pay single bill held not necessarily to imply a state of insolvency.

Appeal from the judgment of the District Court of Jerusalem, dated 15th November, 1926.

JUDGMENT.

This action arises out of a deed of pledge dated the 2nd November, 1925, made between the Raanan Company, Ltd (of which the Respondent is the Liquidator) of the one part, and the Anglo-Egyptian Bank, Ltd. (of which the Appellant is the successor) of the other part.

By Articles 1 and 2 of this deed the Raanan Company, Ltd. pledged certain goods contained in a specified list to the Bank as security for a credit to an amount of £E.1,400 to be granted by the Bank in favour of the Company.

Article 3 of the deed provides as follows:

> "It is expressly agreed between the parties that the goods handed over by the Pledger to the Pledgee as a security for various loans made already amounting to £E.1252.000 m/ms are to be construed as officially pledged, and the pledgee is hereby entitled to enjoy in that respect all the rights and privileges conferred by Law upon the pledgee in general."

It is with regard to the provisions of Article 3 that this action is concerned. The deed of pledge was registered with the Registrar of Companies on the 7th November, 1927. On 6th December, 1925, at an extraordinary meeting of the Company a resolution was passed for the voluntary winding up of the Company. Notice of this resolution was published in Official Gazette No. 156 dated 1st February, 1926, p. 51.

The Respondent having been appointed liquidator of the Raanan Co., Ltd. commenced this action in the District Court to have the pledge in favour of the Bank set aside.

On the 15th November, 1926, the District Court gave judgment whereby it declared that date of cessation of payments of the Co. to be the 30th September, 1925, and it annulled the pledge as having been made subsequently. From this judgment the Bank is appealing,

Under Section 67 (1) of the Companies (Winding-Up) Ordinance, 1922, Articles 155 and 160 inclusive of the Commercial Code are applicable to the winding-up of an insolvent Company, and as the decision to wind up the Company voluntarily was by an extraordinary resolution and not by a special resolution it follows from Section 50 (c) of the Companies (Winding-Up) Ordinance, that the resolution to wind up the Company was taken "by reason of its liabilities", i.e. because the Company was insolvent.

The first point raised by the Appellant is that the transaction comes within the terms of Article 158 of the Commercial Code.

> "All claims, secured by mortgage and all privileged claims can be registered in the manner provided by the law and procedure in force up to date of the order of jurisdiction, and any registration effected after the date at which the debtor ceased payment, or within ten days prior thereto is valid; but if more than 15 days have elapsed between the date of acquisition of the privilege or right of mortgage and the right of registration — it shall be deemed to be invalid and absolutely void".

Article 158 of the Commercial Code, however, governs the registration of mortgages and not their creation, and the question whether the mortgage is validly created or not is governed by the two preceding articles.

Article 156 declares void any transaction not for valuable consideration, and certain transactions for value made after the date of cessation of payments.

Article 157 is as follows:

> "If between the date of the cessation of payments and the date of the order of adjudication, any debtor has paid, either in cash or by commercial bills, any of his matured debts, or has sold any goods or had given any sanad and received the value thereof, each of these transactions shall also be annulled, provided that it shall be proved that the parties interested knew that the debtor had ceased payment".

We have, therefore, to consider whether the transaction between the Appellant and the Raanan Company Limited contained in Article 3 of the deed of pledge is a transaction which falls within the terms of Article 157 of the Commercial Code.

The Court has thus to determine whether at the date when the deed of pledge was signed, the Bank was aware of the fact that the Company had ceased payments.

The District Court has held that such was the case basing its judgment on the protest made by the Appellant Bank on 3rd September, 1925, in favour of a man called "Tertio".

But failure to pay a single bill for less than £E.50 does not necessarily imply the state of insolvency, and we do not think that the District Court was justified in making this finding on the evidence before it.

It must be taken into account that by the very deed which gave rise to this action the Bank was binding itself to give further credit to the Company up to an amount of £E.1,400, and it is inconceivable that it should have done so, even upon security, if it was really aware that the Company was in a state of insolvency.

We hold that the appeal must be allowed, the judgment of the District Court set aside and the Respondent's action dismissed.

Delivered in presence, the 5th day of December, 1927.

JUDGMENT OF MR. JUSTICE KHAYAT.

The points which require consideration in this case are:

(a) Whether or not the mortgage executed in favour of Barclay's Bank is valid under Article 158 of the Commercial Code, or

(b) Whether by the fact that it was executed after the date of cessation of payments it cannot be valid as ruled by the District Court in applying Article 156 and 157 of the Commercial Code.

I am of opinion that the said Articles apply to all contracts in general; they do not deal with privileged debts, also that Article 158 is restricted to mortgages. Therefore the Courts are not competent to disregard and cancel a mortgage except in the case where 15 days elapse between the date of the creation of the mortgage and the date of its registration. Therefore, and in view of the clear provision of the Article, I am of opinion that we cannot enter into the validity of this mortgage, which was created on November 2nd, 1925, and was registered on November 7th, 1925, i.e. within the said period of 15 days.

This view is supported by the fact that Article 156 of the Ottoman Commercial Code is derived from Section 446 of the French Commercial Code which provides in its last paragraph that mortgages executed during the doubtful period are not valid. The Ottoman legislator did not introduce this paragraph into Article 156 and therefore has not interfered with the date of the creation, but has only adhered to the provision in Article 158 that every mortgage created before the declaration of bankruptcy must be held valid, provided that 15 days did not elapse between the date of its creation and the date of its registration. I am therefore of opinion that the judgment should be set aside and the claim of the liquidator dismissed. But if the Plaintiff has anything to say with regard to the creation of the mortgage, in accordance with the requirements of the law or otherwise, or with regard to his demand, he is at liberty to start a fresh action because this point was not considered in the District Court.

Respondent to pay costs.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 74/27.

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

IN THE CASE OF:

The General Bank
Mossad Halvaa Vehisachon — APPELLANTS.

vs

The Registrar of Companies — RESPONDENT.

Refusal of Registrar of Companies to consent to issue of agreement as debenture — Pledge of growing crops and future crops as security for repayment of loan — Secs. 65, 66, Companies Ordinance, 1921 — Consent of Registrar to issue of debentures — "Debenture" defined — Ordinance "in simili materia" — Secs. 2, 4, 7, Debentures Ordinance, 1924 — Form of single debenture — Protection of debenture holders — Right of society to create equitable charge upon its property — Art. 64, Civil Procedure Code — Impossibility of performance of contract — Contracts re "mal mutaqawwim" and "ayan".

Appeal from the judgment of the District Court of Jerusalem dated the 25th April, 1927.

JUDGMENT.

This appeal arises out of a refusal by the Respondent, the Registrar of Companies and Co-operative Societies, acting under Section 66 of the Companies Ordinance, 1921, to consent to the issue as a debenture of an agreement dated the 1st October, 1926, made between the Appellant Bank and the Appellant Society, which is a registered Co-operative Society.

Under the agreement the Bank agrees to lend to the Society £1200 and the agreement contains provisions for the repayment of the loan with interest.

Clause 6 (a) of the agreement is as follows:—

"The Society by way of further security for the repayment of all sums advanced or to be advanced hereunder hereby charges by way of pledge, hypothecation, equitable charge and in any and every other lawful manner in favour of the Bank and its assigns the property of the 1927-28-29 crops of grapes, almonds, and grains of the members of the Society set out in the Schedule attached hereto and in particular but without prejudice to the

generality of the foregoing provisions pledge and agree to pledge the said grapes, almonds and grains to the Bank and its assigns."

The Registrar has given detailed grounds in writing for withholding his approval. Briefly they are that by the law of Palestine a company or co-operative society may secure a debenture issue by a specific mortgage or by floating charge upon all its assets but it cannot validly create any form of equitable charge other than a floating charge: hence that clause (a) of the agreement whereby the Society purports to give the Bank a charge upon certain specified crops not yet in existence, is invalid, and consequently that it is the duty of the Registrar under Section 66 of the Companies Ordinance, 1921, to withold his consent.

Section 66 sub-sections 1 and 2 provide:—

"(1) No debentures shall in any event be issued by any Company save with the consent and approval of the Registrar".

"(2) Before giving any such consent and approval as aforesaid the Registrar may demand all such information as seems to him proper in respect of the affairs of the Company and the terms and conditions of the proposed issue of debentures for the purpose of the protection of the debenture holders and the creditors of the Company and may make his consent and approval to the issue of the debenture subject to all such terms and conditions as seem to him just and equitable in respect of any of the purposes above mentioned."

Neither in the Ordinance nor in any Rules made thereunder is there any provision as to the manner in which the Registrar's discretion is to be exercised.

Clearly, however, he is bound to satisfy himself that the instrument proposed to be issued as a debenture does comply with the requirements of the law relating to debentures.

A debenture is defined in Section 2 (1) of the Debentures Ordinance, 1924. The long title of this Ordinance is "An Ordinance to regulate the Issue of Debentures and Creation of Mortgages by Companies and Co-operative Societies" hence it is "in simili materia" with the Companies Ordinance, 1921.

The sub-section runs as follows:

"For the purpose of this Ordinance the term debenture shall mean a written instrument issued by a Company or a Co-operative Society by way of security for money providing for the payment of a

specific sum at fixed date or upon a contingency with or without interest".

If this definition is to be given the broadest possible meaning it must be held to include any undertaking by a Company or Co-operative Society to pay a specific sum of money, even though the agreement to pay is not secured by a mortgage or charge of any property whatever, it would include a bill of exchange signed by the Company or Society. If that were the meaning of the sub-section the agreement between the Appellant Society and the Appellant Bank would constitute a debenture even though the charge therein contained were invalid.

Section 7 however, of the Debentures Ordinance, 1924, provides that:—

"A single debenture may be secured upon such security as may be agreed upon between the parties and approved by the Registrar but shall not be secured by a floating charge".

Comparing the working of this section with that of section 4 (1) it is clear that repayment of the moneys in respect of which there is issued a single debenture must be secured by a mortgage or charge on property and not merely by a promise to pay.

In form the agreement between the Appellant Society and the Appellant Bank does provide the security required by law.

But Section 66 (2) of the Companies Ordinance, 1921, requires that the Registrar in giving consent to the issue of a debenture shall have regard to "the protection of the debenture holders".

It must therefore be the duty of the Registrar, before giving his consent and approval to a debenture issue, to satisfy himself that the instrument proposed, to be issued as a debenture, not only creates an obligation upon the Society for the sum of money, but also creates a valid mortgage or charge on all or part of the Society's assets by way of security for such payment.

In the present instance, if the Registrar is right in holding that the charge created by the agreement under consideration is invalid, the agreement does not provide any security for repayment of the loan, and consequently is not a debenture as above defined, and the Registrar is thus bound to refuse his consent.

Now Section 7 of the Debentures Ordinance, 1924, does not confer upon a Society any power to create an equitable charge upon its property that it would not otherwise have.

We have therefore to consider whether there is any other provision empowering a company to create such a charge.

Section 65 (2) of the Companies Ordinance, 1921, provides that for the purpose of securing any money borrowed, a company might "mortgage or charge, whether by way of floating charge or otherwise" its assets, but that sub-section has been repealed by Section 17 of the Debentures Ordinance, 1924, and it therefore appears that a Company has now no power to create an equitable charge, other than a floating charge upon its whole assets, unless such a charge can validly be created in accordance with the general law applicable to persons as well as to Companies.

The District Court basing itself on the provisions of the Mejelle has held that no such power exists.

There can, in my opinion, be no doubt that if the position is governed by the Mejelle the District Court's judgment is right, the Appellant, however, has argued that the provisions of the Mejelle in this respect are overruled by the law of the 21st Nissan 1330 (4th May, 1914) which amended Article 64 of the Code of Civil Procedure. The provisions of which law are as follows:

> "The provisions of all agreements and undertakings if they be not prohibited by special law and regulations and if they do not contravene morality and public safety, and do not contradict the personal circumstances such as the capacity of the contracting parties and the rules and principles relating to inheritance and to transfers and dispositions of cash, of waqf lands and immovable property are enforceable and effective as between the contracting parties. But if the subject matter of the contract be impossible of realisation action will lie for the rescission of the contract.
>
> Everything which is of 'mal mutaqawwim (Mejelle, Art. 127) may be the subject matter of a contract, and what is common in being handled of a'yan (concrete things) benefits, and rights in general are considered "Mal Mutaqawwim". Agreements contracted on what will come into existence in the future are recognised.
>
> If the contracting parties are agreed upon the main points of an agreement, the contract will be considered as complete, even though subsidiary points be left silent and if the contracting parties do not agree on the subsidiary points, the Court will fix them taking into full consideration the particulars of the case."

It is argued that this law enables one person to give another an equitable charge upon future crops. The words to which our attention has been directed are "agreements contracted on what will come into existence in the future are also recognised". The effect of this provision is, in my opinion, merely to bring "agreements contracted on what will come into existence in the future" within the first paragraph of the law, and to render such agreements enforceable and effective "as between the contracting parties".

The first paragraph of the law practically re-enacts the former Article 64 and I hold that neither under the Article nor under the first paragraph of the amending law, is it possible for one person to charge his property in favour of another, otherwise than by a specific mortgage, in such a manner as to give the charges any rights against a third party, though the charge may be valid against the charger.

I hold that an instrument under which the sole security for the repayment of the money lent is a charge which, though valid against the borrower, is not valid against third parties is an instrument to the issue of which as a debenture the Registrar should refuse his consent on the ground that it does not afford protection for the debenture holders.

In the course of argument the question was raised whether or not the agreements between the Society and its members which form the basis of the agreement between the Society and the Bank are themselves valid. This, however, is a question which we are not called upon to decide. The position as between the Society and the Bank would be the same if the property charged by the Society were, for example, rents due in the future under leases validly granted by the Society to its members.

I hold that the appeal must be dismissed.

Delivered the 29th day of December, 1927.

JUDGMENT OF MR. JUSTICE FRUMKIN.

It is a condition that the thing pledged be a thing that is good to be sold.

Therefore it must be existent at the time of the contract, it must be Mal Mutaqawwim, and must be capable of delivery (Mejelle 709) viz:— The existence of the thing sold is necessary (197). It is necessary that the thing sold be "Mal Mutaqawwim"

179). It is necessary that the delivery of the thing sold be possible (198).

Mal Mutaqawwim is used in two senses:— The other means property (Mal) acquired. For example:— A fish in the sea is not Mal Mutaqawwim; when it is caught and taken it is Mal Mutaqawwim (197).

It appears from the above that any restrictions as regards things which may be the subject matter of a pledge, have their origin, by way of analogy, in restrictions as to the subject matter of sale. It follows that if at any time a thing which could originally not be sold is brought within the category of things which could be the subject matter of sale such thing automatically becomes capable of being the subject matter of a pledge as well.

To my mind there is no other way of answering the question "Could future crops be pledged under existing law"? than by answering the principal question "Could such crops be sold?"

The answer in both cases under the original Article of the Mejelle quoted would clearly be the negative, as future crops are neither in existence at the time of the contract nor are they acquired property or capable of delivery. But these Articles of the Mejelle are to be read together with Section 64 (2) of the Civil Procedure Code, as amended on the 28th April, 1330, which reads as follows.—

(The division of Section 64 into sub-sections is in the original, Destour Vol. VI, p. 654).

> "Everything which is Mal Mutaqawwim may be the subject matter of a contract and what is common of being handled of A'yan,-benefits and rights in general are like Mal Mutaqawwim. Contracts entered into with regard to things which will come into existence in the future are also valid".

This sub-section clearly overrules the Articles of the Mejelle quoted.

The existence of the thing sold or pledged is no more necessary since contracts with regard to future goods are declared to be valid. For the same reason it is not any more necessary that the thing sold be capable of delivery, the necessity of the thing sold or pledged being Mal Mutaqawwim still remains but this terminus received a much wider definition. It is no more acquired property but any "A'yan" i.e. anything which is fixed and

perceptible (159). More than that,-Mal Mutaqawwim is made to embrace abstract things like rights and benefits as well.

Of course, in ordinary circumstances the legislator would have been expected to add some clear proviso as to the repeal or amendment of Article 197 and 199 and 709 of the Mejelle. But it is to be remembered that the Young Turkish Government at that time, anxious as they were to reform the Law of contract, had no machinery to touch the Mejelle which is of the nature of a codification of Religious Law rather than a Legislative Enactment.

As to the proviso in Sub-Section 1 of Section 64 that all contracts, with certain exceptions, are valid and effective as between the contracting parties, I do not think that it has any other meaning than to state the law that no person could be held to be bound by a contract to which he was not a party. So that if for instance A enters into a contract with B imposing some contractual obligation upon C, who is not a party, the contract would have no effect on C. If however, the contract contains no provision relating to C, but C finds his rights otherwise affected by the contract, it is open for him to apply for such remedies as are provided by law. In this case it would make no difference whether the subject matter is existing or is future goods.

Thus the purchaser of pledged future goods would be in the same position as the purchaser of existing goods previously sold to another.

It should be noticed that it is only Sub-Section 1 which replaces the old Section 64. Sub-Section 2 is entirely new, and deals with contracts generally with no limitation that they are valid as regards contracting parties only.

The contract which is the subject matter of this action would be a good contract if the crops were the property of the Society or if the 18 members had been made parties to the contract entered into between the Society and the Company, but this is not the case.

For this reason I concur in the majority judgment that the appeal should be dismissed.

Delivered the 29th day of December, 1927.

In the District Court of Jerusalem.

C.D.C. Jm. No. 298/27.

BEFORE:

Baker, J. and Baradey, J.

IN THE CASE OF:

Barclays Bank
(Dominion, Colonial & Overseas) PLAINTIFF.

vs

The Liquidator of the
Palestine "Hiram" Co. DEFENDANT.

Security for pledge deposited with Bank—What constitutes a floating charge — Pledged goods not in possession of Bank — Necessity of registration of pledge of Company property with Registrar of Companies — Pledge of goods or proceeds thereof — Sec. 68, Companies' Ordinance, 1921.

JUDGMEMT.

I cannot hold that the security as such was and is a floating charge, bearing in mind that the security was and has always been deposited with the Bank. To become a floating charge I am of opinion that one of the essentials must be that the Company must be able to carry on its business in the ordinary way as far as it concerns the assets the subject matter of the floating charge (see Romer, L. J. Houldsworth vs Yorkshire Woolcombers' Association, 1903, 2 Ch. 284 and 295). The goods being in the possession of the Bank, the Company were not able to use them in the ordinary course of their business.

This security is in reality a security over movable property, i.e. corporal movable property, within Sub-Section (C). The distinction is that it is of the nature of an account current between the parties.

The Bank may advance sums of money, not exceeding a certain sum, from time to time and the Company may against such advances lodge goods in security. It amounts to a series of successive pledges. There is no reason to think that this is an illegal transaction and the only question is as to the registration required by the Companies Ordinance with the Registrar. The question is whether a substituted security is covered by the original registration. The difficulty in the case is created by the fact that

ordinary pledges need to be registered under the Companies Ordinance, thus differing from the English Act. Ladenburg & Company v. Goodwin, Ferreira & Co. Ltd. (1912) 3 K.B. 275, was a case of book debts. No registration had taken place at all but there were a series of transactions. The question did not arise as to whether registration of the original agreement would have been sufficient but it seems to be implied that it would not. Is the position different where the goods are actually in the possession of the pledgee. This question depends on the sufficiency of the entry in the Form of Particulars as to "Short particulars of the property mortgaged or charged" which is given as "Various goods placed at the Stores of the mortgagees". The particulars prescribed are those on the English form. In Cunard Steamship Co. Ltd. v. Hopwood, (1908), 2 Ch. 564, substituted specific securities were held valid under Section 14 (4) of the Companies Act, 1900, a sub-section which is not reproduced in the Palestine Ordinance. This is not however important as this security would not fall under it. In that case there were the differences that the property was specifically mortgaged to the trustees under the Debenture Trust Deed and that the subsection makes a general description of the charge sufficient.

In this case the fact that the goods are pledged are at least as good as the mortgage to the Trustees. Does the description "Various goods etc." answer to the heading "Short particulars etc."? It abviously would not be so in cases (a), (b), (d), or (e) of Section 68 or in the first part of (c), because it would not give any information to someone searching the Register. In the case of a pledge however a prospective lender would know on inspecting the Register that he could find all the excluded goods in the Bank's stores at that particular moment. It is said that to require registration of each particular lodgement would render impracticable the carrying on of this sort of business at all. This is not an answer. It may however be called in aid in interpreting the meaning of a form used under an Ordinance.

I hold that the description of goods as being deposited in the stores of a particular person is a description sufficient to comply with the terms of the Ordinance. I hold accordingly that the security is valid against the liquidator.

Judgment in presence, subject to appeal.

Given at Jerusalem the 4th day of January, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 85/31.

BEFORE:

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

IN THE CASE OF:

Quaker Oats Company of Stockholm — APPELLANT.

vs

Faiwel Epstein
Abraham Epstein — RESPONDENTS.

Property pledged as security for loan—Creditor not bound to levy execution first against property pledged — Action for recovery of debt brought by creditor with security — Right of action on debt not extinguished by pledge — Sale of pledged property — Arts. 730, 757, Mejelle — Fees not paid for cross-appeal.

JUDGMENT.

We are of opinion that in view of the provisions of Article 730 of the Mejelle the District Court erred in holding that under Article 757 of the Mejelle a creditor is bound in the first instance to levy execution against the property pledged as security for the debt and can only then sue for any unsatisfied balance. The judgment of the District Court is therefore set aside and the case is remitted for the Court below to enter into the merits and to give judgment accordingly, the costs to follow the event.

As no fees were paid there was no Cross-Appeal before the Court.

Delivered the 17th day of May, 1932.

In the District Court of Jerusalem.

C.D.C. Jm. 460/32.

BEFORE:

Plunkett, J. and Valero, J.

IN THE CASE OF:

Magasins Généraux & Entrepots — PLAINTIFFS.

vs

Shalom Shmuel Chitrit — DEFENDANTS.

Credit warrant issued for money advanced on goods pledged in France—Holder bound by conditions printed on back of warrant—Defendant sued on obligation incurred abroad.

JUDGMENT.

In this case the Plaintiffs claim Fr. Fcs. 18,402.32 for the difference including various charges, between the sum realised by sale of goods deposited with them and Fr. Fcs. 23,563.30 advanced by them to the Defendant upon a warrant now held by the Plaintiff.

The Defendant contends that the Plaintiffs are bound by all the conditions on the back of this warrant and that they did not institute proceedings for sale within one month following date of protest, as prescribed by said condition and therefore lose all rights against the Defendant as "Endorser". Defendant submits further that he never agreed to elect his domicile at Paris. That the amount claimed contains excessive interest and charge for renewals, etc. That the Plaintiff did not serve Defendant with document of protest.

The Court holds that: The conditions on the back of the warrant clearly refer to the "Borrower" and "The Endorsers" and that the holder of the warrant loses his rights against the "Endorsers" if he does not proceed with the sale within one month, etc. The Defendant was however, in this case the "Borrowers" and there were no "Endorsers" within the meaning of the conditions on the back of the warrant. The Defendant is, therefore, liable for the difference between the price realised by the sale, Fr. Fcs. 10,530.-- and the amount of Warrant, Fr. Fcs. 23,569.30. Balance 13,039.30 F.F. and charge Fr. Fcs. 1,426.68 and interest from date of action only 27. 12. 32.

Judgment for Plaintiffs for Fr. Fcs. 14,465.95 plus interest from date of action and ¾ of costs, advocate's fees £P.3.

Given the 4th day of December, 1933.

POSSESSION OF LAND—

(SEE ALSO TITLE PRESCRIPTION).

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 11/22.

BEFORE:

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

IN THE CASE OF:

Mohamad Ahmed El Akna and Others — APPELLANTS.

vs

Tewfiq Ayoub — RESPONDENT.

Action against heirs to set aside registration in name of testator — Possession of land from time immemorial — Certificate signed by elders and Mukhtar as evidence — What evidence required to set aside registration in Land Registry.

JUDGMENT.

It was found that the Appellants are claiming one share, half share and sixth share in two known plots of land from the lands of Abou Shosheh village registered in the name of the testator of the defendants and the deed comprised the name of Mr. Srabiyon, representative of the committee in bankruptcy of Bergam. The Land Court decided to dismiss the claim of the Appellants since no proof was shown to confirm their claim.

The most important reason which the Appellants showed in their appeal was their possession in the said share from ancient time and they have produced a certificate signed by the elders of the village and some Mukhtars confirming the claim.

After consideration in that matter it was proved that the two plots registered in the name of the testator of the Defendants were registered in his name when a partition of the lands of the village took place after separating the share which belonged to Bergam from the lands of the said village. The documents which were produced by the claimant are not such documents according to which the title deed of the Tabou could be changed.

Therefore the Court finds that the judgment of the Court below is in conformity with law and the reasons of appeal stated

in the Statement of Appeal are not sufficient to set aside or to amend the said judgment and it is hereby decided to confirm it.

Delivered the 10th day of August, 1922.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 19/23.

BEFORE:

The Chief Justice, the Vice President and Frumkin, J.

IN THE CASE OF:

Henri Frank — APPELLANT.

VS

The Lands Department of the Government of Palestine — RESPONDENT.

Effect of occupation of land for period of 10 years — Art. 20, Land Code held to be a defence on the ground of possession and not a right to an occupier to acquire title — Claim of title to land by prescription — Admission that property belongs to another — Art. 1648, Mejelle.

Appeal from the judgment of the Land Court of Samaria dated 20th of January, 1923.

INTERLOCUTORY JUDGMENT.

The Land Court in giving judgment for the Plaintiff on the basis of his occupation for ten years was wrong. The effect of Article 20 of the Land Law is to defeat a Plaintiff whose claim has not been accented by action for ten years in favour of a Defendant who has been in occupation during that period.

The Article does not give an acquisitive title to the occupier so as to entitle him as Plaintiff to obtain judgment for registration as owner in the place of a registration as Defendant.

Given the 8th day of August, 1923.

JUDGMENT.

Having already in an interim decision given our judgment on the question of Prescription, and having heard such other argument as was necessary to show the general scope of the case, we are of opinion that there is only one remaining point on the

judgment of the Land Court to be dealt with by us, namely that certain transactions between the Jewish Colonization Association, who were the real owners of the land registered in the name of Frank, and the persons who claimed rights as tenants of the Government amount to an admission by the Jewish Colonization Association that the peasants had an interest in the lands in dispute. We do not find in these documents anything affecting the lands in dispute and material to the case beyond an agreement on the part of the Jewish Colonization Association to buy up such titles as the peasants might obtain from the Government. The judgment of the Land Court was founded upon a single document. This document is a Power of Attorney from certain peasants to a person who is admittedly an employee of the Jewish Colonization Association empowering him, first, to obtain Miri Titles to the lands they occupied, and secondly, when such titles were obtained, to register the transfers of the lands into the name of the Jewish Colonization Association.

With regard to this document it must be observed, first, that the Appellant Frank is not a party to it, and that whatever its nature, it cannot operate as an estoppel against him, and further that even if Frank and the Jewish Colonisation Association be regarded as identical, there is nothing in this document to show that the Jewish Colonization Association was prepared to make any payment to the peasants unless and until they had obtained registration as Miri owners. So far as this document is any evidence of a transaction entered into by the Jewish Colonisation Association it only proves that the Jewish Colonisation Association sought to obtain by purchase whatever titles the peasants might obtain from the Government; the present action was then pending between the Government and Frank and it was uncertain what would happen to the land in dispute, whether it would be awarded to the Government or to Frank. The transactions seem to have been made by the Jewish Colonization Association in order to secure the land to themselves, whatever might be the issue of the action. Other documents have since been submitted by the Appellant and are of the same nature as that upon which the Land Court based its judgment.

The doctrine laid down in Article 1648 of the Mejelle is generally recognised as a sound rule, but it cannot apply where in a contract for the purchase of land the facts contradict the presumption that the proposed purchaser admits that the land is

not his own. The Jewish Colonisation Association were disputing the title of the Government on the one hand and securing themselves against an adverse decision of the Court by making arrangements with the tenants behind the back of the Government on the other hand.

The two points on which the Court decided in favour of the Government have been disposed of. There remains the issue of fact: "is the land in dispute within the boundaries of the Plaintiffs' registered land or that of the Defendant."

That is a question of fact not decided by the Land Court. Its decision may be arrived at on more than one ground, but the main one is that of the boundaries as appearing on the Kushans. For that enquiry we think an inspection necessary because it is difficult to know what the boundaries on the Kushans are without the geography of the land in dispute being marked and described in reference to the place names appearing in the document.

The judgment of the Land Court will be set aside and the case sent back to be completed by a finding on the issue of fact stated above.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 76/25.

BEFORE :

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

IN THE CASE OF :

Elias Wahbi Inkeiri (Third Party)
and Nazira, Wife of Elias Khouri Tuma — APPELLANTS.

vs

Hassan Haj Omar Zaideh — RESPONDENT.

Claim of title to land by prescription—Effect of occupation of land for period of 10 years—Art. 20, Land Code valid only as defence—Art. 78, Land Code to be read subject to Art. 8 of Tabu Regulations—Injunction to restrain interference with peaceful possession—Absence from Palestine although agent present held to be bar to prescription.

JUDGMENT OF MR. JUSTICE CORRIE.

The Land Court has given judgment against the Defendant based upon ten years' undisturbed possession by the Plaintiff:

apparently holding that such possession gives a title by prescription, whatever defence the Defendant may have. I hold that while it may be that, after ascertaining all the facts of the case, including those of possession, the Court may declare that a person who has had long undisturbed possession is entitled to registration as owner, there is no rule which entitles a Plaintiff to judgment on proof of ten years' undisturbed possession.

The provisions of Article 20 of the Land Code are only valid as a defence; while Article 78 must be read subject to Article 8 of the Tabu Regulations.

The appeal must, in my opinion, be allowed, and the case remitted for hearing.

JUDGMENT OF MR. JUSTICE JARALLAH.

The facts are as follows:—

The Plaintiff Hussein Haj Omar brought an action against the Defendant Nazira (represented by George Eff. Farazli) requesting the registration of certain plots of land, which are registered in the name of Defendant in his name and asked further for an injunction to issue against Defendant ordering them to abstain from interfering in the properties on the ground that he improved and planted the lands and has been in peaceful possession of the same for a period exceeding ten years. The third party Elias Inkeiri appeared on the scene claiming half the lands on the ground that he had participated with Plaintiff in improving and planting the lands, and further that he has been in possession for a period exceeding that prescribed by law.

The District Court in its capacity as Land Court gave judgment declaring the title of Plaintiff, and directed the registration of the same in his name, it being proved that he has been in possession for a period exceeding that of prescription. The Court, however, did not take into consideration the question whether or not the absence of Defendant in Beyrouth is a ground which bars prescription, due to the fact that at that time Haifa fell within the District of Beyrouth, and secondly, because during her absence she had her representative in Haifa. The Court did not determine the rights of the third party due to the fact that an agreement has been arrived at to settle the matter by Arbitration.

In our opinion:—

1. The judgment given in respect of the whole lands was premature, because it was agreed that the dispute between

him and the third party should be settled by Arbitration, and this has not taken place yet.

2. The fact that the Court considered that Haifa and Beyrouth form part of the same Vilayet, is not a ground which prevents the Court from making inquiries about the distance and from holding that such absence was no excuse. Again, the fact that she was represented in Haifa does not prevent her from putting such a plea.

3. So long as the lands were registered originally in the name of Defendant and the action of "Haq El-Qarar', is brought against her, she is entitled to put in any defence which she desires.

The judgment, therefore, must be set aside, and the case remitted for the lower Court to take action accordingly.

JUDGMENT OF MR. JUSTICE KHAYAT.

I concur with Jarallah, J.

Delivered the 1st day of April, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 81/25.

BEFORE :

The Acting Chief Justice, Jarallah, J. and Abdul Hadi, J.

IN THE CASE OF :

Abdul Rahman Saleh El-Hirsh — APPELLANT.

vs

Ali Muhammad El-Mustafa — RESPONDENT.

Action for title to land — Plea of prescription — Art. 78 Land Code held to be confined to claim from Government for issue of kushan — Proof of possession under Art. 8, Tabu Regulations — Art. 20, Land Code valid as defence against private person claiming title.

Appeal from the judgment of the Land Court of Nablus dated 12th March, 1925.

JUDGMENT.

The main defence set up in this case is that the Respondent's action is barred. This defence has been rejected by the Land

Court in reliance upon Article 78 of the Land Code and Article 8 of the Tabu Regulations, on the ground that the Appellant has not proved that his possession was based upon any of the reasons mentioned in Article 8.

Article 78 and Tabu Regulation 8, however, apply to the case of a person claiming from the Government the issue of a Kushan. The article which applies where the defence of prescription is set up against another person claiming title is Article 20.

For the purpose of that Article, provided that the Defendant does not admit that his possession is wrongful, all that is required is that he should prove that he has held undisturbed possession for more than ten years.

This is an issue of fact which it is for the Land Court to decide.

The Appellant also raises the question of boundaries. This is also a question of fact, and the Land Court had evidence before it. The judgment of the Land Court is set aside, and the case remitted for the facts as to possession to be determined. Costs to follow the event.

Delivered the 1st day of April, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 15/28.

BEFORE:

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

IN THE CASE OF:

The Government of Palestine — APPELLANT.

vs

Abdulla Yusef Abdul Rahim — RESPONDENT.

Claim for extension of boundaries to include waste land brought into cultivation — Encroachment upon waste land — Art. 47, Land Code not applicable to registration of land by cultivation and possession — What evidence required to prove cultivation of land—Land not possessed unless inclosed or reclaimed.

Appeal from the judgment of the Land Court of Nablus dated 15th December, 1927.

JUDGMENT.

The Respondent's ancestor, Haj Yusef, was registered in Tabu under a registration effected in 1320 as the owner of two dunams of land, the boundaries given being those of the land the Respondent now claims.

In the werko Register the land is stated to contain 37 dunams.

The area of the land claimed by the Respondent is over 299 dunams. The original registration of the land in the name of Haj Yusef in 1287 gave as its Western boundary "Waste land". This was altered in 1320 to read "Land of Kabbani", without inspection of the land. The case thus has the appearance of being of the type with which this Court is familiar, in which a registered owner whose Land is bounded by waste land gradually extends the area of his cultivation; though it is somewhat unusual that a claim to nearly 300 dunams should be based on a registration for 2 dunams. The Land Court has found that :—

> "It has been proved that the land in claim although its area amounts to 299 dunams and 57 square pics bounded by the above mentioned boundaries was in the possession of ancestor of the Plaintiff (Respondent) Yusef and after him of his heirs, the said Plaintiff and that it was not left uncultivated at all.
>
> "Therefore in accordance with Article 1818 of the Mejelle and Article 47 of the Land Code it is decided unanimously to give judgment against the Defendant (Appellant)".

It is to observed, however, that Article 47 of the Land Code refers only to Registration on Sale. It has no application to the case under consideration.

The President of the Land Court has given a separate judgment in which he relies upon the decision of this Court in Haj Mohammad Abu Mustafa vs Government of Palestine. In that case, however, the land was Mahlul and the judgment was based upon an Article of the Land Code which relates to Mahlul and not to Mewat Land. The case, therefore, does not govern the present appeal.

On the question of possession, the President of the Land Court says :—

> "From the situation of the lands there can be little doubt that they were originally waste which has been

reclaimed, but that is no evidence to show that the Plaintiffs have not been in occupation of the whole for more than ten years or that any part has been left uncultivated."

It must be noted, however, that two inspectors of the Department of Agriculture who were called as witnesses of the Appellant stated that the western portion of the land containing some 89 or 90 dunams is marshy and that there is nothing to show that it had been cultivated within the last ten years.

Unless this evidence is false, it is difficult to see how it can be said that there is no evidence to show that the Plaintiffs have not been in occupation of the whole for more than ten years; and it is equally difficult to follow how the Court arrived at a finding that the land was in the possession of Haj Yusef and his heirs and was not left uncultivated at all.

We do not think that a person can be held to have been in possession of land which has not been enclosed or reclaimed.

We hold, therefore, that steps must be taken to determine by inspection or otherwise whether this portion of the land in claim has ever been reclaimed and cultivated, and if so, at what period.

If it should appear that the evidence of the two witnesses referred to is accurate the Plaintiff's claim to that portion of the land must fail.

Failure on the part of the Respondent to prove occupation of the western portion of the land will also go to support the Appellant's contention that the alteration in the western boundary of the Respondent's land to "Land of Kabbani" was made without any justification; and it will in that event be for the Court to determine whether the Respondents are entitled to more than 37 dunams, in respect of which they pay Werko, except upon payment of Bedl-el-Misl.

The judgment of the Land Court is set aside and the case remitted to the Land Court.

Delivered the 22nd day of July, 1929.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 45/28.

BEFORE:

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

IN THE CASE OF:

Anton Hanna Daud
George Hanna Daud
Samian Petasis — APPELLANTS.

vs

Aziz Eff. Daudi
Awad Bashir — RESPONDENTS.

Action for declaration of ownership of land — Registration of land founded upon Sharia hodja — Null and void transaction under Sec. 2 of Proclamation No. 76 dated 18th November, 1918 — Joinder of third Party by Land Court of its own motion — Sec. 2 (2), Land Courts Ordinance, 1921 — Person appearing to have title to land in suit may be made party to action — Possession of land from time immemorial — Undisturbed possession for period exceeding limitation of actions — Documents of transfer on sale and registered mortgages held not in themselves evidence of possession — Art. 20, Land Code — Art. 1660, Mejelle.

Appeal from the judgment of the Land Court of Jerusalem dated the 27th day of February, 1928.

JUDGMENT.

The appeal arises out of an action brought by the Appellants, Anton and George, sons of Hanna Daud against the first Respondent, Aziz Eff. Daudi, claiming a declaration that they were the owners of a piece of mulk land, of given boundaries, adjoining the Jerusalem Leper Hospital, and forming part of the mulk lands of the Bab el Khalil District of Jerusalem.

The Appellants based their claim upon a series of registered transactions originating in the registration in May, 1924, as owner, of Asma Khanem bint Abder Rahman Kuttub. This registration was founded upon a Sharia hodja of transfer to Asma from Mohd. Abdallah Abd Rabbo Bashir, dated 28 Rajab, 1290.

The first Respondent claimed ownership in reliance upon a notarial deed dated 2nd April, 1918, whereby a piece of land of given boundaries, forming part of the miri lands of the village of Malha, was sold to him by the heirs of Mohd. Abdallah Bashir.

The Appellants took the objection that this transaction was null and void under Section 2 of Proclamation No. 76 dated 18th November, 1918.

In reply Aziz Eff. argued that the transaction had received the written consent of a British Officer of the Administration in accordance with that Section.

This view was not accepted by the Land Court, who held that the objection to Aziz Eff.'s title was valid, and the Court thereupon joined as a Third Party the second Respondent, Abdallah, the son of Mohd. Abdallah Bashir as representing the heirs of his father.

The first point raised in this appeal is that this procedure was irregular and that the Land Court upon holding that Aziz Eff. had no title, should thereupon have given judgment for the Appellants, leaving the heirs of Mohd. Abdallah Bashir to oppose the judgment, if they thought fit to do so.

It must, however, be noted, that Section 2 (2) of the Land Courts Ordinance, 1921, empowers a Land Court "to call for and record all claims to rights in or over mulk or miri and every other class of land". This sub-section clearly authorises the Court to order that any person who may appear to have a title to the land in suit shall be made a party to the action; and, in view of this provision, we hold that the procedure adopted by the Land Court was correct, and that the Appellants were not entitled to a declaration of ownership merely upon proof that the person in possession held the land not as owner but as licensee of some other person. We hold that the Land Court was right in ordering that the Second Respondent be joined as a defendant.

The Appellants Anton and George bought from Samaan Petasis in 1926, and the Land Court ordered that Samaan Petasis be made a party to the action.

On the 27th February, 1928, the Land Court gave judgment dismissing the Plaintiffs' action. Against this judgment both the Plaintiffs, and Samaan Petasis appealed.

Samaan Petasis has since died, and Nizephore Petasis, one of his heirs, has been admitted as an Appellant, as representing the estate of Samaan Petasis.

The Land Court has set out in its judgment six grounds upon which the defendant Aziz Eff. relied, of which the last is as follows (Cp. 4 of Judgment) —:

"(6) That his client (Aziz Eff.) was in possession from the date of purchase and his vendor from a period exceeding 50 years, and the fact that none of the vendors to the plaintiffs was in possession."

It is thus clear that the first Respondent was setting up the defence of undisturbed possession for a period exceeding that of limitation of actions. This defence, if established would render it unnecessary for the Court to go into the question of title. Nevertheless the Court did examine in great detail the evidence of the parties, both as to title and possession.

On the question of possession the Court found (p. 34) as follows:—

"On examination of the personal evidence of both parties we find that the evidence of the witnesses of plaintiffs and their vendor Samaan Eff. is not sufficient to prove material possession".

Again on the same page of the judgment the Land Court states:—

"Consequently the Court is not satisfied with the truth of the evidence of the witnesses in that plaintiffs and their vendors before them were in possession of the land and used to plough it and cultivate it. All that happened was that certain official transactions like a transfer, or a mortgage, were effected without there being material possession".

In the concluding paragraph of the judgment the findings of the Court are summarised as follows:—

"In view of the above reasons it is decided to declare that the certificates of registration of the plaintiffs and the kushan of their vendor Samaan Eff. and his vendors, have no legal effect after proof of the possession of the defendant Aziz Eff. and his vendors the Parties, and their ancestor since a period exceeding prescription, and in view of the fact that the kushan of the ancestor of the vendors to defendant based on the Yoklama was proved.

Further, the President of the Land Court in his separate note states:—

"We find the kushan of 1292 relied on by the defendant is legally valid as the Title Deed for the land, and that it is supported by long possession which of itself would afford a defence under Article 20 of the Land Code".

The passages which have been cited appear to me to permit of only one interpretation, namely, that the defence of undisturbed possession had been established to the satisfaction of the Land Court. In view of the evidence before the Court on the question of possession, it cannot be said that the finding was unreasonable.

It follows that the Land Court was bound to dismiss the Plaintiffs' action and that there was no necessity for the Court to go into the question of title.

It has been argued that the transfers on sale and registered mortgages under which the appellants claim title, are in themselves evidence of possession. That is a view which I cannot accept.

In accordance with the findings of the Land Court the Respondents have been in undisturbed possession from 1292 (1875) until the 21st May, 1920, the time when the Appellants commenced proceedings against the workmen of the Respondent Aziz Eff., that is for a period of 44 years, and, accordingly, the Respondents are entitled to have the Appellants' action dismissed, whether the period of limitation be that prescribed by Article 20 of the Land Code, or by Article 1660 of the Mejelle.

It follows that this Court has not to go into the question of title and the appeal must be dismissed. At the same time it should be pointed out, that it does not necessarily follow that because the Appellants' action is dismissed, the Respondent Aziz Eff. is entitled to be registered as owner by virtue of the transaction which took place in 1918.

The Appellants will pay the costs of the Respondents.

Delivered the 20th day of April, 1932.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 61/28.

BEFORE:

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

IN THE CASE OF:

Hassan Abed Saad — APPELLANT.

VS

Sisillia Francis Damiani — RESPONDENT.

Adverse possession of land for period exceeding ten years — Possession of land registered in name of another gives rise to no presumption of tenancy — Onus of proof that adverse possessor is tenant is on registered owner — Action of owner barred by prescription under Art. 20, Land Code.

JUDGMENT.

It is admitted that the land in dispute is registered in the name of the deceased brother of Plaintiff (Respondent) and that it was in the actual possession of Defendant (Appellant), his mother, and his father for a period exceeding ten years.

The Court below tried to lay down a rule that when a person is in possession of land registered in the name of another, the presumption is that he possesses by virtue of tenancy or otherwise from the registered owner; the Court further indicated that such presumption is to be rebutted by the possessor.

I cannot agree to this view. There are many cases in this country where land is registered in the names of persons as nominees, and actually is in possession of the beneficial owners. In more than one case would it be possible for such owner to rebut a presumption of this nature. The onus of proof that the adverse possessor derived his possession by tenancy or otherwise from the registered owner must be with such registered owner as otherwise his action is barred by prescription under Article 20 of the Land Code.

In this case the Plaintiff offered some sort of evidence to support the suggested presumption and to prove that the Defendant's father was the tenant of Plaintiff and her predecessor on the land. Contracts of lease were produced in which one Mahboube is shown as tenant, but no relationship has been proved between Mahboube and Defendant. Two witnesses were also produced but they all gave evidence of hearsay that the Defendant's father had got the land by way of lease. The Court below did not consider all this evidence sufficient to base upon it a finding of fact as to the tenancy of Defendant or his father.

The last Section of Article 20 does not apply. There is nothing which could be taken as an admission by Defendant that he arbitrarily took possession of the land. He claims to have obtained the land by succession from his father, and this is not disputed. It is not for him to prove how his father derived title to the land.

In my opinion the appeal must be allowed and action of Plaintiff (Respondent) dismissed with costs here and below.

Delivered the 18th day of March, 1929.

POSSESSION OF LAND—

SEE ALSO LAND, PRESCRIPTION.

POSTS AND TELEGRAPHS.

In the High Court of Justice.

H.C. No. 55/25.

BEFORE:

The Chief Justice, and Corrie, J.

IN THE APPLICATION OF:

Jamal Eff. Husseini — PETITIONER.

vs

The Government of Palestine — RESPONDENT.

Ex-Parte.

Application for order against Postmaster-General — Lettering surcharged on postage stamps — Art. 82, Palestine Order-in-Council, 1922 — Art. 22, Mandate for Palestine — Use of official languages of Palestine — Terms of Mandate not enforceable in the Courts unless incorporated in the law — Jurisdiction of High Court where right of citizen infringed or denied — Remedy for moral injury to section of the population — Matters of sentiment or politics not within jurisdiction of the Courts — Invalidity of Ordinance inconsistent with Mandate.

JUDGMENT OF MR. JUSTICE CORRIE.

We are asked to make an Order against the Postmaster General on the ground that the Hebrew lettering "Palestina E.I." surcharged on the present issue of postage stamps is contrary to:—

1. Article 82 of the Palestine Order-in-Council, 1922, and

2. Article 22 of the Mandate for Palestine,

because the letters "E.I." do not appear in the English or Arabic surcharges.

The provisions of the Palestine Order-in-Council are enforceable in the Courts, and if it were shown that the terms of Article 82 have not been carried into effect, the Petitioner might be entitled to his order.

It is doubtful, however, whether a postage stamp comes within the terms of Article 82; and, even if it does, the Article only requires that the three official languages shall be used in official documents, and does not prescribe that the wording of either of the other official languages shall be a literal translation of the English.

The position as regards Article 22 of the Mandate is different. The terms of the Mandate are enforceable in the Courts only in so far as they are incorporated by the Palestine Order-in-Council, 1922, or any amendment thereof.

Now, although as regard legislation the Palestine Order-in-Council, 1922, and the Amending Order-in-Council of 1923 both contain a provision prohibiting the passing of an Ordinance inconsistent with the Mandate, there is no similar provision with regard to executive acts either in general or with special reference to the terms of Article 22.

In so far as the Mandate is not incorporated into the law of Palestine by Order-in-Council, its provisions have only the force of treaty obligations and cannot be enforced by the Courts. It is therefore unnecessary to consider whether the lettering on the postage stamps is in accordance with Article 22 or not.

The petition must be dismissed.

JUDGMENT OF MR. JUSTICE HAYCRAFT.

I agree with the judgment of my learned brother but there is another point raised by the Petitioner which requires to be dealt with and which does not depend on the Mandate.

It is said that the High Court has power to, and should, interfere wherever the action of an official person or Government Department infringes or denies the rights of a citizen, and the case is put as follows:

It is the duty of the Postmaster-General to convey letters on payment of certain postal rates. These rates are paid into the Post Office in return for documents which are attached to letters eposited for transport, and these documents are called postage

stamps. All the people of Palestine, not excluding the Arab majority, have a right to send letters in this way and to buy stamps, but without stamps letters cannot be sent. All stamps are surcharged with a statement of the Country of Issue in the official language. The surcharge appears as Palestine or its equivalent in each language, but following the Hebrew word for "Palestine" are two initial letters which signify "Land of Israel." It is said that Palestine is not an Arabic word but that the Arabs call this country Southern Syria. Nevertheless the Arabs are content to let the word Palestine stand.

But the Petitioner says he is an Arab and that he together with persons of his race complain that they cannot exercise the legal right of sending letters by post without purchasing and using a document in which their country is described as the Land of Israel, that this is an offence to all Arabs including the Petitioner and a moral injury for which the High Court ought to find a remedy.

The further contention that this is an infringement of Article 22 of the Mandate and that the use of initials meaning "Land of Israel" is a mere imposition on the Government and the people and not a repetition in Hebrew of the official name "Palestine" in English and Arabic—this has been dealt with by my learned brother in his judgment and I agree that this Court has no general authority to superintend the carrying out of the Mandate.

But the point of real interest is the former one, the claim that this Court ought to find a remedy for a moral injury which is said in this case to be an offence to the national pride of the Arab Nation, who are compelled to use a document in which their country is described as the land of the Jews.

I do not think that matters of sentiment or politics come within the scope of our authority unless expressly so included by some instrument of Law.

Had the Postmaster-General refused without reasonable ground to convey a letter or to issue a stamp demanded in accordance with the Laws or rules governing his department, that would have been an infringement of right for which a legal remedy would lie, but we can not go so far as we are asked in this case, and interfere with a public department in a matter which has to do with sentiment and politics.

Without expressing any opinion on the merits of a case in

which only one side has been heard, I am of opinion that this application should be dismissed on the above ground and no order to show cause issued.

Delivered the 24th day of October, 1925.

In the High Court of Justice.

H. C. No. 88/28.

BEFORE:

The Senior British Judge and Baker, J.

IN THE APPLICATION OF:

Dr. Moshe Lehrer — PETITIONER.

vs

The Postmaster-General — RESPONDENT.

Refusal of Postmaster-General to accept telegram for transmission in Hebrew characters — Application for order against Postmaster-General—Use of Official Languages in Palestine—Terms of Mandate not enforceable in Courts unless incorporated in the law—Invalidity of Ordinance inconsistent with Mandate.

JUDGMENT.

This is an application for an Order to issue to the Postmaster-General directing him to accept for transmission a telegram in the Hebrew language written in Hebrew characters.

The Postmaster-General, while prepared to accept a telegram in the Hebrew language, requires that it shall be submitted in Latin characters.

The authority cited by the Attorney-General on behalf of the Postmaster-General for this rule is a Public Notice appearing in the Official Gazette of the Government of Palestine issued on 1st October, 1920, headed "Use of Official Languages."

Section 1 of this Notice reads: "English, Arabic and Hebrew are recognised as the official languages of Palestine."

Section 3 reads:

> "Telegrams may be sent in any of the three languages, but if in Hebrew, they must be written in Latin characters, it not being practicable at present for the Post Office to transmit telegrams in Hebrew characters."

The Petitioner alleges that this rule is invalid as being contrary to the terms of the Mandate for Palestine and of the Palestine Order-in-Council, 1922.

In reply the Attorney-General relies upon the judgment of this Court in Ex-Parte Jamal Husseini (High Court No. 55 of 1925).* In that case the Court held that:

> "The terms of the Mandate are enforceable in the Courts in so far as they are incorporated by the Palestine Order-in-Council, 1922, or any amendment thereof.
>
> Now, although as regards legislation the Palestine Order-in-Council of 1922, and the amending Order-in-Council, 1923, both contain provisions prohibiting the passing of an Ordinance inconsistent with the Mandate, there is no similar provision with regard to executive acts either in general or with special reference to the terms of Article 22.
>
> In so far as the Mandate is not incorporated into the law of Palestine by the Order-in-Council its provisions have only the force of Treaty obligations and cannot be enforced by the Courts."

In that case, however, the ground of the Petition was an act executive in character, namely, the issue of postage stamps bearing certain Hebrew lettering.

In the present case, on the other hand, the ground of complaint is a regulation issued by the Government of Palestine, and is thus legislative and not executive in character and hence the rule laid down in Ex-Parte Jamal Husseini does not apply to this Petition.

With regard to legislative acts of the Government of Palestine, it was laid down by the Judicial Committee of the Privy Council in the case of Jerusalem-Jaffa District Governor vs. Suleiman Murra (P.C. No. 98/25), that:

> "The Supreme Court was fully justified in entertaining an argument as to the validity of the Ordinance" and
>
> "it was the right and duty of the Court to examine the terms of the Mandate and to consider whether the Ordinance was in any way repugnant to those terms."

The scope of that ruling, however, must be carefully noted. The legislation which the Judicial Committee had under consider-

* See ante p. 1483.

ation was an Ordinance made under the authority of the Order-in-Council of 4th May, 1923. The regulation we have now to consider is of a different character. It is a regulation which was in force at the time of the issue of the Palestine Order-in-Council. Article 74 (1) of that Order declares that:

> "The proclamations, Ordinances, Orders, Rules of Court and other legislative acts which have been issued or done by the High Commissioner or by any Department of the Government of Palestine on or after 1st July, 1920, shall be deemed to be and always to have been valid and of full effect and all acts done thereunder and all prohibitions contained therein shall be deemed to be valid."

Hence it is clear that this regulation has the force of law by virtue of the Order of 1922 and the provisions of Article 17 of that Order, whether as originally issued or as amended by Article 3 of the Order of 1923, prohibiting the promulgation of an Ordinance inconsistent with the provisions of the Mandate, have no application to this regulation.

It follows that we have not for the purpose of this Petition to determine whether refusal to accept a telegram in Hebrew unless written in Latin characters is or is not inconsistent with the Mandate.

The only other Article of the Order-in-Council having any bearing upon the subject of this Petition is Article 82 which provides that:

> "three languages may be used in debates and discussions in the Legislative Council, and, subject to any regulations to be made from time to time, in the Government Offices and the Law Courts."

No regulations having been issued since the Order-in-Council dealing with the question of the use of the Official languages, the Petitioner is entitled to argue that this Article means that the three languages may now be used in the Government Offices and that it by implication repeals any earlier legislation to the contrary.

We think that this contention is well founded and that if the Public Notice of the 1st October, 1920, had provided that telegrams must not be submitted for transmission in Hebrew, that provision would have been overruled by Article 82.

Such, however, is not the effect of the Public Notice. The Notice makes clear provision for acceptance of telegrams in Hebrew, requiring only that they shall be written in Latin characters.

An argument has been addressed to us to the effect that the use of the Hebrew characters is an essential part of a message written in Hebrew. This is a view that we cannot accept. A message in Hebrew does not cease to be in Hebrew because it is rendered in Latin characters, any more than a message in English ceases to be in English because it is rendered in the Morse code.

The Petition must be dismissed.

Delivered the 2nd day of May, 1929.

POWER OF ATTORNEY.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 135/23.

BEFORE:

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

Irrevocable power of attorney given to transfer land — Admission of sale and of receipt of money contained in wakale — Sale of land by wakale — Action for declaration of title — Regard of Land Courts to equitable as well as legal rights to land — Sec. 7 (1) Land Courts Ordinance, 1921 — Equitable right of possessor of land in certain circumstances to be registered as owner — Effect of failure to execute irrevocable wakale for sale of land.

JUDGMENT.

The Plaintiff in this action, Mohammad Tewfik Mohammad Yahya is one of the heirs of Khadijeh bint Mohammad Ali Aidi.

In 1331 (h) Shaban, Mustafa Aidi, then the registered owner of the half share now in claim, by wakale made in the Sharia Court, appointed Abdullah El-Madi his attorney to transfer the half share to Khadijeh.

The wakale contains an admission by Shaban of sale to Khadijeh and of receipt of the purchase money, 140 Napoleons and is expressed to be irrevocable.

There is no evidence to show whether Abdullah accepted the wakale or not; he never executed it by registration in favour of Khadijeh. The Plaintiff alleges and the Defendants do not deny, that Khadijeh entered into possession of the half share. In 1333 (h) Shaban made a registered transfer on sale of the half share to the Defendants who thereupon took possession.

The Plaintiff relying upon the Land Courts Ordinance has brought the action for a declaration of title in favour of himself and the other heirs of Khadijeh. The Land Court has held that the Plaintiff's claim to ownership was not established, but upon an admission by the Defendants that the wakale was made in respect of a mortgage of the land to Khadijeh, has declared that such mortgage is subsisting and that the Defendants' right of ownership is subject thereto.

Against this judgment the parties have appealed.

In this Court the Plaintiff has disclaimed any interest in the land by way of mortgage and has insisted on his claim to registration as owner as heirs of the purchaser.

In support of this claim it may be said that where a wakale contains an admission of sale and receipt of the purchase money and is accompanied by delivery of possession, this Court held that under Section 7 (1) of the Land Courts Ordinance, 1921, the person expressed to be purchaser is equitably entitled to registration as owner as against the person by whom such wakale was made.

On the other hand it appears to be clearly established that by Ottoman Law the fact that a registered owner of Miri land had made a sale of the land by unregistered deed, had received the purchase money and had given an irrevocable wakale for the transfer into the name of the purchaser accompanied by delivery of possession, it did not prevent him, so long as the wakale remained unexecuted, from totally defeating the purchaser's claim by making a registered transfer in favour of a second purchaser who obtained a valid title free from any claim by the first purchaser even though at the time of the transfer he might have full knowledge of the earlier transaction. Hence the effect of the registered transfer in favour of the Defendants in 1333 was to destroy any right that the Plaintiff might otherwise have had to registration leaving him only his claim against Shaban in damages. Thus when the Land Courts Ordinance came into force the Plaintiff no longer had any equitable interest in the land to which the Court could have

regard. The Plaintiff's claim to registration as owner therefore fails. He is not making any claim as mortgagee.

The judgment of the Court is that the Plaintiff's action be dismissed with costs, and the judgment of the Land Court is varied accordingly.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 51/26.

BEFORE:

Seton, J., Khaldi, J. and Khayat, J.

IN THE CASE OF:

Mohammed Saleh el Swaise — APPELLANT.

VS

Selimah bint Sliman el Haddad — RESPONDENT.

Power of attorney not valid as transfer of land — Null and void disposition of immovable property — Sec. 11, Transfer of Land Ordinance, 1920 — Recovery of monies paid in respect of void agreement of sale of land.

JUDGMENT.

The majority of the Court is of opinion that the Power of Attorney produced could not be regarded as transferring ownership; but the Wakil can execute its terms, unless he be dismissed by the principal, after presenting the amount admitted thereon. The judgment of the Land Court is therefore set aside and the case is dismissed.

JUDGMENT OF MR. JUSTICE SETON.

I think that the Power of Attorney in this case is a disposition of immovable property within the meaning of the Land Transfer Ordinance, 1920, and that as such it is null and void by virtue of the provisions of Section 11 of the said Ordinance save that the Respondent is entitled to recover from the Appellant any money paid to the latter in respect of the transaction.

I am therefore in favour of setting aside the judgment of the Land Court and dismissing the claim of the Respondent with costs.

Delivered the 17th day of June, 1926.

In the High Court of Justice.

H.C. No. 4/28.

BEFORE:

The Chief Justice, and Frumkin, J.

IN THE APPLICATION OF:

J. Yehuda — PETITIONER.

vs

Sheikh Jousef el Dajani

The Chief Execution Officer, Jaffa — RESPONDENTS.

Irrevocable power of attorney given to collect execution debt — Power of attorney intended to act as hawale — Transfer of right to collect debt — Arts. 673-700, Mejelle not applicable to transfer of right of a creditor to collect a debt.

Application for an order to issue to the Chief Execution Officer in the District Court of Jaffa directing him to execute the judgment for £.1700 in favour of the Petitioner and against Sheikh Jousef Dajani.

JUDGMENT.

On the face of it the document of the 18th December, 1927, is a power of attorney nominating one Gold an agent to collect all moneys due under the judgment in issue to the Petitioner by the Respondent. The agent having paid all such moneys to the Petitioner the power of attorney was made irrevocable so as to safeguard his rights. Next day he received back the moneys he had paid and consented to the revocation of the attorney.

The Respondent was in no way prejudiced by the transaction.

Since the articles of the Mejelle relating to hawales do not apply to this document the rule must be made absolute.

The Court therefore orders and it is hereby ordered that the Chief Execution Officer do execute the judgment for £.1700 in favour of the Petitioner against Sheikh Jousef Dajani.

The sum of £P.7 advocate's fees and costs are to be paid by the Respondent Sheikh Jousef Dajani.

Delivered in presence the 15th day of May, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 36/28.

BEFORE:

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

IN THE CASE OF:

Zeev Hazine — APPELLANT.

vs

N. V. Algemeene Yzer Staalmaatschappy "Ferrostaal", Haag — RESPONDENT.

Registration of foreign Company—Sec. 80, Companies Ordinance, 1921 — Carrying on business in Palestine — Effect of failure to register on right of Company to bring bankruptcy proceedings in Palestine — Delegation of agency under power of attorney — Sufficiency of power of attorney to dissolve partnership—Interpretation of documents — Ejusdem generis rule of interpretation — Special words a restriction on general words — Termination of partnership under Ottoman law — Arts. 1353, 1453, Mejelle — Art. 32, Ottoman Commereial Code.

JUDGMENT OF THE GHIEF JUSTICE.

By its judgment dated the 9th of July, 1926 (Civil Appeal No. 140/26*), this Court held that "if the Respondent, a foreign company, was carrying on business in Palestine without being registered under Section 80 and other Sections of the Companies Ordinance, 1921, it was an illegal company and not entitled to bring bankruptcy proceedings in Palestine" and the Court sent the case back to the District Court to determine this question of fact.

The District Court has held that on the 9th of November, 1925, when the petition for bankruptcy was presented by the Respondent, the Ferrostaal Company, it was no longer trading in Palestine, as the agreement of the 21st February, 1922, had been determined by an agreement between the Respondent and Jacob Hazine made on the 12th May, 1925.

That agreement was entered into by Jacob Hazine in purported exercise of a power conferred upon him by his mother, Esther Hazine, acting under a power of attorney from the Appellant.

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* see ante, p. 342.

The Appellant argues that:

(a) The power of attorney given by him to Esther Hazine, while authorising her to carry on his business, did not authorise her to put an end to his partnership with the Respondent company, and

(b) That even if Esther Hazine had power to determine the partnership, the terms of the power of attorney given by her to Jacob Hazine did not authorise him to do so.

The power of attorney in favour of Esther Hazine was in the following terms:

"In view of my absence for a certain time from the "country I herewith beg to make, constitute, and appoint "as my true and lawful attorney, my wife, Mrs. Esther "Hazine, residing in Tel-Aviv (Palestine); for me and in my "name, place, and stead to collect moneys, give valid receipt "and discharge for same, effect all necessary payments, effect "all financial transactions with Banks and Financial Institutions "in Palestine, open credits, sign engagements, bills, contracts, "which will be binding on me, withdraw moneys, which "may be outstanding to my credit with such Banks, Financial "Institutions, Societies and private persons, sign cheques, "represent me in commercial operations, draw up and sign "contracts for sale and purchase of building materials and "any other goods in general, clear up and withdraw goods "kept with the Customs Office, or Bonded, receive moneys, "parcels, and registered letters arrived on my name at the "Post Office Administration in any of the towns of Palestine; "draw up lease contracts with tenants, collect rent, effect "repairs to any flat or house if necessary, ask the eviction "of tenants in the Court, if they are not fulfilling the "conditons stipulated in the contract, appoint advocates and "sue personally before the Courts of Palestine in case of any "dispute whatever arising, represent me personally or through "advocates in the procedure of the Execution Office, including "collection of moneys and arrest of debtors; and delegate "her powers partially or entirely to one or more persons.

"My said attorney is also empowered to effect any "disposition of immovable property whatever in connection "with my property either recorded in Tel-Aviv or at the "Land Registry of Jaffa including sale and mortgage, and

"in general represent me as fully and effectually as if I were "present myself to do the same."

The District Court held that the phrases:
"sign engagements, bills, contracts .....
"represent me in commercial operations .....
"and in general represent me as fully and effectually as if I were "present myself to do the same" gave Esther Hazine full power to do anything which her husband, the defendant, might do himself.

If the question were to be determined according to English Law, I hold that it would be governed by the judgment in Harper v. Godsell (1870), 5 Q.B., p. 422.

In that case, one Porro, a partner in the firm of B. Williams and Co., gave a power of attorney to one Newton "for the purposes "of exercising for me all or any of the powers and privileges "conferred by an indenture of partnership constituting the firm "of B. Williams and Co. and generally to do, execute, and perform "any other act, deed, matter, or thing whatsoever ..... in "or about my concerns, engagements, and business of every nature "and kind whatsoever."

Under this power Newton purported to assign Porro's share in the partnership property to the plaintiff. In his judgment, Mr. Justice Blackburn said (p. 427): "The first question is whether "this assignment of Porro's share is good? I think it is not. The "special terms of the first part of the power prevent the general "words from having an unrestricted general effect. The meaning "of the general words is cut down by the context in accordance "with the ordinary rule of ejusdem generis. This general principle "is laid down in Arlington v. Merricke. I think, therefore, that "the general provisions in the power of attorney did not confer "the right to dissolve the partnership and to transfer Porro's share "to the plaintiff."

The general words in the power of attorney in that case were very wide, and I feel no doubt that if the principles of English Law were applicable to the present case, this Court must hold that the general words in the power given by the Appellant to Esther Hazine are restricted by reference to the special terms which precede them, and that Esther Hazine had no power to determine the partnership with the Respondent.

I know of no authority for holding that a different rule of

construction is applicable under the law of Palestine. Reading the phrases upon which the District Court relied in their context, I hold that the power of attorney in favour of Esther Hazine empowered her only:

(a) to carry on her husband's business, and

(b) to dispose of his immovable property in any manner,

and I hold that the power to carry on her husband's business did not authorise her to determine his partnership with the Respondent company.

I hold, therefore, that Esther Hazine had no power to determine the partnership, and hence could not delegate such power to Jacob Hazine.

It follows that without ratification by the Appellant, Clause 5 of the agreement is inoperative as an agreement to determine the partnership, and there is no evidence of any ratification.

It has, however, been argued that by virtue of Article 1353 of the Mejelle any partner can determine a partnership by giving notice to the other partners without any need for their concurrence.

It is clear, however, that Ottoman Law recognises partnerships for a fixed term. Thus, for example, Article 32 of the Commercial Code requires that the articles of partnership of a collectif or commandite partnership shall specify (inter alia) "(5) the date of the commencement and termination of partnership," and it may be doubted whether in such a case Article 1353 of the Mejelle is applicable. This, however, is a question which we have not to decide, as it cannot be maintained that the agreement for dissolution of the partnership between the Respondent company and Jacob Hazine is a notice to the Appellant of dissolution of partnership. The agreement must be read as a whole and there is nothing in its wording to suggest an intention on the part of the Respondent company to dissolve the partnership except upon the terms set out in the other clauses of the agreement.

I hold, therefore, that the judgment of the District Court must be set aside and the application of the Respondent company that the Appellant be adjudicated bankrupt must be dismissed with costs here and below.

JUDGMENT OF MR. JUSTICE CORRIE.

I concur.

JUDGMENT OF MR. JUSTICE KHAYAT.

I hold:

(1) that the power of attorney of the wife is not general and that it does not include the power to dissolve the partnership or to effect a compromise;

(2) that the power of attorney of the son is restricted to the carrying on of Bank business, and that it is of a narrower scope than that of the wife;

(3) that a partnership may be terminated at the demand of one of the partners according to Article 1353 of the Mejelle;

(4) unless Respondent proves that the Appellant ratified the agreement of 1925 subsequent to the power of attorney in the terms of Article 1453 of the Mejelle the power of attorney cannot be relied upon in admitting the action of a foreign company carrying on business without registration.

I therefore hold that the case should be remitted to the District Court for it to enquire whether there was subsequent ratification in which case the Company would not have been carrying on business. If, on the contrary, this is not proved the Company would be bound by the agreement of 1922 which makes it a partner with Appellant and it cannot be admitted in the case before registration.

Delivered the 2nd day of August, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 2/29.

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

IN THE CASE OF:
Local Council of Petach-Tikvah — APPELLANT.
vs
Palestine Zionist Executive — RESPONDENT.

Sufficiency of power of attorney granted to advocate — Local Council of Petah-Tiqvah a statutory body — Section 2 (1) Local Councils Ordinance, 1921 — Absence of statutory vesting in Local Council of debts of Colony Committee—Liability of Local Council for debts of predecessors.

JUDGMENT.

On the first point, as to the authority of the power of attorney held by the advocate for the Respondent, we hold that the Court below was entitled to hold that it was satisfied with the evidence that the Zionist Executive properly authorised the advocate.

We are satisfied, too, that the Zionist Executive stood in the shoes of the Zionist Commission; but as to the Local Council of Petach-Tikvah, this is a statutory body, created under Section 2 (1) of the Local Councils Ordinance, 1921, on the recommendation of the District Commissioner by the High Commissioner's Order of June 2nd, 1922, and in the absence of a statutory vesting in the Local Council of the liabilities of the Committee of Petach-Tikvah, we hold by a majority that such liabilities of the Committee cannot bind the Council.

We therefore, by a majority, give judgment for the Appellant with £P.2 advocate's fees and costs.

Delivered the 26th day of September, 1930.

In the High Court of Justice.

H.C. No. 14/29.

BEFORE:

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

IN THE APPLICATION OF:

Elias Stempa — PETITIONER.

vs

Chief Execution Officer
J. Bassam — RESPONDENTS.

Order made by Chief Execution Officer for payment of debt within thirty days — Notice from Execution Office served on person holding power of attorney from execution debtor — Absence from Palestine of execution debtor.

Application for an order to issue to the Chief Execution Officer to show cause why he should not be directed to cancel his order of granting 30 days for payment.

JUDGMENT.

Application refused with costs. The notice has been served on a person holding a Power of Attorney from the debtor and it would be absurd that notice be also served on a debtor now in Poland which Petitioner requests.

Given the 23rd day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 45/29.

BEFORE :

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

IN THE CASE OF :

Joshua Hankin — APPELLANT.

VS

Mahmud Abdulla Semarah and Others — RESPONDENTS.

Application for an order declaring title to land — Agreement to appoint attorney to effect transfer of land — Wakale dawrieh intended to have effect of sale of land revoked — Registrar of Lands restrained by High Court from effecting registration of land — Revocation of power of attorney — Limitation of action on sanad—Art. 20, Land Code — Right of purchaser under unregistered sale to be registered as owner restricted to cases where possession and ownership pass to the purchaser — Agreement for sale distinguished from deed of sale.

Appeal from the judgment of the Land Court of Nablus dated the 16th day of May, 1929.

JUDGMENT.

The Appellant Joshua Hankin seeks an order declaring that he is entitled to be registered as owner of certain lands by virtue of a sanad dated 1st March, 1330, and 17th Rabi Tani, 1332.

Under the sanad in question, the first party thereto, who were the Respondents Mahmud and Aref and their brothers Ibrahim and Mohamed and Ali sold the lands in question to the Appellant for 3,800 Napoleons.

By clause 7 of this sanad the vendors acknowledged the receipt of 1000 Napoleons and undertook to appoint the attorney desired by the purchaser to transfer and relinquish their rights in these lands and buildings to Mr. Hankin or his nominee at the said price and to admit having received the 1000 Napoleons.

On 27th Rabi Tani, 1332, the vendors executed a wakale dawrieh appointing the Appellant their attorney for the purpose of registering the transfer of the land in the Land Registry and thereby empowered him to take all necessary steps for that purpose.

No further action was taken until after the British Occupation when the Respondents, in whom the rights of the original vendors were then vested by the inheritance, placed 1000 Napoleons on deposit in the name of the Appellant, and gave notice to him revoking his appointment as attorney.

On the 7th July, 1928, the Respondents obtained from the High Court an order restraining the Registrar of Lands from registering a transfer of the land in question into the name of the Appellant.

The Appellant thereupon brought an action in the Land Court of Nablus and it is against the judgment in that action, whereby the Land Court on 16th May, 1929, dismissed the Appellant's claim for a declaration that the present appeal is brought.

In the proceedings in the High Court in 1928 the Court held that the Respondents were entitled to revoke the wakaleh dawrieh of 1332 and discharge the Appellant from his attorneyship and it follows that any right which the Appellant now has must be based upon the sanad of 1st March, 1330.

The Respondents have argued that whatever rights the Appellant may have had under the sanad, an action to enforce them is now barred by lapse of time by virtue of Article 20 of the Land Code. The Appellant's reply is that until the revocation of the Power of Attorney he had no cause of action, and hence that time began to run against him only from the date of such revocation.

The Court holds that the Appellant's contention in this respect is correct and accordingly that his action is not barred.

On the merits of the case the Appellant's argument is that the sanad of 1330 was in terms an actual sale and not merely an agreement for sale and that although physical delivery of the land

sold has never taken place the vendors remained in occupation as his tenants, and accordingly that he has had legal possession of the land ever since the execution of the sanad.

The Appellant's argument with regard to possession rests upon clause 6 of the sanad which reads as follows:— "The first party undertook that after the disposition is made should there be found some cultivation in the lands, he must lease it from the purchaser for a period which may be required for reaping at a rent of P.T.1000.— and should there be delay in the sale and disposition due to the Government occuring at the time of cultivation of the land then he is bound to take a lease of it for one year at 50 Napoleons."

It is admitted by the Appellant that no rent has ever been paid to him under this clause nor has any lease ever been executed in accordance with the last paragraph of the clause.

The Court therefore is unable to take the view that the Respondents are in occupation as tenants of Appellant or that the Appellant has ever had possession of the lands. It is admitted that a portion only of the purchase money was paid, and further it is clear from the terms of the sanad itself that the sanad was intended to be a preliminary to a registered transfer. Under the circumstances it is difficult to see how the Appellant can be entitled to registration.

There have, it is true, been cases in which the Court has declared a purchaser entitled to registration by virtue of an ordinary sanad. In all such instances, however, the transaction was accompanied by delivery of the land sold, and the circumstances have been such that the Court has inferred that the transaction entered into was intended by the parties to take effect as a complete and final transfer of the land and that ownership had passed to the purchaser.

In the present case the circumstances are totally different. There has not been delivery or possession and only a portion of the purchase money has ever been paid.

The Court knows of no authority for ordering registration by virtue of a transaction of this nature, and the appeal must therefore be dismissed with costs.

Delivered the 26th day of March, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 21/30.

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

IN THE CASE OF:
Isma'il Muhammad En-Nadi — APPELLANT.
vs
Rashid Ibrahim En-Nadi
Suleiman Abu Ghazaleh — RESPONDENTS.

Application for order declaring title to land — Wakale dawrieh for sale of land — Power of attorney ineffective after Transfer of Land Ordinance, 1920, as a transfer of land.

JUDGMENT.

The Appellant, Isma'il Muhammad En-Nadi, is claiming title under a power of attorney for the sale of the land to him given by the Respondent, Rashid Ibrahim En-Nadi, executed before the Notary Public on 23rd May, 1925. The Respondent, Suleiman Abu Ghazaleh, claims certain shares under a registered transfer from the Respondent, Rashid, dated 2nd March, 1927.

It is clear that the power of attorney, having been executed since the Transfer of Land Ordinance, 1920, can confer no interest in the land upon the Appellant; and it is immaterial whether, as regards the shares bought by the Respondent Suleiman, he was aware of the execution of this power of attorney or not.

The appeal must be dismissed with costs, including 500 mils travelling expenses for each Respondent.

Delivered the 23rd day of June, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 60/31.

BEFORE:
The Senior Puisne Judge and Frumkin, J.

IN THE CASE OF:
Arieh Leib Sherwinter — APPELLANT.
vs
Yocheved Sherwinter — RESPONDENT.

Appeal submitted by advocate on behalf of client without power of attorney — No appeal before Court of Appeal.

Appeal from the judgment of the District Court of Jerusalem, dated the 13th April, 1931.

JUDGMENT.

The Petition of appeal before the Court was submitted by an advocate who had no Power of Attorney and accordingly has no authority to submit an appeal.

There is therefore no appeal before the Court and the application is dismissed.

No order is made as to costs.

Delivered the 11th day of September, 1931.

In the High Court of Justice.

H.C. No. 93/32.

BEFORE:

The Senior Puisne Judge and Frumkin, J.

IN THE APPLICATION OF:

Emily Atallah — PETITIONER.

vs

The Land Registrar, Haifa,
Yusef Elias Ni'meh,
Ibrahim Atallah El-Khalil — RESPONDENTS.

Application to obtain order against Registrar of Lands to stay transfer — Power of attorney involving interests of third party — Revocation of power of attorney by death of principal — Termination of agency — Art. 1527, Mejelle.

Application for a rule nisi calling upon the Registrar of Lands, Haifa, to appear before this Court to show cause why the transfer of a house should not be stayed.

ORDER.

We hold that the decision of the Land Registrar was correct and that the power of attorney given by Bahja Bint Raful involves the right of another and thus, in accordance with Article 1527 of the Mejelle, was not revoked by her death.

The Order of this Court dated 20th January, 1933, is discharged, and the Petition is dismissed with costs, including £P.5 costs and expenses of the advocate for the second and third Respondents.

Delivered the 20th day of March, 1933.

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

C.A.D.C. Jm. No. 256/32.

BEFORE:

De Freitas, J., Plunkett, J. and Valero, J.

IN THE CASE OF:

Ezrath Nashim Society — APPLICANTS.

vs

The Township of Tel Aviv — RESPONDENTS.

Society registered by the District Commissioner—Power of Society under Ottoman Law of Associations to act through attorney—Power of Attorney given by President of Society to advocate to appear in Court.

JUDGMENT.

In our opinion it was not within the province of the Magistrate in the action before him to decide whether the District Commissioner was in the circumstances justified in registering the Plaintiff Society, and it is not disputed that the Plaintiff Society has been registered by the District Commissioner.

The Magistrate was called upon to decide whether Mrs. Yellin was authorised to give Mr. King a Power of Attorney to institute proceedings on behalf of the Society.

It is on record in the District Commissioner's Office that Mrs. Yellin is the President of the Society. There is nothing in the Bye-Laws of the Society which necessitates the members of the Committee of Management to act jointly.

Under the Law of Associations a Secretary of a Society may give a Power of Attorney to an advocate to appear in Court on behalf of the Society, a fortiori a President of a Society is also empowered to do so.

We set aside the judgment of the Magistrate, and return the case to him to hear the claim.

In the District Court of Jaffa.

C.D.C. Ja. No. 463/32.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

L. P. Constant — PLAINTIFF.

vs

Wadia Tamari and Others — DEFENDANTS.

Contract for sale of oranges — Use made by father of property of minor — Duties and obligations of father as natural guardian — Breach of trust — Right of natural guardian to make contracts on behalf of ward — Attorney under general power of attorney not entitled to use principal's property for his own purposes — Assignment of debt--Section 2, Assignment of Debts Ordinance, 1928— Right of agent to act in his own name for undisclosed principal — Article 1461, Mejelle.

JUDGMENT.

By an agreement duly certified by the Notary Public and dated 10th March, 1931, Wadia Tamari, (since deceased) in his personal capacity and as Attorney on behalf of his wife Mary Rose Tamari and his son Selim and Selim Barakat, purported to sell to the Plaintiff four thousand cases of oranges for the sum of £.1241-14s-3d. (£P.1241.712 mils) receipt of which sum was acknowledged, the oranges to be delivered as to 2000 cases prior to 15th December, 1931, and as to 2000 cases prior to 15th January, 1932.

In a further clause the vendor was liable to pay the sum of 250 mils for every case which he should fail to deliver in due time. No cases were ever delivered.

In a letter of the 9th March, 1931, which begins "with reference to the contract executed by you today whereby I have purchased from you for the sum of £.1241-14s-3d, 4000 cases of oranges for delivery next season", and which therefore, I think that there can be no doubt, refers to the above agreement of the 10th March, in spite of the slight difference of one day in the dates, the Plaintiff undertook to release Wadia Tamari from that agreement, provided the sum of £P.1241.712 were repaid before 15th November, 1931.

Wadia Tamari purported to act on behalf of his wife by virtue of a General Power of Attorney dated 12th April, 1922, by which Mary Rose Tamari gave him a general power of management over all her properties situated in Jaffa. It is admitted that Wadia Tamari was the natural guardian of his son Selim. The fourth defendant Selim Barakat was, it would seem, cited in error, and his name was struck out of all further proceedings on the first day of hearing in this Court, on the application of the Plaintiff.

The Plaintiff is now claiming the sum of £P.1241.712 being the amount said to have been advanced under the agreement of the 10th March, 1931, and the damages for non-delivery.

If the case had rested on the above facts, there would have been no difficulty for it would have been a typical case on an ordinary orange contract. But in the course of the hearing many additional facts have come to light which have completely altered its complexion and have given us considerable difficulty in arriving at a decision.

The true facts, as now ascertained, are as follows: The Plaintiff is the agent in Palestine of a London firm of fruit salesmen, Messrs. T. J. Poupart Ltd. On the 28th April, 1930, the Plaintiff as agent for this firm entered into an agreement with Wadia Tamari for the purchase of 10,000 cases of oranges. There was a debit balance owing on this agreement of £.968-10s-2d, and this amount was confirmed by S. Tamari et Fils on 7th March, 1931, as correct.

This agreement bears an endorsement dated 17th December, 1931, in these terms: "in consideration of S. Tamari et Fils receiving the sum of £.500 to be paid on the 27th December, 1930, they hereby undertake to ship an additional quantity of 4000 boxes of Jaffa oranges on exactly the same conditions as above, signed,—S. Tamari et Fils." This, I think, must be continued for the purpose of this present case only as a separate agreement between S. Tamari et Fils and T. J. Poupart Ltd. There was a debit balance on this agreement of £.273.4.1, which amount was again confirmed by S. Tamari et Fils on the 7th March, 1931. These two debit balances come to £.1241.14.3. which is the same as the consideration stated to have been received under the agreement which is now being sued on.

In the light of these facts it is now admitted by the Plaintiff that the agreement of the 10th March, 1931, was entered into in

order to secure this debt owing by S. Tamari et fils to T. J. Poupart. It could not very well have been denied, when one considers the identical sums, the date of the agreement which was made three days after the debit balance had been confirmed by S. Tamari et Fils, and a further letter of the 15th December, 1931 written by the Plaintiff to one of the guardians of Selim Tamari in which he speaks of the settlement of the late W. Tamari's debts and also of "my firm Messrs. T. J. Poupart's Ltd", who were asking "that their account should be settled immediately." No consideration in effect passed to Wadia Tamari under this agreement of 10th March, 1931, from the Plaintiff to this action, and the agreement is to this extent a fictitious one. It would have been quite easy to have drafted an agreement setting out the true facts, and no reason has been given to us why this was not done, and this deliberately misleading agreement entered into instead.

In these circumstances we must now consider how far the Defendants or any of them are bound by this agreement. I can find no authority for the proposition that a father, because he is the natural guardian of his son, is entitled to use the property of his son in order to settle debts owing by himself, or by a firm of which he, the father, is a member. If ever there were a breach of trust, this surely is one. I agree that a father in his capacity of guardian may manage his son's property, and may make contracts on behalf of his child for the sale of the produce coming from the child's property, provided of course that the contracts are proper ones and for the benefit of the child, but this power does not extend to authorise him to use the child's property for his own personal ends.

In the case of the wife, the second Defendant, taking her at the moment in her personal capacity, it is true that she has given her husband a power of attorney, in very wide terms, but those terms are not unlimited. She has authorised him inter alia "to manage all my properties situated in Jaffa . . ." to sell same absolutely or in respect of payment of debt or to mortgage same partly or wholly to any person for whatever sum . . . and to spend on these properties and to obtain revenues and proceeds and to borrow money to spend thereon . . . to settle all accounts for my share therein, to receive such share and to give receipts therefor . . . and finally "to carry out all transactions to safeguard my interests . . . ."

There is not one word here of any power given to her husband to use her property to pay his debts or the debts of the firm of S. Tamari et Fils, of which both he and she were members.

If he has purported to do so, his action is void, as it is not covered by the terms of his Power of Attorney, which is limited to managing her property and to safeguarding her interests, and again, his action was a breach of trust.

And it connot be argued that the Plaintiff had no notice of this. Of course he had notice. He knew the origin of this debt—he knew that the child Selim Tamari was not indebted to him or to Messrs. Poupart. He knew or should have known, for ignorance of the law is no excuse, that a guardian cannot use his ward's property to settle his own or any one else's debts. He knew or should have known, for he was put upon enquiring to demand to see the Power of Attorney since Wadia Tamari stated he was acting as Attorney for his wife and he must be deemed to have had notice of its contents—that that power was limited to managing the wife's property and to safeguarding her interests. And therefore he had notice that Wadia Tamari in purporting to use his wife's and his child's properties as securities for the settlement of a debt owing by him or by the firm, S. Tamari et Fils, had no power to do so and was committing a breach of trust in so doing.

We therefore find that the second and third Defendants are under no liability on this agreement of the 10th March, 1931.

And I think that we can see now the reason why this agreement was drawn in the form in which it was. If the real facts had been set out, if it had been stated that it was an agreement entered into by Wadia Tamari for himself and as Attorney for his wife and child to secure a debt owing by him or by the firm S. Tamari et Fils, to T. J. Poupart Ltd. it would have been apparent on the face of it that as regards the wife and child it was invalid.

To turn now to the last point, the liability if any, of the estate of the late Wadia Tamari. If the Plaintiff is suing personally, then he cannot succeed, because it is admitted that no consideration was in fact given by him, that the consideration was a sum previously advanced by Messrs. Poupart, and there has been no assignment of the debt by Messrs. Poupart to the Plaintiff, to comply with the terms of the Assignment of Debts Ordinance, 1928.

He must therefore, in effect be suing as an agent for Messrs. Poupart, though it is not so mentioned in the Statement of Claim.

I agree that under Article 1461 of the Mejelle, an agent may act in making a contract in his own name and need not disclose his principal, but can an agent sue in his own name when he is suing in reality on behalf of a principal? I do not think so. It being once shown and admitted that the agreement was entered into by the Plaintiff on behalf of Messrs. T. J. Poupart, that the debt which was in reality the consideration for this agreement was a debt owing to Messrs. T. J. Poupart, and there being nothing to show that this debt has been legally assigned to the Plaintiff, then the Plaintiff cannot sue in his own name, without stating in the claim that he is suing as agent for the actual persons on whose behalf he admits that he made the agreement.

I have not dealt with the interesting questions of whether these agreements which were the predecessors of the agreement of 10th March, 1931, are liabilities of Wadie Tamari personally or of the firm of S. Tamari et Fils. Their determination is not necessary in this case, and may well be left until it is necessary.

In the result, in our opinion the Plaintiff's case fails as against all the Defendants and must be dismissed with costs and £P.5 advocate's fees, in respect of the first three Defendants.

The fourth Defendant, Selim Barakat, is entitled to his costs up to the date of his appearance; when the case against him was withdrawn and to £P.2 advocate's fees.

The provisional attachment granted by this Court on the 7th December, 1932, is discharged.

Dated the 29th day of April, 1933.

In the Supreme Court sitting as a Court of Appeal.

P.C.L.A. 3/33.

BEFORE:

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

IN THE CASE OF:

Basilah Jabbour and Others — APPELLANTS.

vs

Bayside Land Corporation Ltd. and Others — RESPONDENTS.

Adjournment granted at request of advocate for production of power of attorney — Appeal launched by advocate who had in fact no power of attorney at time of appealing.

JUDGMENT.

We have before us the original petition for leave to appeal signed by Auni Bey as Counsel for Appellants as per general power of attorney.

At the last hearing he himself as recorded on the notes of the judges of this Court said "I am prepared to produce my power of attorney."

The adjournment was expressly stated to be for the production of this power.

Nothing that Fuad Eff. Atallah says gets over the fact that Auni Bey had in fact no power of attorney. There is therefore no appeal validly placed before us.

We therefore dismiss the application.

Delivered the 23rd day of May, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 149/33.

BEFORE:

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

IN THE CASE OF:

Joshua Hankin — APPELLANT.

vs

Mahmud Samara and Others — RESPONDENTS.

Contract for sale of land barred by lapse of time — Power of attorney given by vendor appointing agent for registering transfer in Land Registry — Revocability of irrevocable power of attorney — Commencement of running of period of limitation of actions.

JUDGMENT.

The District Court dismissed the Applicant's claim on the ground that the agreement of 17 Rabbi 'Tani, 1332, was barred by lapse of time in that they held that there was no connection between the agreement and the Power of Attorney.

This Court however in an appeal between the same parties, namely, Land Appeal No. 45/29 [1]), when the agreement the subject matter of this appeal was taken as a basis for an action for title to the land held "that until the revocation of the Power of Attorney there was no cause of action and that time only began to run from the date of such revocation".

Now what was held by the Court of Appeal when the said agreement was taken as a basis for an action for ownership to the land equally applies in the present appeal when the same agreement is relied upon as a basis for a claim to damages.

The finding of the High Court in High Court No. 40/28 [2]) which has been quoted to us and which states that Mr. Hankin's rights under the Power of Attorney are restricted to the right to receive 1,000 Napoleons out of the purchase money," we hold, cannot be construed to prevent the Appellant from claiming any damages he may be legally entitled to under the agreement.

The judgment is therefore set aside and the case remitted to the Court below for the said Court to enter into the merits of the case and give judgment in accordance therewith.

Costs to follow the event.

Delivered the 4th day of July, 1934.

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[1]) see ante, p. 1499.
[2]) see ante, p. 119.

In the District Court of Jaffa.

C.D.C. Ja. No. 485/33.

BEFORE:

Copland, J. and Shehadeh, J.

IN THE CASE OF:

Henry Roch and Others — PLAINTIFFS.

vs

Joseph Klein
Israel Shaffer — DEFENDANTS.

Action for damages for breach of contract — Validity of delegation of power of attorney — Revocation of power of attorney by insanity of donor — Principal and agent.

JUDGMEMT.

This is an action for damages for breach of a contract in regard to the sale of certain land by the Plaintiffs to the Defendants. A preliminary point has been raised by the Defendants with regard to the validity of the Power of Attorney given to Mr. Ben-Shemesh. Zachi Roch, one of the Plaintiffs gave a General Power of Attorney on 30th November, 1931, to Yusef Zamarieh with power to delegate. The latter on 3rd April, 1926, gave a similar power to Mme Labibeh Roch, who in turn gave a power to Henry Roch on 16th July, 1933, for the purpose of this action, with authority therein to Henry Roch to appoint an advocate, and Henry Roch appointed Mr. Ben-Shemesh to bring this action. In the course of the argument that this power given to Mr. Ben-Shemesh was invalid, inasmuch as a power to delegate, cannot be delegated by the first donee of the power, it transpired, and was further admitted, that Zachi Roch is of unsound mind and has been in a mental home in Paris for some years. This in itself is sufficient to render null and void the Power of Attorney given by Zachi Roch, with the natural consequences that the whole series of Power of Attorneys issuing from this first Power of Attorney falls to the ground. The action is therefore improperly brought.

In these circumstances the question arises what we should do with this case. Application has been made to us to adjourn the hearing for further consideration so that the defect may be remedied. Now the contract of sale on which this action is founded is dated the 4th June, 1933, and transfer had to be effected by the Plaintiffs,

within four, or in certain events, five months from that date, that is to say, at the outside by the 4th November, 1933. The time for transfer, has thus long since passed, and at that time the Plaintiffs were and still are unable to give a valid title, and even if they should be in a position to give one it is now too late. An adjournment therefore will not be of the slightest use to them. The action must be dismissed with costs and LP.5 advocate's fees.

Delivered the 23rd day of January, 1934.

PRE-EMPTION.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 59/24.

BEFORE:

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

IN THE CASE OF:

Yusef Ma'louf — APPELLANT.

VS

Salim Francis El Bittar — RESPONDENT.

Claim of right of pre-emption made on first intimation of sale — Formal claim of right of pre-emption to be made before witnesses — Articles 1029, 1030, Mejelle.

JUDGMENT.

It appears from the proceedings in this case that the Appellant bought during the War a house which adjoins the property of the Respondent. The Respondent alleges in his statement of claim that the fact of this purchase was first communicated to him in March, 1920, in the shop of Hanna Zamaria and that it was the Appellant himself who gave the information. Whereupon, the Respondent says, he immediately claimed his right of pre-emption "Talab Muwathabah" in the presence of Hanna Zamaria and shortly afterwards brought witnesses to the house in question and again made his claim in their presence in the manner required by Article 1030 of the Mejelle.

Thereafter the Respondent brought this action to inforce his right to pre-emption and the Court below gave judgment in his favour which judgment the Appellant appeals.

There are many reasons why the judgment of the Court

below cannot be upheld but it will suffice to give one which, in our opinion, is of itself sufficient to defeat the Respondent's claim.

The first thing required in exercising the right of pre-emption is the "Talab Muwathabah" as defined in Article 1029 of the Mejelle which states:

> "A man who has the right of pre-emption in the case "of a sale of property must in the assembly when he heard "the sale of this property say 'I have the right of pre- "emption in the sale of this property'."

The Respondent alleges that he made this claim but he has not proved it. His one witness Hanna Zamaria says definitely that it was not claimed in his presence.

We hold that the Respondent's failure to prove the Talab Muwathabah is fatal to his claim. The judgment of the Court below is therefore set aside and the action dismissed with costs against the Respondent.

Delivered on the 10th day of December, 1924.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 121/24.

BEFORE:

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

IN THE CASE OF:

Bedour Ragheb El-Sukhun — APPELLANT.

vs

Priest Michel Abu Atta
Yousef Khalil El-Yousef — RESPONDENTS.

Right of pre-emption — Against whom the right may be exercised — No agent of a Society having no legal existence — Legal existence of Religious Community — Claim for pre-emption against agent of principal.

Appeal from the judgment of the Land Court of Nablus, dated the 9th day of August, 1924, whereby the action of the Appellant for exercising his right of pre-emption (Shufa'a) over land bought by Defendant Michel from the other Defendant Yousef was dismissed with costs.

JUDGMENT.

The land claimed was purchased for and has been registered in the name of "the Greek Orthodox Community of Tulkarem". The purchase was effected by the Respondent Michel Abu Atta the priest of the Community. The Respondent's advocate states that the Community is not either the Orthodox Church as a whole which may be regarded as represented by the Patriarchate, nor is it a society having a recognized constitution and clothed with a legal personality, but is simply an expression for the Orthodox Congregation in Tulkarem and has no legal personality.

It would appear therefore that the registration has been made in the name of, and that the Respondent is holding himself out as acting for, a body having no legal existence.

Under these circumstances the Respondent Michel is the only person against whom as purchaser, the Appellant can claim Shufa, and we need not decide the question whether or not a claim for Shufa can be made against an agent acting for an existent and known principal.

The judgment of the Land Court is set aside and the case remitted; costs to follow the event.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 13/25.

BEFORE:

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

IN THE CASE OF:

Ramadan El-Haj Muhammad El-Jayar — APPELLANT.

vs

Shakib and Hasib Ahmad El-Jayar — RESPONDENTS.

Purpose of right of pre-emption — Pre-emption as between co-owners of property — No right as against purchaser already owning share in property — Art. 1008, Mejelle.

Appeal from the judgment of District Court of Jaffa dated the 27th November, 1924, whereby the Appellants' action claiming pre-emption (Shuf'a) in certain shares in the house in dispute was dismissed.

JUDGMENT.

The right of pre-emption (Shuf'a) exists for the purpose of enabling an owner of property to prevent a stranger being forced upon him as a co-owner or neighbour by purchase.

In the present case the purchaser already owns a share of the property, and would himself be entitled to exercise the right of Shuf'a in the event of a sale of a share of the property to a stranger. No ground therefore exists for allowing the Appellant to exercise the right of Shuf'a.

The appeal is dismissed with costs.

Judgment to be notified to the parties through Land Court of Jaffa.

Delivered the 8th day of August, 1925.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 94/25.

BEFORE:

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

IN THE CASE OF:

Sheikh As'ad Shuqeiri — APPELLANT.

VS

Zahra Bint Kamel El-Moghraby, the Widow of Ahmad Saleh Nour — RESPONDENT.

Claim for pre-emption in miri land upon which trees planted and buildings erected before Law of Disposition of 1331 — Claim by co-owner — Right of prior purchase of miri (Awlawie) distinguished from pre-emption of mulk (Shuf'a) — Arts. 41, 44 Land Code — No right of pre-emption as regards trees or buildings — Art. 1019, Mejelle.

JUDGMENT.

The property in respect of which this claim for pre-emption (Shuf'a) is made by the Respondent, is a share in Miri Land upon which trees have been planted and buildings erected before the Law of Disposition of 1331, with the trees and buildings thereon.

The Respondent at first claimed priority of purchase (Awlawie) under Article 41 of the Land Code and her action has been dismissed.

She is now claiming pre-emption (Shuf'a) on the ground that the land has acquired the character of mulk.

As regards Miri Land, however, which has been planted or built upon, the first right of purchase is vested by Article 44 of Land Code in the owner of the trees.

And as regards the trees or buildings themselves, no right of Shuf'a exists under Article 1019 of the Mejelle.

Hence it is clear that the Respondent cannot claim to take over the purchasers' share in the trees and buildings and so long as that share is vested in the purchaser, he has (under Article 44 of the Land Code) the first claim to the land on which they stand.

The appeal is allowed. The judgment of the Land Court is set aside and the Respondent's claim is dismissed with costs here and below, including £E.10 advocates' fees and expenses.

Delivered the 17th day of March, 1926.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 20/31

BEFORE:

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

IN THE CASE OF:

Hanna Mousa Mitri — APPELLANT.

vs

Ismail Abu Shahin — RESPONDENT.

Legal formalities required in exercise of right of pre-emption — Correct name of purchaser not stated in exercise of formalities.

Appeal from the judgment of the Land Court of Jaffa, dated the 4th March, 1931.

JUDGMENT.

This is an appeal from the judgment of the Land Court whereby they decided that the Appellant had failed to exercise his right of pre-emption against the actual purchaser so far as the formalities required by law were concerned, inasmuch as the said Appellant did not throughout the three formal stages of pre-emption quote the correct name of purchaser.

The allegation of Appellant is that the mistake in the first name of the purchaser upon the second declaration (Ishad) is a mistake that appears on the record only and is a clerical mistake. Appellant alleges that he did in fact mention the correct name to Wadie Talamas and Elias Buzwa.

The Court below should have heard the evidence of these witnesses before deciding this point.

As to the mistake in naming the father of the purchaser, we are of opinion that this is not a material mistake so long as the person intended was in fact the right person.

The case is, therefore, remitted for completion. Costs to be costs in the cause.

Delivered the 17th day of November, 1931.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 44/32.

BEFORE:

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

IN THE CASE OF:

Salimeh Bint Ahmad El-Musleh — APPELLANT.

VS

Abdallah Yehia — RESPONDENT.

Legal formalities required in exercise of right of pre-emption — Right of pre-emption destroyed by offer to purchase made to seller — Art. 1024, Mejelle.

JUDGMENT.

The Appellant admits in her appeal that she approached the Respondent with a view to purchasing the land from him before she commenced her action for pre-emption (Shuf'a).

It follows that, by virtue of Article 1024 of the Mejelle, her right of pre-emption is destroyed.

The appeal is dismissed with costs.

Delivered the 1st day of May, 1933.

In the Land Court of Jaffa.

L.Ja. No. 47/33.

BEFORE:

Copland, J. and Mani, J.

IN THE CASE OF:

Israel Halevy — PLAINTIFF.

vs

J. Halperin
A. Ratner
S. Levy — DEFENDANTS.

Legal formalities required in exercise of right pre-emption — Delay held to destroy right of pre-emption.

This is an action for Shuf'a brought by Mr. Israel Halevy against three Defendants, Messrs. Halperin, Ratner and Levy.

The case has been extremely well argued by both sides, and it is not due to any lack of respect to the arguments of Mr. Goitein if I say straightaway that the Plaintiffs' action fails. The case depends purely on questions of fact and on the credibility of evidence.

We have heard many witnesses called by both the Plaintiff and by the Defendants. We have carefully considered the evidence and we have come to the conclusion that the tale told by the Defendants' witnesses is the true one. We place considerable reliance on the evidence of Hanna Eff. Salah, the Municipal Engineer, and the Surveyor Mr. Penn, and we are satisfied on the balance of the evidence we have heard that the Plaintiff paid a visit to the office of the Defendant Mr. Ratner in July after Mr. Ratner had obtained the Kushan for this particular property and discussed the question of roads, and we are further satisfied that on the occasion of this visit the Plaintiff was aware that Mr. Ratner had the Kushan of his property.

It has been argued that in the case of Shuf'a the right does not arise unless and until the person who claims the Shuf'a has been informed of the price with which the property has passed. We can find no foundation in law of that theory. It has been laid down by judgments of the Supreme Court of this country that the moment a person learns that the property had been sold he must

immediately take steps to exercise his right of Shuf'a and the slightest delay in so doing would defeat this right.

We are satisfied that the Plaintiff knew that this property had been sold to Messrs. Ratner and Co. in the second part of July. He did not claim Shuf'a until August the 6th, and the delay would destroy his claim.

In the circumstances, therefore, the Plaintiffs' action fails and must be dismissed with costs and LP.6 advocate's fees.

The provisional attachment granted on the 31st August, 1933, automatically lapses.

Delivered the 9th day of October, 1933.

PRESCRIPTION —

SEE LIMITATION OF ACTIONS.

PRESIDENT OF DISTRICT COURT.

In the High Court of Justice.

H.C. No. 34/26.

BEFORE:

The Chief Justice and Jarallah, J.

IN THE CASE OF:

Lulu Abdallah Lulu
Nabiha Abdallah Lulu — PETITIONERS.

VS

The Chief Execution Officer, Jaffa
Muhammad Shaaban Hindi — RESPONDENTS,

Discretion of President of District Court as Chief Execution Officer to stay sale — Execution of mortgaged premises — Discretion of Chief Execution Officer under Transfer of Land Ordinance, 1921.

Application for an order to issue against the Chief Execution Officer setting aside his order of the 12th February, 1926, for the stay of sale on payment of £E.200 at once and the remainder at the rate of £E.100 a year and requiring him to proceed with the execution and sale of the property mortgaged by the Respondent with the Petitioners.

ORDER.

The Court upon hearing Hassan Eff. Budeiri on behalf of the Petitioner, and in absence of the Respondents who were duly notified:

It is ordered that the order asked for be refused and the petition dismissed. The order to show cause dated 22nd May, 1926, will have to be discharged.

There is no authority limiting the discretion conferred upon the President of the District Court by the Transfer of Land Ordinance, No. 2 of 1921, to accepting a settlement only up to the date of an order for sale so that he may not accept a settlement after making an order for sale.

Delivered in the presence of the advocate of Petitioners the 24th day of July, 1926.

In the High Court of Justice.

H.C. No. 37/26.

BEFORE:

The Chief Justice and Seton, J.

IN THE APPLICATION OF:

Dimitri Pritchen — PETITIONER.

vs

The District Commissioner, Jerusalem
The Chief Execution Officer, Jerusalem
Head of the Russian Eccl. Mission — RESPONDENTS.

Discretion of President of District Court as Chief Execution Officer—Chief Execution Officer ordered to exercise his discretion in conformity with Section 2, Transfer of Land Ordinance, 1921.

Application for an order to issue against the Chief Execution Officer requiring him to execute the judgment in favour of Petitioner against the Russian Ecclesiastical Mission in Palestine.

ORDER.

The Court upon hearing Mr. Friedenberg, advocate, on behalf of the Petitioner, Mr. Kermack, Government Advocate on behalf of the Attorney-General and Mr. Faraj on behalf of Archimandrite Meletios orders and it is hereby ordered as follows:—

That the Chief Execution Officer in the District Court of Jerusalem with regard to the execution of the judgment of the Petitioner against the Russian Eccl. Mission by sale of the immovable properties of the said Mission, do exercise his discretion in conformity with Section 2 of the Land Transfer Ordinance, 1921, and not otherwise.

Petitioner to get costs.

Given and delivered in presence the 21st day of May, 1926.

In the High Court of Justice.

H.C. No. 33/27.

BEFORE:

The Acting Chief Justice and Frumkin, J.

EX-PARTE APPLICATION.

IN THE CASE OF:

Lewis Levinson — PETITIONER.

vs

The Chief Execution Officer, Jaffa
Dov Ber Spak Labsovsky
Mrs. Doba Spak Labsovsky — RESPONDENTS.

Discretion of President of District Court as Chief Execution Officer—Discretion under Transfer of Land Ordinance, 1921, not interfered with by High Court.

JUDGMENT.

Petition dismissed. It is not for this Court to interfere with the exercise by the President of the District Court of the discretion conferred upon him, by Transfer of Land Ordinance No. 2 of 1921.

Delivered in presence of Petitioner the 25th day of April, 1927.

Before the Chief Execution Officer, Jaffa.

C.E.O. Ja. No. 2856/28.

IN THE CASE OF:

Isaac Aharon — APPLICANT.

vs

Eliezer Muller — RESPONDENT.

Foreclosure of mortgage by Chief Execution Officer — Right of mortgagor to set up defence of usurious interest — Foreclosure proceedings not a Court "action" — Chief Execution Officer not a "Court" — Defence of usurious interest to be raised only by defendant — Usurius Loans (Evidence) Ordinance, 1922.

ORDER.

The Usurious Loans Ordinance gives this defence on any action for debt, under bill of exchange, promissory note, or admission or acknowledgement of debt and therefore a mortgagor has this statutory right of defence.

The Land Transfer Ordinance (No. 2) [Bentwich Vol. 1, p. 64, printed as Section 13 (1)] says that the "Courts" may order sale and in Section 13 (2) that such applications are to be made to the President of the District Court. From this it would appear that foreclosure proceedings are "Court" proceedings and therefore that the mortgagor who is defendant in foreclosure proceedings can raise this plea of excessive interest in such proceedings. But there is a decision of the High Court that applications for foreclosure are not actions and therefore should not pay the fees prescribed on an "action". I therefore in view of this High Court's decision must hold, that I am not a "Court" and therefore cannot hear this statutory defence. The District Court Jaffa has held that only a defendant in an action can raise this defence.

The mortgagee will not bring an action and therefore the mortgagor cannot be defendant in "an action" unless in bringing an action before the District Court claiming an injunction against the mortgagee against claiming excessive interest, he be regarded as action as Defendant, being in fact defendant in foreclosure proceedings. In other words "defendant" must be held to include a defendant in foreclosure proceedings unless a mortgagor is to be deprived of his statutory defence.

This I cannot do myself without an order from the High

Court and I must therefore, I admit with reluctance, refuse the application for stay and order sale of the mortgaged property.

Made the 6th day of July, 1928.

In the High Court of Justice.

H.C. No. 45/32.

BEFORE:

The Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:

Ahmad Mustafa Ahmad el Musa, as one of his late father's heirs and on behalf of the other heirs — PETITIONER.

vs

The Chief Execution Officer, Jaffa
Zeinab bint Handan Abdel Hamid — RESPONDENTS.

Discretion of President of District Court as to making or refusing orders of sale in execution of judgment — Section 2, Transfer of Land Ordinance No. 2 of 1921 — Jurisdiction of High Court to interfere where discretion of President unreasonably exercised.

Application for an Order to issue to the first Respondent directing him to show cause why his order dated the 13th May, 1932, should not be set aside.

JUDGMENT.

Under the Transfer of Land Ordinance No. 2 of 1921, the President of the District Court has a discretion as to making or refusing orders of sale in execution of a judgment.

There is nothing in this case to suggest that such discretion has been exercised unreasonably; and this Court has therefore no ground for interfering with the Order made by the President of the District Court.

The Order of this Court made on the 19th October, 1932, is discharged, and the petition is dismissed with costs.

Delivered the 23rd day of March, 1933.

In the High Court of Justice.

H.C. No. 50/32.

BEFORE:

The Senior Puisne Judge and Khayat, J.

IN THE APPLICATION OF:

Yola Shehab — PETITIONER.

vs

The Chief Execution Officer, Haifa
Hanna (John) Nasr Abyad — RESPONDENTS.

Discretion of President of District Court as to making or refusing orders of sale in execution of judgment — Order postponing sale conditional upon payment by mortgagor of instalments held invalid— Section 2, Transfer of Land Ordinance, No. 2 of 1921.

ORDER.

The President of the District Court has made an order postponing the sale of the mortgaged property for six months, conditional upon payment by the mortgagor of £P.500 within 15 days of his order, and of instalments at the rate of £P.200 every three months.

Under the Transfer of Land Ordinance No. 2 of 1921, Section 2, the President of the District Court has power to order postponement of sale of mortgaged property upon the grounds therein mentioned. But the section does not confer upon the President of the District Court the power to make such postponement conditional upon payment of the mortgage debt by instalments, or to order that the debt shall be so paid.

It follows that the Order made in the present case by the President of the District Court was in excess of the powers conferred upon him by law, and must be set aside.

The Order of this Court, dated the 20th September, 1932, will be made absolute.

Delivered the 21st October, 1932.

PREVENTION OF CRIME.

In the High Court of Justice.

H.C. No. 39/27.

BEFORE :

The Chief Justice and Frumkin, J.

IN THE CASE OF :

Absieh Ibrahim & Others — PETITIONERS.

vs

The District Commissioner, Jerusalem District — RESPONDENT.

Persons placed under police supervision — Persons confined to certain area under Prevention of Crime Ordinance, 1920-21 — Magisterial power of District Commissioner under Prevention of Crime Ordinance, 1920-21.

Application for an Order to issue to the Respondent setting aside his Order dated the 21st May, 1927, made under the Prevention of Crime Ordinance, 1920-1921, for the confinement of the Petitioners within different towns within Palestine other than their own village.

JUDGMENT.

The power was exercised magisterially and the District Commissioner was expressly invested with the power irrespective of the provisions of Magistrate's Courts Jurisdiction Ordinance, 1924.

The application is dismissed.

Delivered in presence the 27th day of June, 1927.

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

M.A.D.C. Jm. No. 29/28.

BEFORE :

Baker, J., Grieve, J. and Said, J.

IN THE CASE OF:

Daher Dana
Rashid Dana — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Bonds required by District Commissioner to be of good behaviour and to reside within certain area — Persons confined to certain area under Prevention of Crime Ordinance, 1920-21 — Magisterial power of District Commissioner — No appeal from decision of District Commissioner.

JUDGMENT.

A petition has been lodged in the form of an appeal applying for the setting aside of a decision of the District Commissioner, Southern District, whereby he sentenced the two Appellants inter alia to execute bonds to be of good behaviour and for one to reside in Nablus under the Prevention of Crime Ordinance, 1920-1921.

The Court of Appeal has decided in High Court Case No. 39/27 that the powers exercised by the District Commissioner under the before-mentioned Ordinance are exercised magisterially and that a District Commissioner is expressly invested with such powers irrespective of the provisions of the Magistrates' Courts Jurisdiction Ordinance, 1924.

Now there is no provision in the Prevention of Crime Ordinance, allowing an appeal, and it having been decided that the powers conferred on a District Commissioner under the said Ordinance are irrespective of the provisions of the Magistrates' Courts Jurisdiction Ordinance, 1924, it must necessarily follow that there is no appeal from a District Commissioner under the Ordinance.

Therefore the appeal is hereby dismissed.

Dated the 27th day of April, 1928.

PRIOR PURCHASE.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 21/24.

BEFORE:

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

Limitation of actions on right of prior purchase — Suspension of period of limitation during period when Courts closed — Art. 16, Proclamation for Establishment of Courts, 24th June, 1918 — Laches of claimant in commencing action as bar to claim — Art. 41, Land Code.

JUDGMENT.

The Court finds that the Land Court is not included within the Courts which were constituted in accordance with the Ordinance issued in July, 1918, therefore the provisions of Article 16 do not apply to priority claims according to Article 41 of the Land Code. It is unjust that when the Courts are in general closed the Petitioner should lose his rights where the period of prescription has elapsed before the Courts were opened, but in this case the Plaintiff waited about two years after the Land Courts were opened.

Whereas the said time has elapsed without the Plaintiff lodging any claim, this shows negligence on her part to defend her rights and her negligence prevents her benefiting from rights which are given by law.

Therefore it is decided to set aside the appeal for the said reasons and not for the reasons on which the Land Court has relied.

Delivered the 10th day of September, 1924.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 5/27.

BEFORE:

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

IN THE CASE OF:

Haj Saleh Agha Abu Ramadan — APPELLANT.

VS

Selim Ben Mahmud — RESPONDENT.

Land of village held in common tenure — Purchase by stranger of land of village — Right of prior purchase of village land confined to villagers — Limitation of action on right of prior purchase — Closing of Courts as excuse to interrupt running of prescription — Arts. 8, 41, Land Code — Land Court not bound by rules of evidence — Sec. 7, Land Courts Ordinance, 1921 — Right of prior purchase only effective when possession of miri land is in accordance with law.

Appeal from the judgment of the Land Court of Jaffa, dated 26th November, 1929.

The facts of the case are as follows:

In the District of Gaza there is a village called "Al Yeih" registered in the Land Registries as "partitioned" but in fact it is held by the people of the village in what is called "common tenure" as is the practice hitherto adopted in that district. The lands of the said village are represented by two plots, one called "Kiblieh" and the other "Nakoura".

The Appellant and Respondent in this case are of Gaza and not of the said village.

The Appellant has the right to be in possession of certain specified shares, but his title deed indicates his possession of divided or separated plots since the years 1316, 1317, 1325.

The Respondent also bought certain shares in the lands of the village and his title deed indicates his purchase of divided and separated plots, similar to that of Appellant since 1331 (1921).

On January 23rd, 1923, in accordance with Article 41 of the Land Code, he claimed, by way of priority, those shares bought by the Respondent on the ground that he was a partner (or co-owner) in the two plots, and that Respondent was a stranger to the village.

The Land Court dismissed the action of the Appellant on the ground that the claim by way of priority was prescribed (in spite of the existence of excuses) in accordance with Article 41 of the Land Code which disregards any excuse. This was on May 7th, 1924.

Appellant launched an appeal stating that the excuses disregarded by Article 41 do not include the period during which the Palestine Courts were closed.

In the Court of Appeal it was decided by majority to deduct

the period during which the Courts were closed and to restrict the excuses to lunatics and minors, and further to remit the papers back. This was on May 7th, 1925.

The Land Court again dismissed the case but on different grounds. It is against this judgment that the present appeal stands.

On perusal of the judgment of the Land Court it will appear that the case was dismissed on grounds, the most important of which were:—

FIRST:

That the Respondent was not a stranger to the village and that he owned property therein since 1324, and that his last purchase was with the consent of the Appellant.

SECOND:

(A ground of legal importance) the restriction of the right of priority to the partner in a partitioned or separated land, to the exclusion of the partner in the whole lands of the village held by the people in common, is contrary to Article 8 of the Land Code.

The main objections of Appellant were that the Land Court has on the strength of personal evidence found that the Appellant has abandoned his right of priority when the Respondent purchased the land. This, however, is not sufficient. The above should have been proved by documentary evidence in accordance with the commentary to Article 11 of the Tabou Regulations.

That the "common tenure" referred to in Article 41 was absolute whether it referred to separate plots or to the whole lands of the village.

The Court holds that the intention of Section 7 of the Land Courts Ordinance and all the rules thereof is to the effect that the Land Court is not at all bound by the rules of evidence. The Law has conferred on it an absolute discretion, and, consequently, the first objection of Appellant falls to the ground.

The right of priority is only effective when the possession of miri land is in conformity with the provisions of the Land Code in all respects.

It is therefore decided to dismiss the appeal and to confirm the judgment of the Court below with costs.

Delivered the 11th day of July, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 15/27.

BEFORE:

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

IN THE CASE OF:

Sheikh As'ad Al-Shuqeiri — APPELLANT.

vs

El-Haj Khalil El-Taha — RESPONDENT.

Right of prior purchase held by joint owner of servitude — Share of rights over property (Khalit) — Art. 41, Land Code.

Appeal from the judgment of the Land Court of Haifa dated the 20th December, 1926.

JUDGMENT.

The Court holds that a person who shares in rights over property (Khalit) is entitled to priority (Awlawiyeh) in miri lands according to Article 41 of the Land Code.

Whereas the Land Court has not considered this point although Plaintiff claimed it and whereas it is necessary to hear evidence and to inspect the land in order to ascertain whether Plaintiff is a Khalit or not, therefore the judgment of the Land Court is set aside and the case remitted for necessary action and fresh judgment to be given. Costs to be costs in the cause.

Delivered the 26th day of July, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 36/27.

BEFORE:

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

IN THE CASE OF:

Abd Er-Rahman Mukhtar,
Darweesh Sayed Ali Agha Kurdi
Ahmad Sayed Ali Agha Kurdi — APPELLANTS.

vs

Haj Khalil Taha — RESPONDENT.

Transfer of land of village to inhabitant of other village — Right of prior purchase by co-villagers — Art. 45, Land Code, applied to village only and not to town like Acre.

Appeal from a judgment of the Land Court of Haifa dated 10th February, 1927.

JUDGMENT.

After hearing Mr. M. Moghannam on behalf of the Appellants and Sheikh Said Kassab on behalf of the Respondent, the Court holds that Article 45 of the Land Code must be applied to a village only, and not to a town such as Acre.

The appeal is dismissed with costs (£E.6 advocates' fees and expenses).

Delivered the 14th day of June, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 59/27.

BEFORE:

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

IN THE CASE OF:

Muhammad Hussein Muhammad El-Absi — APPELLANT.

vs

Jamil Na'aman El-Alami
Sudki Na'aman El-Alami — RESPONDENTS.

Sale of undivided share in village meshaa — Right of prior purchase not extended to unpartitioned share in meshaa land — Scope of Arts. 41, 42, Land Code.

JUDGMENT.

This is a case in which all the cultivable land of the village of Jasair is held in defined undivided shares which are redistributed at regular intervals.

The Appellant has a title deed for the share to which he is entitled as heir of an ancestor who owned one out of forty-two and a half sikkehs. The Respondents are also the holders of certain shares, and they have recently bought a further share from another owner. In this the Appellant claims to exercise a right of priority (awlawiyeh) under Article 42 of the Land Code.

Article 8 of the Land Code intended that where the whole land of a village was held in undivided shares, it should be partitioned, and that each of the persons entitled should be given a separate piece of land and a Kushan for it.

After this step has been taken the provisions on Articles 41 and 42 would apply to land which by devolution on death or otherwise passed into joint ownership; but we hold that until the provisions of Article 8 are complied with, Articles 41 and 42 do not apply, and a person who holds an undivided share in the general meshaa of a village cannot invoke their aid and claim priority of purchase (awlawiyeh).

The appeal is dismissed with costs.

Delivered the 13th day of October, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 61/27.

BEFORE:

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

IN THE CASE OF:

Salem Habib and Others — APPELLANTS.

vs

The Palestine Land Development Co. — RESPONDENT.

Time for claim of prior purchase is one year — Art. 45, Land Code — Limitation of actions on right of prior purchase — Judgment in favour of person claiming prior purchase to be executed within reasonable time — Necessity of Court declaration to confirm lapse of legal right.

JUDGMENT.

Article 45 of the Code, under which the Appellants have claimed and been awarded awlawieh, allows the claimant one year within which to make his claim. It is clearly the intention of the law that such a right shall not remain in suspense over the head of a purchaser until barred by the lapse of fifteen years and it would be very unreasonable if such were the case. Such, however, would be the effect of the Appellants' present claim.

We hold that a person claiming awlawieh must be prepared to give effect to his claim within a reasonable time after judgment

is given in his favour; and that it is for the Court in each case to decide what is a reasonable time for completion having regard to all the circumstances of the case. In this case the Court fixed two months and we see no ground for revising their decision.

The Land Court has empowered the Respondent company, in the event of the Appellants not completing within two months, to apply to the Court for a declaration that they have abandoned their right.

In our view such declaration is unnecessary. If the persons entitled to awlawieh fail to exercise their right within the time allowed by the Court, the right lapses without the need of any declaration.

No appeal, however, has been made on this point, and hence we cannot amend the judgment of the Land Court in this respect, and the Respondent company should apply to the Land Court for a declaration.

The appeal is dismissed with costs here and below.

Delivered the 9th day of July, 1928.

In the District Court of Nablus.

C.D.Na. No. 30/29.

BEFORE:

The Acting President (Sherwell, J.) and Dajani, J.

IN THE CASE OF:

Hussein Moussa Serouji
and Others — PLAINTIFFS.

vs

Keren Kayemeth Le-Israel, Limited — DEFENDANTS.

Lands sold by public auction in satisfaction of mortgage indebtedness—Claim for prior purchase of such land sold by Chief Execution Officer — Claim of jiftlik — Rights of cultivators — Application of Article 45, Land Code—Transfer of land as between co-villagers—Articles 41, 44, 45, Land Code — Matter res judicata.

JUDGMENT.

This is an action by the Plaintiff Hussein Moussa Serouji, mukhtar of Wadi el Hawareth, and four other inhabitants of Wadi

el Hawareth against the Defendants who are a limited company known as the Keren Kayemeth Le-Israel Ltd., Jerusalem.

The claim relates to the lands which comprise some 30,000 dunams of Wadi el Hawareth or to some portion thereof. These lands were mortgaged by Anton Bishara Tayan to Mouri Estrangin for 15,000 Napoleons. The heirs of the mortgagee obtained an order for sale under the Transfer of Land Ordinance, No. 2, 1921, and the lands were put up for sale by public auction, and were purchased through the Execution Office by the Defendants for £P.41,000. The sale and transfer were completed and the lands were duly registered in the name of the company by order of the President of the District Court acting in his capacity as Chief Execution Officer.

Later, the Plaintiffs instituted the present proceedings asking in the beginning for a declaration that they are entitled to ask and claim the said lands or some portion thereof, that is to say, claiming the right to take same by priority (Awlawieh) as against the Defendant company on payment of "Bedl el Misel", such claim being based on Article 45 of the Land Code (Tute's Ottoman Land Laws, p. 50).

It is not denied that the claim was lodged within the period of one year as required by the said article.

It is unnecessary to refer in detail here to all the different stages and phases through which these proceedings have passed except to state that at the Plaintiffs' request made on 23th February, 1933, the Court as at present constituted decided to hear the proceedings ab initio in consequence of the Court's ruling of 14th February, 1933. Whereupon in re-opening their case the Plaintiffs modified their original claim under Article 45 of the Land Code, or as an alternative thereto, relied upon Article 3 of the Law Concerning Land of 7th Moharrem, 1293 (22nd January, 1909), Tute, p. 152, claiming thereunder that the lands in question being jiftlik, they, as cultivators residing thereon, enjoy a preferentia right (Hak er Rajahan) to acquire the said lands or some portion thereof.

It should be noted here that although this law of 1293 was referred to by the Plaintiffs for the purposes of analogy, in the original proceedings, it does not appear to have been relied upon by the Plaintiffs as the basis of their claim as then presented. This may be because the Defendants originally contended that the lands

in question were jiftlik and therefore Article 45 of the Land Code could not be applied.

However that may be, the Plaintiffs, further to their claim under the law of 1293 or in the alternative, have pleaded that the above mentioned auction sale proceedings by the Chief Execution Officer are void because as Plaintiffs now allege, they were fictitious or collusive or voluntary, although in appearance "compulsory" and "correct in form". It is said that the auction sale was merely a cloak and the result of a collusive prior agreement between the mortgagors and the actual purchasers at the auction proceedings (namely Defendants here) but it is not alleged that the President as Chief Execution Officer had any knowledge of, or was a party either to the agreement or collusion, which is alleged. Moreover, the Plaintiffs admit that the sale was through the Execution Office and correct in form.

Finally in suppott of such allegations the Plaintiffs ask to call Mr. Hankin and the representatives of the Defendants as their witnesses to prove the original (sic collusive) agreement.

I will deal now with these four contentions of the Plaintiffs in the above mentioned order. It is quite clear that in so far as the claim here can be or is based upon Article 45 of the Land Code it must fail having regard to the judgment of the Court of Appeal in Spectoroff vs Kupath Milveh Haklaith Cooperative Society Ltd., (L.A. No. 64/32)*) which is binding upon us and which decided that Article 45 does not apply where land is sold in execution proceedings, thereby impliedly confirming the reserved or considered judgment of His Honour Judge Webb, the then President in the original proceedings before this Court.

As to the Plaintiffs' further or alternative claim under Article 3 of the Law concerning Land dated 7 Moharrem 1293 (2nd January, 1291) this Article translated from the original Turkish text by Ongley (Ongley's Ottoman Land Code p. 259) reads as follows:—

> "Farmers who are cultivators in certain jiftliks, and who are moslem or non-moslem subjects, shall have preference at the time when land sold by auction or alienated by private individuals is being received".

Fisher's translation (Fisher's Ottoman Land Laws, Article 45, p. 72) reads thus:—

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*) see ante, p. 1908.

"Moslem and non-Moslem cultivators residing in certain jiftliks shall enjoy a preferential right to acquire land sold by auction or transferred by private persons."

A third translation made directly from the Turkish text for me by the interpretor reads as follows :—

"Moslem and non-Moslem cultivators found in certain jiftliks shall have right of preference in lands sold by auction or transfer (Wakti Tafawoud ve Tafarrough) Wakt il Tafawoud wel Faragh".

It is interesting to compare these translations with that of Article 45 of the Land Code which according to my interpreter reads thus when translated directly from the Turkish :—

"If the possessor, by title-deed, of lands lying within the boundaries of a village transfers them to a person of the inhabitants of another village, the persons of the inhabitants of the village in which the said lands lie who are in strong need of the lands are entitled to ask and claim them within one year by Bedl el Misl." Here the words and phraseology are different from those used in Article 3 of the Law of 1293.

I will say here that the views I have formed on this point are based upon the assumption that the lands to which the Plaintiffs claim a right of preference do in fact fall within the category of "Jiftliks" referred to or intended (but not actually specified) in Article 3 of the above-mentioned law. Perhaps I should remark here that neither the form nor the particulars of the Plaintiffs' claim as originally produced to this Court appear to suggest that this is the actual fact, nor do I find any indication of this in the Tabu registrations. I find it, therefore, somewhat difficult in the circumstances here to assume on the proofs before me that these lands or any part thereof are jiftliks or form part of any jiftlik within the meaning of that term as defined and referred to in Articles 131 and 31 of the Land Code. (Tute, p. 149-50, Goadby and Dukhan pp. 55 and 72, et sequitur and 254-5) In fact one of the Plaintiffs' advocates originally drew the Court's attention to buildings in the Kushans of Tabu or Tabu extracts thereby distinguishing this land from jiftlik.

However that may be, I am satisfied that the same principles, which underly the judgments referred to above should be applied even in the case of a "forced" sale of jiftlik lands in execution proceedings. It is admitted by the Plaintiffs now that the

alleged jiftlik lands here were in fact sold in execution proceedings, and one of their advocates in the original proceedings, moreover, stated that they were sold by the Chief Execution Officer's order and this without any apparent contradiction at the time by any of his colleagues.

Therefore, although Article 9 of the Law of 1293 is not specifically mentioned in any of the judgments under reference (though it was referred to during the particular proceedings before the Court of Appeal and His Honour Judge Webb), nevertheless I think that I am bound here by the principles of or ratio decidendi in the said judgment of the Court of Appeal. Apart from the foregoing I base my opinion in particular on the following grounds.

The only decision of importance brought to my notice which may be interpreted in a contrary sense is that of the Turkish court of Cassation (No. 85, 25th August, 1330). As I understand the facts and judgment in that case, the matter there concerned a claim under Article 41 of the Land Code by a co-owner and/or co-sharer in a certain garden and field which had already been sold by auction by the Agricultural Bank in satisfaction of a debt due to the said Bank. The co-owner in question proved by Tabu extract his co-ownership in the land in dispute.

Plaintiffs' advocate here, in the original proceedings himself contended that a co-owner etc., and villager are preferred to a cultivator as regards right of "awlawieh" and Article 3 of the Law of 1293 deals only with the right of hak or rajahan of cultivators (i.e. right of preference). Moreover, there is no mention of Bedl el Misl in the Turkish text of Article 3 of the Law of 1293, whereas in the Turkish text of Articles 41, 44 and 45 this term is specifically adopted.

Lastly, the decision in question was delivered before the Provisional Law of Mortgage, 1331, and the Mortgage Law Amendment Ordinance, 1921-22. For these reasons, I consider that case is distinguishable from the present one, the auction proceedings in 1330 moreover, being entirely different from those in the present one which were made through the President District Court acting as Chief Execution Officer.

Again, looking at Article 3 of the Law of 1293, I have come to the conclusion that it refers only to voluntary sale, i.e. "sales by the owner" and I think the same reasoning must apply in the application of this Article as adopted in the learned judgment of

His Honour Judge Webb, with which I desire here to associate myself. In any event, I hold that this Article never could have been intented to include and cannot be applied to sales in the execution proceedings effected under the Law of 1331, and the above mentioned Ordinance of 1920 and 1920-21. On the other hand, if this particular law is to be distinguished from Articles, 41, 44 and 45, then I think that the term "preference right" (hak er rajahan) used in Article 3 of the Law of 1293 refers to a right which must and can only be exercised "at the time of auction" or "at the time of transfer". In support of this it is to be noted that whereas in Articles 41, 44 and 45 a specific period is mentioned in each Article limiting the right, nevertheless in Article 3 of the said law no such period of limitation is mentioned for the very good reason that it must and can only be exercised at the time either of the auction or transfer, such being the intention of this law. The Plaintiffs on the contrary, relying upon the term "bedl el misl" have always contended that their priority right (right of awlawieh) arises only after sale is completed and transfer has been effected. But the right of awlawieh (priority) must be distinguished from that of hak er rajahan (preference right) since the former only arises under Articles 41, 44 and 45 of the Land Code and not under Article 3 of the Law of 1293 which deals with the latter.

As to Plaintiffs' third contention, in my opinion there is no foundation in law or in fact for such, particularly having regard to the admission of the Plaintiffs made through their advocates in these proceedings.

In any event, having regard to their own conduct and to the judgment of the High Court No. 25/30 which was given in regard to these execution proceedings, I must hold that they are estopped now from alleging that the said proceedings were not carried out in accordance with law. Further, I fail to see how an agreement such as is alleged, assuming it to be true, could affect such proceedings in law, it being admitted that, the Chief Execution Officer was not a party to it in any way, and the High Court has already held at least impliedly that the actual execution proceedings concerned were lawfully conducted. Further, and having regard to what I have just said I do not think that the Plaintiffs' fourth point arises here and there can be no question now of this Court hearing any evidence thereon or of the nature indicated by the advocate for Plaintiffs. The question of the validity of the

auction proceedings authorised and confirmed by the Chief Execution Officer has already been decided by the High Court in File Case No. 25/30 in favour of their validity. Plaintiffs, or one of them at least might have raised this point there in its present form, though it appears that this was not done. In any event in my opinion the matter is res judicata, and even if I am wrong in so holding I consider that this Court having regard to the provisions of Section 6 (b) of the Courts Ordinance, 1924-25 (Bent. Vol. I, p. 406, and p. 151) and Section 4 of the Land Courts Ordinance, 1924, has no jurisdiction to deal with such a question.

For these and the foregoing reasons I hold here that the Plaintiffs' action fails and must be dismissed.

Judgment delivered in presence of parties and subject to appeal.

PRIVY COUNCIL.

In the Supreme Court sitting as a Court of Appeal.

P.C.L.A. No. 21/25.

BEFORE:

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

IN THE CASE OF:

Gargur — APPLICANT.

vs

The Armenian Convent — RESPONDENT.

Leave to appeal against judgment of Court of Appeal — Extension of time for leave to appeal to Privy Council—Conditions on which provisional leave granted not fulfilled within period prescribed — Final leave to appeal refused — Article 20, Palestine (Appeal to Privy Council) Order-in-Council, 1924.

Application for final leave to appeal against the judgment of the Supreme Court of Palestine sitting as a Court of Appeal dated 29th July, 1925, whereby the action of the Petitioners claiming against the Respondent certain land was dismissed.

JUDGMENT.

The Court holds that when the period fixed by the Court for fulfilling the conditions subject to which leave to appeal was

granted has expired, the Court has no power to grant an extention of time.

Article 20 of the Palestine (Appeal to Privy Council) Order-in-Council, 1924, confers upon this Court a discretion in the case where an Appellant who has fulfilled the prescribed conditions has not prosecuted his appeal with due diligence. No such discretion is conferred where the Appellant fails to fulfill the conditions.

The Appellants have not fulfilled within the time prescribed in the order of this Court dated 24th October, 1925, the conditions upon which conditional leave was granted in that they have not taken the necessary steps for the purpose of procuring the record and the despatch thereof to England.

The Court cannot therefore grant final leave and the conditional grant of leave made by the said order must be rescinded, with costs.

Given and delivered in presence of the advocates of both parties the 21st day of February, 1926.

In the Supreme Court sitting as a Court of Appeal.

P.C.L.A. No. 10/26.

BEFORE:

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

IN THE CASE OF:

Shakib El Haj — APPLICANT.

vs

Shmuel Samuel Moyal — RESPONDENT.

Leave to appeal to Privy Council — Sufficient security for appeal not provided by Applicant — Article 6, Palestine (Appeal to Privy Council) Order-in-Council, 1924.

ORDER.

Petitioner asks for delay to put in sufficient guarantee. He is now out of time for producing a sufficient guarantee. The one month allowed has passed and the maximum under the Order-in-Council has passed.

Order giving final leave to appeal refused as the necessary conditions of formality and sufficient guarantee have not been complied with.

Delivered the 29th day of October, 1926.

In the Supreme Court sitting as a Court of Appeal

P.C.L.A. No. 17/26.

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

IN THE CASE OF:

Moshe Pinchasovitz — PETITIONER.

vs

Morris Litvinsky
Sara Litvinsky
Philip Kroll
Reichard Lipman
Emanuel Hagenlocher — RESPONDENTS.

Leave to appeal against judgment of the Court of Appeal—Failure of Petitioner to appear to ask for grant of final leave.

Application for final leave to appeal to His Majesty in Council against the judgment of the Supreme Court sitting as a Court of Appeal dated 22nd April, 1923.

JUDGMENT.

On the application of the Respondent, in the absence of the Petitioner and failure on his part to attend and ask for grant of final leave the petition for final leave is dismissed with costs. £P.2 advocate's fees to Morris Litvinsky and £P.4 advocate's fees to Sara Litvinsky and £P.8 in respect of the remaining three Respondents.

Delivered the 17th day of February, 1928.

In the Supreme Court sitting as a Court of Appeal.

P.C.L.A. No. 14/27.

BEFORE:

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

IN THE CASE OF:

Elie Zarifeh — APPLICANT & RESPONDENT.

VS

Menahem Shlomo Slonim — APPLICANT & RESPONDENT.

Application for leave to appeal from judgment of the Court of Appeal — Amount of security fixed by Court — Judgment of Court of Appeal carried into execution although appeal made to Privy Council — Article 6, Palestine (Appeal to Privy Council) Order-in-Council, 1924.

Application for leave to appeal against the judgment of the Supreme Court sitting as a Court of Appeal dated September 19th, (C.A. No. 19/27) to His Majesty in Council and cross application.

ORDER.

After hearing the Applicant Elie Zarifeh in person and Mr. H. B. Samuel for the other party, Menahem Shlomo Slonim, the Court orders and it is hereby ordered as follows:—

That leave to appeal be and it is hereby granted to Elie Zarifeh and Menahem Shlomo Slonim.

That the amount of security to be given by each side be £P.300.

That the parties do file the security and take the necessary steps within one month from to-day.

That the appeals of both parties be consolidated as regards the Record.

That the costs of preparation of the Record be borne by the parties in equal shares.

That the judgment of the Supreme Court dated the 29th September, 1927, be carried into execution on terms that the applicant Slonim do before execution thereof enter into good and sufficient security to the satisfaction of the Court for the due performance of such Order as His Majesty in Council shall think fit to make thereon.

Delivered the 11th day of January, 1928.

FINAL-ORDER.

After hearing Mr. M. Eliash for Elie Zarifeh and Mr. Horace B. Samuel for Menahem Shlomo Slonim, the Court is satisfied that the securities submitted by both Applicants are sufficient and that the necessary steps have been taken within the time granted by the Court and therefore grants final leave to appeal to both Appellants.

Delivered the 19th day of November, 1928.

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

P.C. of 1930.

BEFORE:
Viscount Dunedin, Lord Thankerton and Lord Russel of Killowen

IN THE CASE OF:

Yousef Mizrahi el Orfali — APPELLANT.

vs

The Attorney-General of Palestine — RESPONDENT.

Appeal to Privy Council from criminal conviction — Privy Council not a Court of Criminal Appeal — Failure of Court to hear evidence — Grounds of appeal to Privy Council — Miscarriage of justice by failure to lead evidence.

JUDGMENT.

VISCOUNT DUNEDIN: The case for the Petitioner has been argued with remarkable clearness and ability by the learned Counsel who has appeared on his behalf, but, in spite of what he has said, their Lordships feel that they cannot advise His Majesty to grant leave to appeal without interfering with the rule which they have again and again laid down, that they are not a Court of Criminal Appeal. This disposes once and for all of any question as to attacking the judgment come to, upon the ground of insufficiency of evidence and of discrepancies in the evidence, and so on. The point that is raised particularly in this case is that, there having been granted a new trial, which was granted partially upon the ground that in some matters the Court of Appeal was not quite satisfied with the evidence that had been before the first Court, and, secondly upon the ground that the

evidence of certain additional witnesses referred to by name was tendered, the first Court, on the re-hearing had heard those additional witnesses which they mentioned but has refused to hear another witness who was tendered—that witness's disposition not having been known to the Defendant's advisers at the time when they went to the Court of Appeal to apply for the new trial. The effect of the second trial was that the two Judges before whom the trial took place re-affirmed the original verdict, and then again there was an appeal taken to the Court of Appeal, and the Court of Appeal affirmed that decision. It is, of course, against that decision that the present application for a re-hearing before this Board is made.

The grounds of appeal are set forth in Section 64, Sub-Section (1), of the Trial Upon Information Ordinance, 1924. None of the grounds there could possibly be a matter of appeal to this Board except one, because they would all fall under the general view that this Board is not a Court of Criminal Appeal. One ground on which an appeal may come here is (c) "that evidence was wrongly admitted or excluded at the trial". Those are the words of the Ordinance, to which must be added, so far as we are concerned: "and the result is that a grave injustice has taken place". In the Ordinance there is put this proviso to the various grounds "Provided that the Court may, notwithstanding that they are of opinion that a point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred". It is perfectly impossible in their Lordships' view, to consider that the Court of Lordship's Appeal here, dealing with this matter and having the whole of the points necessarily put before them as they must have been, could have dismissed the appeal altogether unless they were of opinion that the additional evidence proferred really did not persuade them that there had been any miscarriage of justice by the additional evidence not having been led. I am not surprised at that, because I cannot help thinking that the evidence of identification of the place where the bodies were found is quite insufficiently made out by the Affidavit. I am not keeping out of view what the learned Counsel for the Petitioner said, that that may be so by itself but, if it is interwoven with other evidence given by other people, then it will be found there is identification, but that was a point which the Court of Appeal could determine, and therefore upon these grounds and simply following out regular

rule, their Lordships are unable to advise His Majesty that special leave to appeal to this Board should be granted.

Delivered the 25th day of July, 1930.

In the Supreme Court sitting as a Court of Appeal.

P.C.L.A. No. 4/32.

BEFORE:

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

IN THE CASE OF:

Anton Hanna Daoud
and two Others — APPELLANTS.

vs

Aziz Eff. Daoudi
and Another — RESPONDENTS.

Final leave to appeal to Privy Council — Lapse of time for appeal to Privy Council—Section 24, Palestine (Appeal to Privy Council) Order-in-Council, 1924 — Final leave cancelled for failure to prosecute.

JUDGMENT.

In view of the lapse of one year and twenty one days after the order giving final leave issued before this application was filed, we grant a certificate in terms of Section 24 of the Palestine (Appeals to Privy Council) Order-in-Council, 1924, that the appeal has not been effectually prosecuted and in consequence the appeal is deemed to stand dismissed as from this date.

No order as to costs as Abcarius Bey does not ask for them.

Delivered the 7th day of November, 1934.

PROCEDURE.

(SEE ALSO CIVIL PROCEDURE)

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 34/24.

BEFORE:

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

IN THE CASE OF:

Abdullah El-Khatib — APPELLANT.

vs

Ibrahim Bey El-Khalil — RESPONDENT.

Failure to submit written grounds of appeal — Good cause not shown for such failure—Rules of Court, Civil Appeals, of 1st June, 1921 — Art. 186, Ottoman Code of Civil Procedure.

JUDGMENT.

In accordance with the judgment of the Court of Appeal in the case of Iskandar Kassab and others v. Mubarak Ishak Jabrieh (Civil Appeal No. 162 of 1922), the Appellant having failed to submit written grounds of appeal and having shown no good cause for such failure, the appeal is dismissed with costs.

Delivered the 18th day of September, 1924.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 114/24.

BEFORE:

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

IN THE CASE OF:

Mrs. Sattnik Agob Maksudian — APPELLANT.

vs

Banco di Roma — RESPONDENT.

Right of cross-appeal — Cross-appeal dependent upon acceptance of appeal — Failure of cross-appeal together with appeal — Article 185, Civil Procedure Code.

JUDGMENT.

The Court holds that the right of a Respondent to appeal under Article 185 of the Code of Civil Procedure after the period otherwise allowed by law for the appeal has expired, depends upon the acceptance by the Court of the appeal of the Appellant. Thence if the Appellant's appeal is refused by the Court on the ground that the procedure prescribed by law has not been fulfilled by the Appellant, the Respondent's appeal, being dependent upon that of the Appellant, fails with it.

In the case cited, Iskander Kassab and Others v. Mubarak Jibriyeh (Civil Appeal No. 162/1922), no objection was raised to the hearing of the cross-appeal, on the ground that it was out of time, and the case is therefore not an authority on the points at issue.

The cross-appeal by the Bank is dismissed.

Delivered the 30th day of March, 1925.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 131/24.

BEFORE:

Seton, J., Jarallah, J. and Khayat, J.

IN THE CASE OF:

Heirs of the late Sa'd Ed-Din Pasha Qabbani — APPELLANTS.

vs

Heirs of Amineh Hanum Qabbani — RESPONDENTS.

Application for review of judgment — Contradictory judgments given by different Courts.

JUDGMENT.

The Appellants allege that a final judgment has been given by the Court of Appeal which is contrary to a final judgment given in the same matter by the District Court of Haifa and they apply for review.

The grounds upon which review may be had are set out in Article 27 of the Amendment to the Code of Civil Procedure.

They extend to cases where contradictory judgments have been given by the same Court but not to those in which contradictory judgments have been given by different Courts.

The present is a case where contradictory judgments have been given by different Courts and in our opinion review does not lie and the application should be dismissed with costs.

Delivered the 30th day of April, 1927.

In the District Court of Jaffa.

C.D.C. Ja. No. 302/26.

IN THE CASE OF:

Histadruth Mithyashwim — PLAINTIFF.

vs

Adib Bamieh — DEFENDANT.

Action by Company on agreement made by Company's agents in their own names — Personal liability of agent where principal is not disclosed — Art. 1461, Mejelle—Novation of contract defined—Novation held to be new contract.

JUDGMENT.

This is an action by the Plaintiff Company claiming damages from the Defendant for non-fulfilment of a contract to sell land.

By an agreement dated April, 1925, the Defendant agreed to sell to seven persons, named in the agreement, a plot of land at Salameh. These seven persons paid to the Defendant considerable sums on account of the purchase price, and further sums were paid by the Givat Rambam Society on the same account.

The Plaintiffs claim that these persons were their agents, and contracted this sale, not for themselves, but on behalf of the Plaintiffs and the latter are now suing on this agreement of April, 1925, alleging that the Defendant has made default in transfer of the land to them and claiming damages under the penal clause in the agreement.

The Defendant says that the Plaintiffs are not the proper persons to sue, inasmuch as they are not parties to the original agreement of 8th April, 1925.

Article 1461 of the Mejelle is very clear, and it appears from

this Article that unless an agent states that he is acting on behalf of a principal, the agent is the only person who can sue or be sued on the contract.

In the present case, nowhere in the agreement is it stated that these seven persons are acting on behalf of the Givat Rambam Society or of the Plaintiffs, and therefore leaving out of the question for the moment whether or not there has been a novation, in our opinion the present Plaintiffs are unable to sue on an agreement to which they were not parties.

The Plaintiffs further allege that there has been a novation of the old agreement by the Defendant in their favour. They say that the Defendant has admitted that the agreement was made for their benefit because he had taken part of the purchase price from them and given receipts to them, and has admitted that the land was sold to them.

In support of this agreement they produce "R". A novation is defined in Halsbury, Vol. 7 p. 505, as "a form of assignment in which by the consent of all parties, a new contract is substituted for an existing contract. Usually, but not necessarily a new person becomes party to the new contract, and some person who was party to the old contract is discharged from further liability The introduction of a new party prevents the new contract from being a mere accord without satisfaction and thus affords a defence to any action upon the old contract.

For novation to ensue there must be not only the substitution of some other obligation for the original one, but also the intention or animus novandi."

And on page 506 we find these words "Since novation is a new contract, it is essential that the consent of all parties shall be obtained".

I am not too sure that the doctrine of novation occurs in Ottoman Law, as neither myself nor my learned colleague can find anything in the Mejelle which bears upon this point, but assuming that it does, then we are not satisfied that such has occurred here. The consent of all parties has not been obtained, and without that consent there can be no novation.

By a novation a new contract is substituted for the old one which becomes cancelled. It cannot therefore be sued upon. If the Plaintiffs say that there is a new contract, then they must sue upon this new contract.

For these reasons we are of opinion that the Plaintiffs are not proper parties to sue upon the agreement of 7th April, 1926, and the action must therefore be dismissed with costs and £P.2 advocate's fees.

Dated the 1st day of December, 1926.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 205/26.

BEFORE:

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

IN THE CASE OF:

Jabrin Ibn Sheikh Hassan Abu Hajjar — APPELLANT.

vs

Haim Samuel Cohen — RESPONDENT.

Failure to give security for costs — Failure to lodge grounds of appeal—Appellant's attention drawn to these omissions—Article 186, Civil Procedure Code.

JUDGMENT.

Appellant having failed to give security or to lodge grounds of appeal in spite of the fact that the Respondent had drawn his attention to these omissions, the appeal is dismissed with costs, including £E.2.500 advocate's fees and expenses.

Delivered the 19th day of January, 1927.

In the High Court of Justice.

H.C. No. 37/27.

BEFORE:

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

IN THE APPLICATION OF:

Ahmad Mohammad El-Shek'a — PETITIONER.

vs

The President of the District Court of Nablus
Hajjeh Zakieh — RESPONDENTS.

Discovery of documents in civil proceedings — Order made by President of District Court to search home of party to civil action— Availability of search warrant—Section 14 (a), Arrest of Offenders and Searches Ordinance, 1924.

ORDER.

The Court holds that the provisions of Section 14 (a) of the Arrest of Offenders and Searches Ordinance, 1924, do not apply to Civil Proceedings.

The Court therefore orders and it is hereby ordered that the order of the President of the District Court of Nablus made under the said section be set aside, and that the books seized in consequence thereof be returned to Petitioner.

Delivered the 1st day of June, 1927.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 58/27.

BEFORE:

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

IN THE CASE OF:

Isaac Shwartz — APPELLANT.

vs

Shalom Yashar
Devora Higrin — RESPONDENTS.

Damages for breach of contract — Payment of balance of purchase monies conditional on transfer being made — Claim of damages for non-fulfilment made by party alleging the agreement to be void — Right to plead alternative defence.

JUDGMENT.

This appeal arises out of an action by the Appellant for damages for an alleged breach by the Respondents of an agreement dated the 27th April, 1925, for the sale by the Appellant to the Respondents of a house and land, and a supplementary agreement dated 27th July, 1925.

The appeal is based on two alleged defaults by the Respondents:—

(1) Failure to pay the balance of the purchase money on the date stipulated in the agreement — namely 27th October, 1926.

(2) Failure to sign the deed of transfer.

1. The property has not been transferred to the Respondents, but the Appellant argues that payment of the promissory note is not dependant upon a transfer being made of the property.

The terms of the agreement as to payment of the purchase money are contained in Clause 2 which provides:

> "The purchaser shall pay this price to the vendor in the following manner: On signing this agreement he shall pay in cash the sum of £P.1000. On 12. 5. 1925 the sum of £E.200. On 27. 7. 1925 the sum of £E.600 and the remainder (i.e. £E.1037.500) on 27th October, 1926. This sum shall be secured to the vendor by an official and legal mortgage of the said property which is to be made concurrently with the transfer of the said property into the name of the purchaser in the Land Registry of the Government."

From this, it is clear that the intention was that the property should be transferred before payment of the balance of the purchase money, and we hold that the liability for such payment is conditional upon a transfer having been made.

2. With regard to the alleged failure by the Respondents to sign the deeds of transfer; all that need be said is that there is no evidence that any deeds were at any time presented to them for signature.

Beyond serving a notary public notice upon the Respondents calling upon them to pay the balance of the purchase money, the Appellant appears to have taken no steps.

The appeal must therefore fail.

In the District Court the Respondents lodged a counterclaim alleging that the Appellant by failing to transfer the property had committed a breach of the agreement. The counterclaim was dismissed by the Court and against this dismissal the Respondents have presented a cross-appeal.

The District Court based its judgment with regard to the counter-claim on two grounds:

(a) That the Respondents having in their defence to Appellant's claim alleged that the agreement was void as

being contrary to Sections 10 to 12 of the Transfer of Land Ordinance, 1920, they cannot at the same time claim damages for non-fulfilment of such agreement.

(b) That as no case for registration had been fixed, the Appellant could not be held to have committed a default.

With regard to the latter point, The District Court appear to be mistaken.

The agreement provided in Clause 4 that the vendor is to give instructions to the Committee of Tel-Nordo to transfer the said property into the name of the purchasers, immediately the latter have paid the above-mentioned instalment of £E.600," and payment of the £E.600 instalment was fixed by Clause 2 of the agreement for the 27th July, 1925.

From the supplementary agreement of the 27th July, 1925, it is evident that £E.600 instalment was paid on the due date and the Appellant undertook to give instructions to the Committee of Tel-Nordo to transfer the property to the Respondents not later than the 29th July, 1925.

We hold that the Appellant was bound to have the transfer made within such time after the 27th July, 1925, as the Court might hold was reasonable for the purpose of carrying out the necessary procedure.

In any case the Appellant was clearly bound under Clause 2 of the agreement to get the property transferred to the Respondents before the date fixed for payment of the balance of the purchase money, namely, 27th October, 1926, and that he has failed to do.

It would appear, therefore, that Appellant did commit a breach of the agreement such that the Respondents might have recovered damages had they brought an action for this purpose.

The Respondents, however, are Defendants to an action in which their main defence is that the agreement upon which the action was based is void.

Clearly they are entitled to put in an alternative defence, and plead that if the Court holds against them that the agreement is valid, they have in fact committed no breach of such agreement; but they cannot allege the invalidity of the agreement as a defence to the Appellant's claim and at the same time base a counter-claim for damages upon the terms of the agreement.

We hold therefore that the cross-appeal must be dismissed.

Delivered the 16th day of December, 1927.

In the High Court of Justice.

H.C. No. 80/27.

BEFORE:

Corrie, J. and Khaldi, J.

IN THE APPLICATION OF:

Abdel Qader Sheikh Ali — PETITIONER.

vs

The Acting President of the Land Court of Jaffa — RESPONDENT.

Order made by President of Land Court to release attachment held to be interlocutory order — Interlocutory order subject to appeal not within jurisdiction of High Court — Article 66, Civil Procedure Code.

ORDER.

The Order of 11th October, 1927, is an interlocutary Order of the Land Court made in an action, and is thus subject to appeal with the final judgment in the action (Code of Civil Procedure Article 66 as amended on 26th February, 1312). It follows that the High Court has not jurisdiction to decide whether the Order was duly made or not.

The petition is dismissed.

Delivered the 23rd day of November, 1927.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 81/27.

BEFORE:

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

IN THE CASE OF:

Muhammad Ahmad Othman Muhammad and Others — APPELLANTS.

vs

Abdel-Fattah Darwish and Others — RESPONDENTS.

Action struck out by Land Court with leave to renew on payment of prescribed fee — Appeal only against final judgment in suit — Interlocutory judgment — Article 66, Civil Procedure Code.

JUDGMENT.

The judgment of the Land Court was that the action was struck out with leave to renew on payment of the prescribed fee. That is not a final judgment as it does not preclude the Land Court from hearing the action on renewal. Hence it is not subject to appeal to this Court except with a final judgment in the action (Code of Civil Procedure Article 66 as amended).

The appeal is dismissed with costs.

Delivered the 23rd day of January, 1928.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 110/27.

BEFORE:

Corrie, J., Jarallah, J. and Khaldi, J.

IN THE CASE OF:

Hassan Ahmad 'Allan
Yusef Ahmad 'Allan — APPELLANTS.

VS

Hafeezeh Bint Ibrahim Hassan — RESPONDENT.

Failure to file security for costs — Cash deposit in lieu of security may be made in Court of Appeal on day of hearing — Art. 186, Civil Procedure Code.

JUDGMENT.

No security having been given and the Appellants not being prepared to pay a deposit forthwith, the appeal is dismissed with costs, including £P.2 advocates' fees.

Delivered the 21st day of March, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 129/27.

BEFORE:

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

IN THE CASE OF:

Raphael Jana Shvilli — APPELLANT.

VS

Michael Binia — RESPONDENT.

Payment by Appellant of appeal fee required by Clerk of Court — Appellant's appeal not out out of time because larger fee should have been paid.

JUDGMENT.

The Appellant paid the fee required by the clerk within due time. The fact that it afterwards appeared that a larger fee was due does not operate to render the Appellant's application out of time.

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

Costs will follow the event.

Delivered the 6th day of March, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 13/28.

BEFORE:

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

IN THE CASE OF:

The Northern Assurance Company Ltd. — APPELLANTS.

VS

Dov Sachs & Sons — RESPONDENTS.

Procedure for dealing with urgent application — Provisions of Civil Procedure Code imported into Arbitration Ordinance, 1926 — Procedure under Sec. 15 (1) Arbitration Ordinance, 1926 — Arts. 4, 7, Addendum to Civil Procedure Code.

JUDGMENT.

The Court is of opinion that in view of Section 15 (1) of the Arbitration Ordinance, 1926, Article 4 of the Addendum to the Code of Civil Procedure which replaces Article 22 of the original Code is imported into the procedure in question and that the five days' notice were not sufficient since no application on the grounds of urgency was made under Article 7 of the Addendum to the Code of Civil Procedure.

The Court therefore allows the appeal, sets aside the judgment of the District Court on the question of the opposition, and remits the case to the District Court to decide the question of opposition on the merits.

Costs to follow the event.

Delivered the 10th day of July, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.L.A. C.A. No. 58/28.

BEFORE:

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

IN THE CASE OF:

Haim Schlang — APPLICANT.

VS

Bertha Schlang — RESPONDENT.

Application to Court of Appeal for leave to appeal from judgment of District Court confirming arbitration award — Application for leave to be made first to District Court and on refusal of District Court to Court of Appeal — Sec. 15 (2), Arbitration Ordinance, 1926.

JUDGMENT.

As no application has been made to the District Court which must first be asked for leave under Section 15 (2) of the Arbitration Ordinance before the Court of Appeal is approached, the application is discharged.

Applicant to pay costs and £P.2 advocates' fees.

Delivered the 4th day of December, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 107/29.

BEFORE:

Corrie, J., Baker, J. and Frumkin, J.

IN THE CASE OF:

Jacob Itin — APPELLANT.

vs

Moshe Hefet — RESPONDENT.

Procedure for verification of handwriting — Judgment of District Court set aside for failure to follow correct procedure — Arts. 97-105 Civil Procedure Code.

JUDGMENT.

The Court holds that Articles 97 to 105 of the Code of Civil Procedure are still in force and govern the procedure for the verification of handwriting.

The verification in the present case was not carried out in accordance with those articles.

The judgment of the District Court must therefore be set aside and the case remitted to the District Court for retrial.

Costs will follow the event.

Delivered the 20th day of February, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 16/30.

BEFORE:

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

IN THE CASE OF:

Muhammad Habbab
Ahmed Habbab — APPELLANTS.

vs

Pouparts Limited — RESPONDENTS.

Procedure on proof of bankruptcy petition — Court entitled to take judicial notice of other actions brought before it — Formal evidence to prove existence of action in Court.

JUDGMENT.

The Court holds that the District Court was entitled to find that the Defendants were traders on the evidence before it and that consequently a promissory note signed by them as a firm is a commercial transaction, and that it was entitled to take judicial notice of other actions brought before it against Defendants on unpaid promissory notes; although it would have been a more correct procedure to have called formal evidence from a clerk of the Court to testify to this, but the omission to call such formal evidence having involved no miscarriage of justice, the appeal is dismissed with costs.

Delivered the 25th day of April, 1930.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 18/30.

BEFORE:

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

IN THE CASE of:

Said Abd Sheikh Ibrahim and Yusef Naser Samara — APPELLANTS.

VS

Sheikh Muhammad Kashou' and Abdel Fattah Da'as — RESPONDENTS.

Notice of appeal not entered within period allowed by law — Extension of time for entry of — Reasonable cause for delay — Rules of Court, Civil Appeals, 1st June, 1921.

INTERLOCUTORY JUDGMENT.

The grounds of appeal were lodged 24 days out of time. Taking the whole of the circumstances into consideration, we consider it is a case, in view of previous decisions of the Court, in which we should allow the Court's indulgence provided by Rules of Court of 1st June, 1921, and the appeal is allowed.

Delivered the 2nd day of December, 1931.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 98/32.

BEFORE:

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

IN THE CASE OF:

Abdel Raouf El Bitar — APPELLANT.

VS

United German Pumping Manufacturers Borsig Hall Ltd. — RESPONDENTS.

Name of party incorrectly set out in pleadings — Summons with incorrect name accepted by advocate for party incorrectly named — Amendment of pleadings — Irregularity of proceedings in trial Court — Order by Trial Court that subject matter of dispute be inspected by expert — Only expert chosen by Court and no other to be heard — Irregularity of procedure to be pleaded at trial, otherwise party estopped on appeal.

INTERLOCUTORY JUDGMENT.

The Appellant has not satisfied us that the United German Engineering Works Junkers Borsig Hall Ltd. and the United German Pumping Manufacturers Borsig Hall Ltd. are one and the same company.

In view, however, of the fact, that Mr. Farbstein, who acts for the latter Company, but does not represent the former, accepted service of the Appellant, the United German Pumping Manufacturers Borsig Hall Ltd., is not entitled to resist an application by the Appellant to amend his notice of appeal.

JUDGMENT.

This appeal arises out of the irregularity with which the proceedings in the District Court were conducted. The Court made an order that the pump which is the subject of the action should be inspected by an expert, Mr. Wagner.

This inspection was never carried out; but instead, the Court heard the evidence of witnesses, including that of an engineer named Stellat who had examined the pump. Upon this evidence the Court gave judgment, dismissing the Appellant's action.

It is clear, that if the Appellant had objected in the District Court to this irregular procedure, this Court would be bound to

hold in his favour and to send the case back to the District Court for a fresh trial.

From the record of the proceedings in the District Court, however, it appears that not only did the Appellant then raise no objection to the procedure adopted, but he actually argued in support of it against the objection made by the Respondent.

It follows that the Appellant cannot, now, turn round and argue that the judgment should be set aside on the ground of irregularity of procedure.

The appeal must therefore be dismissed with costs.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 137/32.

BEFORE:

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

IN THE CASE OF:

Yona Dinovitch — APPELLANT.

vs

Halvaa Vehisachon Co-operative Society — RESPONDENT.

Member of Co-operative Society bound by Society's account books — Proof of membership — Member not accepted by Council Board of Society — Validity of proceedings conducted by advocate without proper power of attorney — Preliminary objection to be raised in Court of first instance.

JUDGMENT.

For the purpose of this appeal we need only deal with one of the many grounds raised in the appeal, namely, the question whether the Appellant was a member of the Respondent Co-operative Society or not.

Section 4 of the Rules of the said Society prescribes:

"(a) No person shall be admitted as member of the Society except by the Council Board.

(c) The Council Board decides upon the admission of members at its discretion and may refuse the admission of anybody without stating the reasons of its refusal."

There was an application for membership by the Appellant before the Lower Court but there was no evidence that the Council Board had ever approved and accepted the Appellant as a member and without such approval and acceptance it cannot be held that Appellant was a member and as such subject to the Rules of the Society and the laws in force governing Co-operative Societies.

The appeal must be allowed, the judgment of the Lower Court quashed and the case remitted for Respondent to prove his claim by the ordinary rules of evidence. Costs are allowed Appellant with LP.3 advocate's fees.

Delivered the 5th day of June, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 156/32.

BEFORE:

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

IN THE CASE OF:

Alexander Karoshi Lubitch — APPELLANT.

vs

Ali Mustakim — RESPONDENT.

Civil procedure — Appeal — Failure of Appellant to lodge guarantee for costs — Failure of Appellant to serve copy of judgment on Respondent although attention called to such failure — Art. 186, Civil Procedure Code.

JUDGMENT.

No guarantee having been lodged, also no service having been effected of the judgment on Respondent, despite Respondent having called Appellant's attention thereto, the appeal must be dismissed with costs and advocate's fees assessed at £P.2.

Delivered the 30th day of March, 1933.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 170/32.

BEFORE:
Baker, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Messrs. Honegger & Co. — APPELLANTS.

vs

Zeev Gloskin, in his capacity as Administrator of the Estate of Abraham Podeshevsky — RESPONDENT.

The Anglo-Palestine Bank Ltd. — THIRD PARTY.

Civil procedure — Appeal — Failure of Appellant to lodge proper guarantee for costs — No authority in President of District Court to assess amount of guarantee — Failure of Appellant to serve copy of judgment on Respondent although attention called to such failure — Art. 186, Civil Procedure Code — Extension of time for appeal — Discretion of Court under Rules of Court, Civil Appeals, 1st June, 1921.

JUDGMENT.

The Appellants have not complied with the requirements of Article 186 of the Code of Civil Procedure, viz., that a duly authenticated deed of security must be lodged within the time allowed for appeal.

The guarantee in question is limited to an amount certain instead of an unlimited amount. It was assessed by the President of the District Court who is not empowered to do so: and it has also not been authenticated. In addition to the defect in the guarantee, an official copy of the judgment was not served on Respondent until seven months after the appeal was lodged.

In view of the before-mentioned defects in the appeal and the fact that no valid reason has been given upon which the Court could exercise in favour of the Appellants the discretion conferred upon it by Section 2 of the Rules of Court, Civil Appeals, published in 1921, to allow an extension of time for defects to be made good, and following the decision of this Court in Land Appeal No. 8/25 and other similar decisions, the appeal is dismissed with costs and advocate's fees and travelling expenses assessed at £P.2.500 in respect of Respondent's advocate and also the advocate of the third party.

Delivered the 26th day of October, 1933.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 9/33.

BEFORE:

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

IN THE CASE OF:

Guzida Lermitte	APPELLANT.
vs	
The Head of the Discalced Carmelite Order	RESPONDENT.

Civil procedure — Statement of claim lodged against several Defendants — When defendants to be separately sued — Joinder of causes of action — Illegal occupation of land for long period — Inspection of land made by Land Court — Credibility of witnesses is question for lower Court.

JUDGMENT.

This is an appeal from the decision of the Haifa Land Court of the 17th of January, 1933, whereby they dismissed the present Appellant's claim with costs.

The Appellant lodged in the Haifa Land Court an action against 29 persons alleging that during the absence from the country of her predecessor in title the said 29 Defendants had illegally occupied land on the slopes of Mount Carmel which belonged to the Appellant. The Appellant based claim to the said property on the fact that she was the heir of her late father who purchased a plot of land in the year 1305 (Financial Year) and to whom was issued a Kushan which she produced and which records the registration in her name of a piece of land 3 dunams in area situated in a locality called Mafharah, with the following boundaries: (1) Majdoubeh (2) Abou Salim (3) Prusianiah (Poussians) (4) The Lands of the Convent.

It was submitted by the Appellant to the Land Court that the Western Boundary of her land which according to the before mentioned Kushan is described as Lands of the Convent, was at the time her deceased father purchased the land between point B I and B II, described on a survey map or plan which has been filed by Appellant, and is marked Exh. J. and that this boundary was illegally changed by Respondent during the absence of her deceased father to a boundary marked on the said plan by a blue

line and described as E I and H I. Respondents thereby appropriated the greater portion of Appellant's land.

At the hearing before the Land Court it was submitted by Counsel for Respondent that as the action was brought against 29 Defendants in respect of 29 different plots a separate action should be brought against each named defendant. This contention was upheld by the Court and Appellant upon being requested to elect which defendants she would then proceed against, elected to proceed against the present Respondent.

The Land Court appointed experts to inspect the land of Respondent and to see whether it lay within the boundaries mentioned in Appellant's Kushan.

An inspection was carried out by the three of the duly appointed experts and their respective reports were read in Court. The Court then inspected the land themselves in the presence of the parties and their Counsel and heard a witness and their Counsel of either party on the said land. Subsequently the Court after hearing ten witnesses for the Appellant and five for the defendant decided that:

> "The Eastern boundary of the Convent land (the boundary in dispute) occupied the possition it does to day as long ago as the year 1297 which is eight years before the Plaintiff's father acquired his Kushan: That the Plaintiff's case so far as concerns the identity of the land comprised in her Kushan rested on the evidence of the witnesses who had testified before the Court on her behalf and whom they found most unsatisfactory and entirely unconvincing none of them being people of any standing with the exception of Mr. Freschleh and Jamal Bey. The former spoke of the existence of the wall on the line B.C. which is not denied by Defendant and the latter's evidence was more favourable to the Plaintiff but it lacked corroboration."

> "They found that the Plaintiff had not succeeded in proving her contention with regard to the Eastern boundary of the Defendant's land nor had she proved the whereabouts of the land of either Abu Salim or Majdoubeh; in other words she had wholly failed to establish the identity of the land described in the Kushan upon which she relied and consequently dismissed her action."

Appellant in her appeal alleged at the outset, that the lower Court was wrong in deciding that separate actions should be brought against the 29 different Defendants in respect of the 29 plots claimed by Appellant and that she was prejudiced by the Court separating the 29 claims.

Appellant has cited no authority for this contention. Article 15 of the Civil Procedure Code, however states that "Every suit shall be instituted by the presentation of a plaint." And there appears to be no authority in the Ottoman Law of Procedure for the joinder of causes of action. It has however been the practice of these Courts that if it appears to the Court that several causes of action cannot be conveniently tried or disposed of together, the Court may order separate trials of any of such causes of action.

It cannot be argued that common qualities of fact would arise, and the only persons to be prejudiced would be the 28 Defendants who would perforce have to sit idle in Court whilst the action against each of the other defendants was being tried.

I am accordingly of opinion that the lower Court was correct in refusing to join the 29 alleged defendants.

With regard to the remaining grounds of appeal: they consist, of a criticism of the evidence of the defendant witnesses and an allegation that there was evidence upon which the lower Court should have come to a decision different to the one they did.

The lower Court after hearing evidence and after due inspection of the land made a finding that Appellant had not proved her case. There certainly was conflicting evidence in the case but I am satisfied that there was evidence sufficient, if believed, to support that finding. The credibility of witnesses is a question for the Court below and we cannot question their appreciation of that evidence.

Accordingly the judgment of the lower Court must be affirmed and the appeal dismissed with costs and advocate's fees assessed at £P.6.

Delivered the 18th day of May, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 92/33.

BEFORE:

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

IN THE CASE OF:

David Shapira — APPELLANT.

vs

Moshe Moldavsky
Yehoshua Shahor
Abraham Ratsky — RESPONDENTS.

Civil procedure — New Plaintiff substituted after commencement of action — Amendment of statement of claim — Action by representatives of Co-operative Society in their personal capacities — Art. 1650, Mejelle.

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 Supreme Court sitting as a Court of Appeal.

C.A. No. 99/32.

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

IN THE CASE OF:

Hamdi Muhammad Sharab — APPELLANT.

vs

Yusuf Ahmad Sharab, — RESPONDENT.

Civil procedure — Venue of action — Bill of exchange containing clause: "payment and litigation in any Court" — Bill made in Palestine in Egyptian currency.

JUDGMENT.

The bill which the Respondent is alleged to have signed, and upon which the judgment which it is sought to have registered is based, contains the phrase "payment and litigation in any Court."

There is no evidence before the Court as to the place where the bill was made, but the sum secured by the bill is 20,000 piastres in Egyptian currency.

Under the circumstances we hold that the expression "any Court" cannot be constructed to mean "any Court in Palestine" but must include any competent Egyptian Court.

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

Costs will follow the event.

Delivered the 1st day of November, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 103/33.

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

IN THE CASE OF:

Phoebus Werke A. G. — APPELLANT.

vs

Bashkin & Wertheim — RESPONDENTS.

Civil procedure — Grounds of appeal not included in notice of appeal — Grounds of appeal filed on thirty-fifth day after delivery of judgment — Extension of time for entry of grounds of appeal — Reasonable cause for delay — Discretion of Court under Rules of Court, Civil Appeals, 1st June, 1921 — Art. 185, Civil Procedure Code.

JUDGMENT.

No grounds of appeal were included in the Notice of Appeal; they were however filed on the thirty-fifth day after delivery of judgment, and the Appellant is asking that the Court should exercise a discretion in his favour.

It is clear, however, that under Rule 1 of the Rules of Court, Civil Appeals, dated 1st June, 1921, an application to the Court to exercise its discretion must be made "within one month of the date on which the time for appeal expired."

It follows that we cannot now accede to the Appellant's application, and the appeal must be dismissed.

There being no appeal before the Court, the provisions of Article 185 of the Civil Procedure Code cannot be invoked in favour of the cross-Appellant, and the cross-appeal must also be dismissed.

No order is made as to costs.

Delivered the 8th day of January, 1935.

In the District Court of Haifa,

C.D.C. Ha. No. 136/33.

BEFORE:

The President (Seton, J.) and Aziz Daoudi, J.

IN THE CASE OF:

W. G. Smithers — PLAINTIFF.

vs

The Attorney-General — DEFENDANT.

Action for damages caused by negligence of Palestine Railways — Collision between motorcar and locomotive—Action against Government under Crown Actions Ordinance — Causes of action against Government enumerated in Sec. 3, Crown Actions Ordinance, 1926.

JUDGMENT.

This is an action brought by Mr. W. G. Smithers against the Palestine Railways and the Haifa Harbour Works for the sum

of £P.179 representing the amount of the damage sustained by the Plaintiff's motor car in a collision which occurred between the said motor car and a locomotive at a level crossing in or near the Customs Area at Haifa in the month of May, 1933, which collision according to the Plaintiff's allegation was due to the negligence of the Defendants on account of their failing to provide satisfactory warning to traffic of the approach of the locomotive in question.

The written consent of the High Commissioner was obtained authorising the Plaintiff to bring the action subject to a demurrer being made in Court to the effect that an action does not lie against the Government under the Crown Actions Ordinance, 1926.

At the trial it was submitted on behalf of the Defendant that the Court was unable to entertain the action, the claim not coming within the exceptions mentioned in Section 3 of the Crown Actions Ordinance. We uphold this contention. Section 3 of the Crown Actions Ordinance provides that no claim whatsoever against the Government or any Government Department shall be entertained in any Court unless it be claimed for obtaining relief against the Government or a Governmental Department in respect of certain matters therein enumerated. The present action is not a claim for relief in respect of any of the matters enumerated in Section 3 and in consequence the Court has no power to entertain it. Judgment will be entered for the Defendant with costs including advocate's fees £P.3.

Delivered in the presence of the parties subject to right of appeal, the 25th day of June, 1934.

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.

VS

Salim Ayoub — RESPONDENT.

Civil procedure — Adjournment of action on ground of death of grandmother of advocate — Fit and proper ground for adjournment — Grounds of appeal not submitted within period prescribed by law — Good reason not shown for default — Rules of Court, Civil Appeals, 1st June, 1921.

JUDGMENT.

Appellant in this appeal has applied for the adjournment of the hearing of this appeal on the grounds 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, Civil Appeal 76/27[1]), Land Appeal 10/32[2]), etc. — the appeal is dismissed with costs and advocate's fees assessed at £P.2.

Delivered the 14th day of May, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 144/33.

BEFORE:

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

IN THE CASE OF:

Ephraim Aboutboul — APPELLANT.

vs

Dr. Gabriel Abyad — RESPONDENT.

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[1]) see ante, p. 149.
[2]) see ante, p. 329.

Civil procedure — Burden of proof — Contingent undertaking to transfer land of debtor into name of creditor in the event of failure to pay debt — Grounds for setting aside arbitration award—Errors contained on face of award — English rule of arbitration law applied — Effect of mistake of law made by arbitrator — Non-payment of bill proved by other means than production of bill.

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 Ramle, 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 12th March, 1925. £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 not 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 Daoudi 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 from Mr. Abella dated 23rd October, 1927, which was submitted by the Appellant, had been (sic) 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.A. No. 168/33.

BEFORE:

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

IN THE CASE OF:

Muhammad Abd Er-Rahman Edkibi — APPELLANT.

VS

Ali Fadda — RESPONDENT.

Procedure — Application for review of judgment on ground of discovery of forgery — Period for lodging review — Review to be lodged within ten days of conviction for forgery — Art. 203, Civil Procedure Code and Arts. 27, 28, Appendix thereto — Secs. 4, 5, Magistrates' Courts Jurisdiction Ordinance, 1924.

JUDGMENT.

Leave to appeal was granted on the following point of law by the District Court: "Whether an application for review under Articles 27-28 of the Appendix of the Civil Procedure Code of a judgment given by the District Court sitting in its appellate capacity dismissing a judgment given by the Magistrate's Court, should be lodged within ten days from the date of the discovery (Viz: the date of conviction under Art. 155 of the Penal Code of Respondent

herein by the said Court) as held by the District Court on the hearing of the application for review, or within 30 days from the said conviction as applicant contends."

Article 203 of the Code of Civil Procedure provides that the period allowed for the presenting of an application for review shall be the same as that allowed for appeal.

The relevant part of Article 28 of the Appendix to the Code of the Civil Procedure, which replaced Article 203, runs: "The period allowed for review shall be the same as that allowed for appeal reckoned . . . from the date on which the fraud or forgery is established."

Now, a right of appeal to the Supreme Court from a District Court, sitting on appeal from a Magistrate's Court, is governed by Sections 4 and 5 of the Magistrates' Courts Jurisdiction Ordinance under which such right of appeal is only by leave of the District Court and the only period prescribed therein is 10 days, in which application for such leave must be made.

We, therefore, hold that the article of the Code must be read as allowing application for review to be made by it, being lodged within ten days of the date on which the forgery is established by the conviction of the person charged with that offence.

The appeal is therefore dismissed and the judgment of the District Court is confirmed with LP.2 advocate's fee and costs.

Delivered the 24th day of May, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 177/33.

BEFORE:

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

IN THE CASE OF:

Eliahu Haskel Tweig — APPELLANT.

vs

Nicola Hawa — RESPONDENT.

Civil procedure — Leave to appeal granted by President of District Court — Procedure where leave to appeal granted — Copy of order granting leave to be filed with Court of Appeal — Sec. 5 (2), Magistrates' Courts Jurisdiction Ordinance, 1924.

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 (2) of the Magistrates' Courts Jurisdiction Ordinance 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 LP.2 advocate's fees.

Delivered the 8th day of June, 1934.

PUBLIC OFFICER.

In the High Court of Justice.

H.C. No. 1/30.

BEFORE:

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

IN THE APPLICATION OF:

Muhammad Saleh Alawi — PETITIONER.

VS

Dr. F. M. Goadby, in his capacity as Chairman of the Legal Board — RESPONDENT.

Application for mandamus order to issue to Chairman of Legal Board — Licence to practice as advocate refused — Duty of Legal Board held to be towards Chief Justice and not towards public.

ORDER.

The Court holds that the duty of the Board (even if it had been properly summoned, which is not the case) being merely to advise the Chief Justice, is not a duty towards the public, but only towards the Chief Justice and hence is not enforceable by Mandamus.

The rule is therefore discharged with costs.

Delivered the 12th day of March, 1934.

In the Supreme Court sitting as a Court of Appeal.

CR.A. No. 29/31.

BEFORE:

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

IN THE CASE OF:

Hassan Mustafa Hirmas
Banna Musa Kanawati — APPELLANTS.

vs

The Attorney-General — RESPONDENT.

Public officer convicted of bribery — Ghaffirs held to be Public Officials within meaning of Arts. 67, 68 Ottoman Penal Code.

JUDGMENT.

We are satisfied that the lower Court could lawfully find, on the evidence before them, that the two accused were ghaffirs and therefore Public Officials within the meaning of Article 67 and 68 of the Ottoman Penal Code.

There was evidence upon which they could base a conviction of accepting a bribe and the conviction must be upheld; the sentence, however, we reduce to one of three months' imprisonment. Appellants to pay the costs of this appeal.

Delivered the 14th day of April, 1931.

In the High Court of Justice.

H.C. No. 51/32.

BEFORE:

The Chief Justice and Khaldi, J.

IN THE APPLICATION OF:

Fayez El-Fares — PETITIONER.

vs

The Commandant of Police — RESPONDENT

Application by prisoner to be examined by doctor of his own choice — Orders of Mandamus and Prohibition to Public Officers— Difference between Rule Nisi in High Court in England and Order Nisi granted by High Court in Palestine — Section 6 (b), Courts Ordinance, 1924 — Nature of orders under Article 43, Palestine Order-in-Council — Absence of Petition of right in Palestine.

JUDGMENT.

The Attorney-General impugns the Order Nisi on the ground that it does not tally with a Rule Nisi for the grant of a mandamus as employed in the High Court of Justice in England; but the order follows the precedents established during the last eight years in respect of orders directed to public officers under Section 6 (b) of the Courts Ordinance, No. 21 of 1924, which is concerned with a procedure which in the absence of petitions of right has been built up in this territory as regards orders not only in the nature of mandamus and prohibition as contemplated in that subsection but also as regards orders on petitions and applications as con-contemplated in the second para. of Article 43 of the Palestine Order-in-Council.

The order absolute envisaged in the Rule Nisi issued by the Court at the last hearing would be an order to allow the Petitioner to be examined by a private medical practitioner of his own choosing.

We have to consider whether the Commandant of Police is in breach of any statutory duty in refusing to allow such examination.

The duty of the Commandant of Police vis-à-vis unconvicted prisoners in set out in Sections 254, 257, 258 and 259 of the Prison Regulations, 1925, and since we can find no statutory duty imposed upon him of the nature claimed by the Petitioner, the Rule must be discharged with costs.

Delivered the 30th day of June, 1932.

RABBINICAL COURT.

In the Supreme Court sitting as a Court of Appeal.

L.A. No. 145/22.

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

IN THE CASE OF:

Saada Rasaby — APPELLANT.

VS

Haim Kalev — RESPONDENT.

Validity and effect of Jewish will is matter of Jewish law—Validity of verbal will — Jurisdiction and constitutionality of Rabbinical Court — Appointment of Chief Rabbis — Certificate of Succession of Sharia Court — Action to set aside registration of Land Public notice signed by Civil Secretary treated as law — Will confirmed by ex-parte application — Ottoman Regulations regarding the Jewish Community, Vol. 2, Young—Jurisdiction of Orthodox Patriarchate—Jurisdiction of Land Court to decide validity of will.

JUDGMENT.

The Court holds:

1. The Land Court was not entitled to decide the validity or non-validity of the will.

2. The registration of 3/4 of Shlomo Shia Kalev's property to the name of the Respondent is bad so long as the will has not been set aside by a competent Court.

3. The judgment of the Land Court is therefore set aside and the case sent back (a) for an order to be given to stay any transaction upon the land in dispute until further notice; (b) for a reasonable period to be given to Repondent to bring an action before the Rabbinical Court; (c) for judgment of registration to be given according to the final decision of the Rabbinical Court.

JUDGMENT OF THE CHIEF JUSTICE.

In November, 1921, the Respondent obtained registration in the Tabu Office of a 3/4 share of a house which had been the property of his brother Shlomo Shia Kalev who died in Damascus in 1917 on the strength of a Certificate of Succession obtained from the Sharia Court. In May, 1922, Saada widow of the deceased brought an action in the Land Court to set aside the registration on the ground of a will of the deceased made in her favour.

It was a verbal testament evidenced by a document signed by three persons who testified having been present when the deceased expressed his testamentary intentions.

The signature to the above document had been verified and apparently the will confirmed by the Chief Rabbi of Haifa and the local Jewish Committee and in January, 1920, the Rabbinical Court of Jerusalem gave judgment in an action between the present parties in which the will was treated as valid. Up to that time, however, there had been for a certain interval no legally appointed Chief Rabbi in Palestine but on the 18th March, 1921, a public notice signed "W.H. Deeds, Civil Secretary", was issued from the Occupying Government announcing the election of two Chief Rabbis and three members of each of the Sepharadic and Ashkenasic communities. Three lay councillors also were declared to have been elected. The public notice went on to say, "The Government of Palestine will recognize the council and any Beth Din sanctioned by it as the sole authorities in matters of Jewish Law. It will execute through the Civil Courts judgments given by the Beth Din of the Council in first instance or on appeal as well as the judgments given by any Beth Din in Palestine sanctioned by the Council". This document was a public announcement issuing from the Occupying Government intended to have a certain legislative value. Under the circumstances in which the Government and the Law Courts were then placed, it is in my opinion impossible to regard it otherwise than as having provisionally the authority of Law.

In January, 1922, the testamentary document was again confirmed by the officially recognised Rabbinical Court. But it is said that this was done on an ex-parte application and not in the presence of the Respondent.

It would appear that after the public notice above quoted there could be no question that, the validity and effect of a Jewish will being matter of Jewish Law, the Rabbinical Court was the sole authority able to deal with it. It was the duty of the Civil Court, in this case the Land Court, to give judgment upon the will, and if the will came into question before the Rabbinical Court had given a decision, to send the parties to that Court for a declaratory judgment.

In this case we are informed that the confirmation of the will by the Rabbinical Court was ex-parte and I follow Mr. Frumkin's opinion that if the Respondent still disputes the validity of the will in Jewish Law he should have an opportunity of applying to be

heard before the Rabbinical Court before the Land Court gives judgment in the case. Our judgment therefore, will be in the form drawn up by Mr. Frumkin.

The terms of the public notice are so wide as to include declarations as to the validity of wills and it is not really necessary to examine the Ottoman rules for confirmation of authority. It has however been argued that the authority of the Rabbinical Court follows that of the Court of the Patriarch as appears from a communication from the Minister of Justice to the Chief Rabbi quoted by Mr. Frumkin and the note on page 153 of the second volume of Young. This note applies to clause 29 of the Ottoman Regulations of 23rd Chevat, 1281, (1st April 1864) regarding the Rights of the Jewish Community. "Toute les affaires religieuses sont de la competence du Conseil Spirituel sans ingerence quelconque d'autrui" (Article 29).

It has been pointed out that if we refer to the jurisdiction of the Orthodox Religious Courts we find in the Vezirial Order of 23rd Djemad II, 1308 (3rd February, 1891) that their jurisdiction of the Orthodox Christians and that according to a note on page 322 of the first volume of Young the jurisdiction of the Orthodox Patriarch concerns wills drawn up during the life time of the deceased. It has been argned that this condition applied also to the jurisdiction of the Rabbinical Court, but the general terms of the Law of 23rd Chevat, 1281, appear to exclude any such condition and the absolute terms in which the public notice of 1921 is drawn clearly show that no other Court than that of the Rabbi is competent to decide a question of Jewish Law.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 161/23.

BEFORE:

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

IN THE CASE OF:

Rabbi Abraham Shorr — APPELLANT.

vs

Shlomo Perlman

The Postmaster-General — RESPONDENTS.

Jurisdiction of Civil and Religious Courts — Dispute re internal administration of Jewish Waqf — Action for injunction restraining the delivery and receipt of correspondence — Sufficiency of evidence to prove waqf — Religious Courts incompetent to issue orders to public officers.

JUDGMENT OF MR. JUSTICE CORRIE.

This action was brought by the Appellant Shorr: a) against the Postmaster-General for an injuction restraining him delivering letters addressed to the United Aged Home otherwise than upon a receipt signed by the Appellant and b) against the Respondent Perlman to recover certain sums of money and for an injunction restraining him from receiving letters addressed to the Home and from taking any part in the affairs of the home. The defence raised was that the District Court had no jurisdiction inasmuch as the disputes related to the internal administration of a Jewish Waqf and hence lay within the exclusive jurisdiction of the Rabbinical Court.

To establish this defence a certificate from the Ashkenazic Secretary of the Chief Rabbinate was produced.

In reliance upon such certificate the District Court has held that it has no jurisdiction on the ground that "the Institution is Waqf constituted only before the Rabbinical Court, and by Article 53 of the Palestine-Order-in-Council, 1922, exclusive jurisdiction in questions of internal administration is given to the Rabbinical Courts and the present case in such a question of internal administration".

In support of this judgment it has been argued on behalf of the Respondent Perlman (1) that where either party alleges that the question at issue is one of Wakf, the only competent Court is the Religious Court and hence that upon either party raising such plea, the Civil Court immediately becomes incompetent to try the case, (2) that in fact, evidence, in the form of the certificate already mentioned, and been produced to the District Court, establishing that the question in dispute was one concerning the internal administration of a Jewish Wakf.

With regard to the first of these arguments: although the Civil Court concerned is not one upon which jurisdiction is conferred by Section 38 of the Order-in-Council, it is evident that the view put forward cannot be accepted, as it would enable any defendant who wished to defeat or delay the enforcement of a plaintiff's

rights against him in any civil action, to do so by the simple expedient of pleading that the matter was one of Waqf, whereupon, without further enquiry the Civil Court would be compelled to dismiss the plaintiff's action. The Civil Court must have evidence before it to justify it in taking such a course. We have therefore to consider the evidence submitted by the Respondents—namely the certificate of the Secretary of the Chief Rabbinate. The Appellant objects to the admission of the certificate as evidence, but admitting it for what it is worth, I am quite unable to accept it as proof that the United Aged Home is Waqf constituted before the Rabbinical Court, thereon according to the Jewish Law. The certificate originally submitted was indeed to the effect that "the United Aged Home Institution is registered as Wakf of the Jewish Ashkenazic Community".

On further enquiry, however, a second certificate was given. The translation of this certificate which has been put in reads is as follows:

November 21st, 1922.

"In accordance with the letter attached from the Management of the Moshav Zekanim, it is decided to accept for the present, Waqf on twenty-nine (29) houses built by the present trustee and to find a way to arrange Waqf on all the property of the institution, which are according to law Wakf for the said institution and for the Jewish Ashkenazic Community.

Clearly this certificate contains no suggestion that the Institution itself, the United Aged Home, is a duly constituted Rabbinical Waqf. In any case a mere certificate by the Secretary is insufficient proof on the proceedings in the Rabbinical Court. And I hold that there was no evidence before the District Court upon which it could give a desition on the question of jurisdiction.

Accordingly as between the Appellant and Respondent Perlman, I hold that the judgment of the District Court must be set aside and the case remitted.

As between the Appellant and the Postmaster-General no argument has been heard by this Court, as the view appears to have been taken that this part of the case was governed by the decision as between the Appellant and Respondent Perlman.

I do not think that this necessarily follows. The action against the Postmaster-General was for an injunction restraining him from dealing with correspondence in his custody. The decision

of this action would appear to depend primarily upon an examination of the instructions given to the Postmaster-General and hence would be within the competence of the Civil Court.

Even if it should be found to involve questions not within the competence of the Civil Court as to the right of the persons by whom the instructions were given, to issue such instructions, the proper course, in my opinion, would be for the Civil Court to adjourn the hearing of the action against the Postmaster-General until a decision on the questions not within its jurisdiction had been obtained from the competent Court. To hold otherwise would be to imply that it was within the powers of Religious Courts to issue orders in the nature of injunctions to a Government Department and for this proposition I know of no authority. In the present case, however, if it is held that the District Court was wrong in dismissing the action against the Respondent Perlman, it follows that the action should not have been dismissed as against the Postmaster-General and there is thus at present no need to go further into the matter.

The judgment of the District Court deals not only with jurisdiction, but with the merits of the case.

It is sufficient to say that until the question of jurisdiction has been decided, no judgment can be given on the merits.

Delivered in presence the 14th day of March, 1924.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 5/25.

BEFORE:
The Chief Justice, The Senior British Judge and Frumkin, J.

IN THE CASE OF:

Rabbi Abraham Shorr — APPELLANT.

vs

Shlomo Perlman
The Postmaster-General — RESPONDENTS.

Jurisdiction of Civil and Religious Courts — Determination of proper constitution of waqf — Action for injunction restraining delivery and receipt of letters — Sufficiency of evidence to prove waqf — Section 3 (b), Jurisdiction of Civil and Religious Courts Ordinance, 1925.

JUDGMENT.

The District Court in its judgment dated the 15th December, 1924, has not dealt with the question of jurisdiction as required by the judgment of the Court of Appeal*).

The subject matter of the action is letters and money sent from various places for the benefit of aged Jews. Two persons claim the right to receive the letters and money and to dispose of the latter for the benefit of the charity to which it is destined.

The District Court was directed by the Court of Appeal to ascertain what is the wakf or endowment or charitable institution to which the letters and monies are sent — not merely what is the name, but how it is to be known and identified. Having found the above as a fact, the District Court will then have to determine whether it has been duly constituted a wakf or charitable endowment before a Rabbinical Court according to Jewish Law. Constitution is an act of dedication of some person or persons having a right to dispose of the subject matter of the dedication or endowment. If no such act has taken place then there has been no constitution before a Rabbinical Court which will deprive the Civil Court of jurisdiction in the case. If on the other hand there has been a constitution, but before a Moslem and not before a Rabbinical Court prior to 1922, then, according to Section 3 (b) of the Jurisdiction of Civil and Religious Courts Ordinance, 1925, the action, if one of administration, should be brought before the Rabbinical Court if the dedicator was a Jew.

The District Court instead of satisfying itself as to what was the wakf or endowment, if any, to which the letters and money were destined and further whether such wakf or endowment, if any, had been constituted before a Religious Court, accepted a declaration of the Rabbinical Court to the effect that the Aged Home is a Wakf. That is not the question in issue. Moreover, when asked by the Court of Appeal if there was any evidence of constitution before a Rabbinical Court no facts were ever suggested by counsel which could be regarded as a constitution, whatever may be the Jewish Law in regard to the procedure to be followed by a dedicator.

We were told that there is a Waqf called the Aged Home constituted before a Moslem Religious Court and if that is the institution for which the letters and monies sent from abroad are

*) see ante, p. 1582.

intended that should be decided by the Civil Court which would then leave the question of its administration to the Religious Court.

The case must go back to the District Court to carry out the directions given by the Court of Appeal in its former judgment.

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

P.C. No. 69/30.

BEFORE:

Viscount Dunedin, Lord Blanesburgh and Lord Darling.

IN THE CASE OF:

Rabbi Abraham Shorr — APPELLANT.

VS

The Trustees of the United Aged Home (Institution), Jerusalem — RESPONDENTS.

Jurisdiction of Civil and Religious Courts — Dispute re right to delivery of letters and monies addressed to "United Aged Home" — Proof of dedication as waqf — Court declaration of charitable trust within meaning of the Charitable Trusts Ordinance, 1924 — Allegation by Appellant of failure to hear his witnesses — Plaintiff entitled to hearing of his pleaded case — Remuneration for services of trustee.

JUDGMENT.

Lord Blanesburgh: Dating from the 'eighties of the last century, there has existed in Jerusalem a charitable institution well known by its Hebrew name of "Moshab Sekenim," or "Aged Home." From small beginnings it has grown to great proportions, and in its homes and houses, specially set apart for the purpose, Jewish poor, hundreds in number, are maintained. In 1911 the inmates of two smaller local institutions for poor, aged Jews, which had become financially embarrassed, were taken into the "Moshab Sekenim," and since that time the "Aged Home" has come to be known as the "United Aged Home," and the Hebrew equivalent "Hameuchad" is often used with the Hebrew name as part of its description.

The actual lands and buildings of the "United Aged Home"—they are situated in different districts of Jerusalem, are diverse in description and character, and apparently very extensive—were in

part, in the years 1887 and 1908 respectively, dedicated as Waqf, and, whatever at these dates may have been the legal effect of such dedications, the management of the charity, before the commencement of the action out of which this appeal arises, was, in fact, always, directly or indirectly, controlled by the Rabbinical authorities of Jerusalem.

The Plaintiff and present Appellant—the Rabbi Shorr—has not, for some time, seen eye to eye in all matters with these authorities, nor they with him. He brought the action, suing, "in his capacity as trustee of the 'United Aged Home,' " for the immediate purpose of securing to himself, as such trustee, the delivery of the correspondence addressed to the Home, containing, in many instances, contributions to its funds.

The determining question upon this appeal will ultimately be whether the "United Aged Home," thus referred to in the title to the action, and again in the statement of claim, was any other than the Institution of that name, of which some description has just been given. Their Lordships hope to show before they have finished, that these Institutions are one and the same, and in the meantime they will proceed on the assumption that they have done so.

The defendants to the action were one Shlomo Perlman and the Postmaster-General of Palestine. The presence of the Minister was purely formal: he has not appeared before the Board. Shlomo Perlman was made defendant for the reason that it was he who, in 1918, under an instrument later to be stated, had received at the hands of the Appellant and another, treated as a co-trustee of the Home, the appointment of Treasurer of the Institution. He had, however, ceased to be obedient to the Appellant in the matter of the mail: having indeed long before action accepted office as Treasurer of the Institution from the Rabbinical Court, the Beth Din. So long as he remained a contesting defendant, Perlman was really representative of the Rabbinical authorities. In April, 1924, Perlman fell out with them, came to terms with the Appellant, and, as put by him, "retired from the case." In his place, notwithstanding strenuous opposition from the Appellant, the Trustees of the Institution, as appointed by Beth Din, were added as third parties to the action, and remained on behalf of these authorities to face the claims of the Appellant. And, all through, these claims were strenuously resisted. In the forefront of his defence, Perlman had taken the objection that there was not in the District Court,

or in any Civil Court, any jurisdiction to try the case. The matter in dispute was concerned only with the rights of persons to act as guardians of a Waqf. Such causes were within the exclusive jurisdiction of the Religious Courts under the Proclamations and Palestine Orders-in-Council. Without prejudice to the objection to jurisdiction, the defence went on to allege that the Appellant had, in 1917, been appointed a trustee of the "United Aged Home," but that in July, 1918, he had been relieved of his office by the Beth Din with no right of management reserved to him: that since his removal from the trusteeship, up to the commencement of the action, he had neither exercised nor claimed to exercise any authority in regard to the Institution, which, in 1918, was by Roth Chavas, the defendant Perlman, and Kook, the then Beth Din trustees thereof, formally regisrered as a charity with the Government of Palestine: that all charges of irregularity against Perlman were unfounded: while the complaints alleged to have been made by the inmates of the Institution were discounted, Perlman was not accountable to the Appellant in regard to any matters connected with the Institution. By a counter-claim, the original defendant sought to have it declared that the Appellant had no right to interfere with the Institution or any officer or inmate thereof, and claimed delivery of its documents, books of accounts and letters, which the Appellant was therein alleged to have abstracted in May, 1923, and thereafter to have retained, with further relief.

The action came on for trial in the District Court as long ago as the 27th May, 1923. The objection to the jurisdiction was at once taken by the defendant Perlman and was upheld by the Court, which thereupon dismissed the action with costs. Thereafter during the next four years this question of jurisdiction was agitated at various hearings in the Supreme Court by way of appeal and in the District Court by way of rehearing. And at a final hearing in the District Court on the 5th July, 1927, the objection to jurisdiction was at length repelled, and the Court, for the first time, dealing with the merits, rejected the Appellant's claims in the action as put forward, but by its judgment declared the "United Aged Home" to be a charitable trust within the meaning of the Charitable Trusts Ordinance, 1924, and with the office of trustee thereof vacant, and leave was given to the Attorney-General of Palestine to apply under the Ordinance for the appointment of proper trustees.

The charitable trust so declared was expressed to be the "United Aged Home" in its entirety, "including its general machinery of administration, the organisation for inviting, collecting and receiving subscriptions and chattels of the Institution and all property belonging to it, whether in the form of movable or immovables not yet constituted Wakf, or constituted Wakf, but for the transfer of which into a charitable trust application has been made to this Court." The application referred to had been made by the Appellant and was before the District Court on the 5th July, 1927.

Now, quite clearly, the "United Aged Home" with which the defence was concerned was the charitable institution of that name already described and no other. Equally clearly, it is with reference to that Institution and to no other that the order just stated was made. As to the "United Aged Home," whose affairs were brought into suit by the Appellant, there is so far nothing to show that the assumption, upon which with reference to it their Lordships are still proceeding, is not otherwise than justified.

Pursuant to the leave given as stated, the Attorney-General duly applied under the Ordinance for the appointment of trustees of the charitable trust declared by the Court, and by order of the 11th July, 1927, upon his petition, the District Court appointed the Respondents, Abraham Zvi Goldsmith, Akiba Eliash and Moses Silver to be such trustees. There has been no appeal from that order. The appointment has not been challenged in any quarter, and ever since its date, these Respondents have been acting as trustees of the "United Aged Home." At the suggestion of the Appellant himself, they were served with his petition of appeal to the Supreme Court against the judgment of the 5th July, 1927. They duly appeared and supported that judgment and the appeal was dismissed by a judgment of the Supreme Court of the 16th December, 1927. On the present appeal therefrom, they are the only Respondents.

In other words, the judgment of the District Court of the 5th July, 1927, has been accepted by the Rabbinical authorities, and is canvassed now only by the Appellant. He asks that the judgments be discharged. He does not ask for judgment in his own favour. In hoc statu, he recognises that he is not in a position to do so. He must confine his claims before the Board to one for an order that the action be remitted to the District Court for further trial. His true case, the Appellant says, has never yet been

heard. The District Court refused to hear his witnesses in support of it. The oral judgment of the 5th July, 1927, was brought into Court, typed and ready to be delivered, before, at that hearing, any argument had been addressed to the Court by Counsel.

Their Lordships disregard and will not again return to the complaint that the judgment was immature. The case had been before the Court on many previous occasions, while no complaint on that score can be made with reference to the learned Judges of the Supreme Court by whom the judgment of the District Court was affirmed. But the allegation that the Appellant's witnesses were not heard in support of his case is one which must be inquired into. It is too serious in character to be ignored. Before embarking upon that inquiry, however, their Lordships permit themselves to express the doubt whether, in the special circumstances of this case, a further hearing could advantage anyone. They regret that the Appellant, avowing himself to be a trustee only, should in the circumstances think it right to advance such a demand.

The hearing before the District Court on the 5th July, 1927, was the last of four separate hearings of the action in that Court. The case has been four separate times before the Supreme Court on appeal. It has now been pending for nearly nine years. Its long-drawn-out proceedings, until the 5th July, 1927, barren of result, are already in the region of scandal. To send back the cause for a rehearing on the ground that, so far, it has never been heard at all, would cause the judicious to grieve. But that is not all. The action is concerned with charitable funds, the safety of which is now ensured by the existing judgment. As a result of it, the affairs of the charity are in the hands of independent trustees, who for over four years have been in control, and upon whose competence and integrity no kind of reflection has been cast. To the Appellant, again, the only consequence of the judgment is that as a result of it he has ceased to hold a trusteeship which, as is still being assumed, he had claimed to be his, a grievance hardly serious enough of itself to earn a welcome for the displacement of a judgment attended by so much benefit to every other interest concerned.

A plaintiff, however, is entitled to a hearing of his pleaded case. That right must be vindicated as often as it is without justification denied. Accordingly, the Appellant's complaint must receive dispassionate investigation at their Lordships' hand, and if

made good, must be redressed, however unfortunate the result in the present instance must almost necessarily be.

The complaint to be investigated is that the Appellant was not given the chance to prove his real case in the District Court. What was his case as so described? Was it within the purview of the action as pleaded? These seem to be the questions to which attention must now be directed.

Throughout the proceedings in their earlier stages, it was apparently taken for granted, on all hands, that the "United Aged Home," whose mail the Appellant, as trustee, was seeking to have delivered to himself, or by his direction, was the charitable Institution already described in this judgment. As the proceedings developed, however, and the pretensions of the Rabbinical authorities to control that charity through trustees appointed by the Beth Din became more formidable, it was suggested by the Appellant's Counsel that the "United Aged Home," with whose affairs the action was concerned, was something quite different from that well-known Institution. The assertion, apparently first definitely put forward at the second hearing before the District Court (see Record, p. 19), and thereafter made with increasing emphasis, was that the plaintiff's "United Aged Home" was merely the trade name of the Appellant, attached by him to an organisation initiated by himself for the collection of funds to be applied to charity. The mail addressed to the "United Aged Home" was really addressed to himself, and did not belong to "the Wakf," i.e., to the charity in the other sense of the words. (See Record, p. 21.)

The witnesses whom the Appellant desired to call and whose evidence was, he says, rejected were to be called to prove these allegations. It was never apparently suggested that the "United Aged Home," in the physical sense of buildings or lands, in any way belonged to this charitable organisation of the Appellant's.

Now no application to amend the pleadings was ever made. Was such a case within the ambit of the statement of claim as it stood, or was it not? Unless the answer is in the affirmative any evidence in support being irrelevant to any issue in the suit was rightly rejected. That, then, is the question, and the answer to it, as their Lordships think, must quite clearly be in the negative.

As has already been seen, the "United Aged Home," referred to both in the defence and judgment of the 5th July, 1927, is indubitably the charity above described. That the Appellant also

is, in the action, referring to that charity is shown by a document to which, while he was actually its trustee, he put his hand, as also by the contents of his statement of claim, the relief in which is based upon the alleged breach by the defendant Perlman of his obligations under that document. The document referred to is dated the 2nd May, 1918, is signed by one Eliahu Ram, the Appellant, and the defendant Perlman. In it the Appellant and Ram are described as "Trustees of the United Aged Home" and in it is recorded a meeting of these trustees, at which they had resolved to appoint Perlman Treasurer of the Institution. Through his hands the funds of the Institution were to pass, subject, however, to the conditions stated in the instrument, two of which were as follows:—

> "A. The aforementioned Trustees," that is to say, the Appellant and Eliahu Ram, "shall prepare immediately circulars to the Banks, the Post Office, the Joint Distribution Committee, and the Spanish Consul, i.e., to all the channels through which moneys flow to our Institution, officially advising them of the appointment of the said Treasurer and notifying them that as from this date they are not to deliver moneys to our Institution, except against the three signatures of the said Trustees and the said Treasurer.
>
> "B. The Trustees Rabbis Abraham Shorr and Eliahu Ram are adjudged highly satisfactory in the performance of their duty, and bear the responsibility for the entire administration of the Home. It is, therefore, resolved that they shall receive remuneration out of the funds of the Institution (as keepers of cabinets in the temple receiving remuneration out of the funds of their cabinet). Any trustees, however that may be subsequently appointed shall only bear the title of Honorary Trustees or some designation like Advisory Board, and none of them shall receive any remuneration from the Institution funds nor shall their signatures be necessary for the receipt of moneys."

Their Lordships are not concerned now with the remarkable provision whereby the Appellant and Ram, two charitable trustees, purport to assign to themselves exclusively a right to remuneration for their services. This reservation might well prove to be a fatal obstacle to any final success of the Appellant in these proceedings. But for present purposes, it is sufficient to note that the treasurership of the "United Aged Home," to be held by Perlman, is one constituted by an appointment from two trustees and not from

the Appellant alone, and that upon any fair construction of the document the "United Aged Home," "for the entire administration of which" the two trustees "bear the responsibility," point to the Institution already described in this judgment.

This same conclusion results even more clearly from the statement of claim. The allegations therein, by which the Appellant seeks to justify his right to sue for its mail as a trustee of the "United Aged Home," are that he and the said Eliahu Ram (the latter, however, is no party to the action) are the trustees of "the Home" and have been so since 1910. The pleading then sets up the defendant Perlman's appointment as Treasurer by the instrument of the 2nd May, 1918. It alleges that without any authority from the Appellant the mail addressed to the Institution has been handed over against Perlman's sole signature: that recently the Appellant has had complaints from the inmates of the Institution to the effect that Perlman was committing irregularities in his capacity of Treasurer, and that the Postmaster-General, notwithstanding his objection, has continued to hand over the mail to Perlman on his sole signature. Accordingly, the Appellant claims, as against the Postmaster-General, an injunction to restrain him from handing over the mail in question to Perlman, or to anyone without the Appellant's signing therefor. As against Perlman, he claims an injunction restraining him from interfering with or applying to the Post Office "for the mail of the Institution" and from taking any part whatsoever in the affairs of the Institution "or entering its precincts."

Now, first of all, it is clear from this pleading that the Institution referred to is the Institution of which Perlman had been appointed Treasurer. Further, it is an institution with "inmates" from "the precincts" of which Perlman is by the order of the Court to be excluded altogether; an institution of which, according to the allegation, both the Appellant and Ram still remain trustees. The Institution has no reference whatever to any trust or collecting organisation, with neither premises nor inmates for which the Appellant could claim sole responsibility and of which there had never been any trustee but himself or one appointed by him.

In these circumstances there can be no doubt as to the issue to which the rejected evidence was to be directed. It was thus described by the Appellant's Counsel at the final hearing in the Supreme Court. (See p. 62 of the Record: "President, District

Court, should have heard my witnesses, who would have said that Shorr had founded an organisation for collecting of subscriptions.")

Their Lordships say nothing, of course, about the difficulties which must have confronted the Appellant in any attempt to prove such a case with any effective result. They do, however, say that in their judgment, such a case was in no way within the purview of the action, and for that reason alone, any evidence tendered in support of it was rightly rejected. It must have been disregarded by the Board had it been admitted.

With that ground for the discharge of the order of the 5th July, 1927, out of the way, no other justification for this Appeal remains. In the course of their judgment the learned Judges of the District Court say this:—

> "Both parties agree and it is further abundantly clear from the documents submitted that the Institution in question has for its object the relief of needy Jews of the Ashkenazi Section of the Jewish Community who are resident or come to spend their last days in Jerusalem, and that the property, proceeds and income of the Institution and the subscriptions sent to it from abroad are or ought to be devoted to the said charitable purpose."

This finding of fact was expressly accepted by the Supreme Court and it is now concurrent. The Supreme Court held, also, that the charitable trust declared by the District Court was rightly described in the words from the judgment of that Court already transcribed.

Both Courts are also agreed that there were, in July, 1927, no trustees of the institution so described. Upon that point the Beth Din Trustees might have had something to say, had they objected to their own supersession. But they have accepted the judgment on that as on all other matters, and the Appellant has failed to establish, if, indeed, he then desired to contend, that of the charitable trust declared, he remained in any sense a trustee. It appears to their Lordships, on the evidence available, that he had ceased to be such trustee in July, 1918.

Nor has it been seriously suggested that if there were no trustees of the charity it was not within the power of the Court, under the Ordinance, to appoint the Respondents to be trustees as it did by the order of the 11th July, 1927, from which, indeed, there has been no appeal.

In short, this appeal in their Lordships' judgment is without either merit or foundation. It ought to be dismissed, and with costs.

And their Lordships will humbly advise His Majesty accordingly.

Delivered the 16th day of February, 1932.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 120/31.

BEFORE:

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

IN THE CASE OF:

Clara Levy
Sharina Levy — APPELLANTS.

vs

Alfred Levy
Edmond Levy
Isaak Levy — RESPONDENTS.

Application to President, District Court, for an order prohibiting Rabbinical Court from dealing with estate — Exclusive jurisdiction of Rabbinical Court in matters of confirmation of wills of members of their Community — Conclusive evidence of validity of will — Will not applicable to miri property — Arts. 51, 53, 55, 59, Palestine Order-in-Council, 1922 — Sec. 5 (2), Succession Ordinance, 1923 — Application for reference to Special Tribunal refused.

JUDGMENT.

Article 53 of the Palestine-Order-in-Council provides that the Rabbinical Courts of the Jewish Community shall have exclusive jurisdiction, inter alia, in matters of confirmation of wills of members of their community other than foreigners as defined in Article 59.

There is no dispute as to the deceased not having been a foreigner as contemplated by Article 59 of the Palestine Order-in-Council.

The provision of Article 53 of the Order-in-Council, so far as concerns the jurisdiction relating to the confirmation of wills, was amplified in Section 5 of the Succession Ordinance, 1923— Subsection (2) of which runs as follows:—

"The certificate of the Court of the community confirming a will shall be deemed to be conclusive evidence

that the will is valid in form and that the testator had capacity to make the will and was not affected by mistake, fraud or undue influence, but confirmation by a Court shall not make valid any disposition of property thereby which is contrary to law."

In the present case, the Rabbinical Court, in two certificates dated 15 Tewet, 5691, and 5 Adar, 5691, ruled that the two documents in issue constituted the will of the deceased, declaring that such a will was in accordance with Jewish Law and confirmed the will.

It is not alleged by the Appellant that the will contains any provision as to the disposition of property which is contrary to law, and the Respondents agree that the will will not apply to the Miri property of the deceased, if any.

Under the provisions of Section 5 (2) of the Succession Ordinance this is conclusive, and the District Court had no alternative but to decide as it did.

With regard to the alternative plea of the Appellant that the matter be referred to a Special Tribunal, the second part of Article 55 of the Palestine Order-in-Council runs as follows:—

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

Article 51 of the Order-in-Council includes wills among the matters of personal status. Article 53, as we have seen, invests the Rabbinical Courts of the Jewish Community with exclusive jurisdiction in matters of wills.

The Appellant's reason for claiming a reference to a Special Tribunal is that the documents in question do not constitute a will. The Rabbinical Court, however, which has been given exclusive jurisdiction in matters of confirmation of wills, has confirmed these documents as a will which it would not have done if it had held that they did not constitute a will. That Court being the only Court competent to give a decision on the matter, there can be no question of referring it to a Special Tribunal.

The appeal is, therefore, dismissed with costs and £P.2 advocates' fees.

Delivered the 19th day of December, 1932.

RELIGIOUS COURT.

In the District Court of Jerusalem.

C.D.C. Jm. No. 73/25.

IN THE CASE OF:

Asher King — PLAINTIFF.

vs

Rivca Baruchin for Herself
and as guardian of the minor
heirs of the late Leib Baruchin
Dr. Baruch Baruchin
Salomon Baruchin — DEFENDANTS.

Application for declaration of waqf — Jurisdiction of Civil and Religious Courts re questions of waqf — Sec. 2, Jurisdiction of Civil and Religious Courts Ordinance, 1925 — Constitution of Non-Moslem waqf before Moslem Religious Court — Civil Procedure — Effect of new Ordinance altering jurisdiction of Court on action commenced under prior law.

JUDGMENT.

The plaintiff in this action applies to the Court under Section 3 para (a) of the Jurisdiction of Civil and Religious Courts Ordinance No. 3 of 1925 for a judgment of this Court declaring that a certain property was duly constituted Waqf. He relies on a judgment of the Sharia Court of the 28th Jamad El Akhir, 1918, declaring the said property to be Waqf which was confirmed by the Sharia Court of Appeal on the 8th December, 1918.

However opposition to this judgment was allowed to certain third parties in 1921 and the judgment of the Sharia Court of Appeal was on the first June, 1922, quashed.

Plaintiff appealed this latter judgment and on the 22nd November, 1922, the Sharia Court of Appeal decided to set the judgment aside and remit it. And now counsel for the Defendants produced a judgment of the Sharia Court of the 25th November, 1925, which confirmed the judgment of 1st June, 1922, quashing the two decisions of the year 1918.

The Plaintiff alleges that the judgments subsequent to 1918 are null and void in that the Sharia Court after 24th June, 1918,

had no jurisdiction to try cases relating to ownership of land which he alleges this action was.

However one of the judgments on which Plaintiff relies to prove that the property is Waqf is the Sharia Appellate judgment of the 8th December, 1918, subsequent in date to the Ordinance of the 24th June, 1918, and if it be contended that he relies on the Sharia Court judgment of 1st instance of the 28th of Jamad El Akhir of 1918, this cannot be considered as a final judgment and therefore insufficient to base his title to a claim before us that the property is Waqf.

We are also of opinion that if an action is commenced in certain Courts before an Ordinance is enacted giving the jurisdiction in such a type of action to another Court, in the absence of anything to the contrary in the Ordinance, the Courts where the action was commenced are not precluded from proceeding with the trial of that action and following appeals and oppositions in such Court until a final judgment is given.

We therefore find that the judgment on which Plaintiff bases his claim that the property is Waqf is not final and therefore the action must be dismissed with costs.

Judgment in presence subject to appeal.

Delivered the 23rd day of December, 1925.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 41/26.

BEFORE:

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

IN THE CASE OF:

Avrosina, Wife of Mina Dabbas — APPELLANT.

vs

Dimitri Mina Dabbas — RESPONDENT.

Jurisdiction of Religious Court in matters of insanity — Ecclesiastical Court — "Proceeding" in Religious Court — Appointment of guardian of insane person — Jurisdiction of Religious Court contingent upon consent of parties — Arts. 47, 51, 54 (ii), Palestine Order-in-Council, 1922.

JUDGMENT.

We are of opinion that if at any time a proceeding takes place in which all the parties do not agree the Ecclesiastical Court ceases to have jurisdiction. Each of these applications to appoint or dismiss a guardian is a proceeding and the consent of all partiest is necessary to give the Court jurisdiction. As they are in a state of disagreement we cannot see our way to restore the jurisdictio of the Ecclesiastical Court. But we would remined the Civil Courn that the assumption of jurisdiction involves a certain vigilance in regard to the proceedings of the guardians, especially when they are attempting to dispose of the property of the inhibited man.

Costs £E.3 to be paid by the Appellant.

Delivered the 19th day of July, 1926.