ANNOTATED

SUPREME COURT JUDGMENTS

1938

Vol. I

EDITED BY

ARNOLD M. APELBOM

LI. B., BARRISTER AT LAW, ADVOCATE

PUBLISHERS

S. BURSI
20 ACHAD HAAM ST.
TEL-AVIV

P. KADI
JAFFA ROAD P. O. Box 772
JERUSALEM

Printed in Palestine

Co-operative Printing „Hapoel Hazair", Tel-Aviv

INTRODUCTION.

The new edition of the *Supreme Court Judgments* will appear monthly and will contain reports of all the judgments of the Supreme Court with the exception of formal judgments containing no legal grounds whatever. This will not only give a wider selection of cases to the pactitioner but will also enable him to follow the present trend of judicial thought.

The full annotations appended to every judgment, giving as they do a gist of the entire case law on the point, will be of invaluable assistance in looking up the law. These annotations have been compiled with great care and attention with the object of effecting an economy of time and labour for members of the profession.

The Editor.

ABBREVIATIONS.

A. G. — Attorney General.
C. A. — Civil Appeal.
C. E. O. — Chief Execution Officer.
C. of J. — Collection of Judgments (Rotenberg).
C. of J. 1934—36. — Collection of Judgments, 1934—36.
CR. A. — Criminal Appeal.
Ct. L. R. — Current Law Reports.
H. C. — High Court Application.
P. L. R. — Palestine Law Reports.
P. P. — Palestine Post Reports.
S. C. J. — Supreme Court Judgments.

HIGH COURT No. 73/37.

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

BEFORE : The Senior Puisne and Copland, J.

IN THE APPLICATION OF :

Hanna Yousef Shami. — PETITIONER.

v.

1. George Abdul Nour,
2. Chief Execution Officer, Jaffa. — RESPONDENTS.

Sale in execution — Final order of sale — Effect of judgment of partition on final order of sale.

On the return to a *rule nisi* directing the Second Respondent to show cause why his order dated the 11th December, 1937, ordering the final sale of the property of the Petitioner and others to the last bidder, the First Respondent, should not be set aside :—

HELD : 1. Every application of this nature must be considered on its merits and there must be very strong grounds to support an application to upset a final order of sale made by a Chief Execution Officer.

2. The fact that a judgment for partition had been given before the final order of sale was made could not be raised at this stage as it should have been brought to the notice of the Chief Execution Officer before he made his order.

ANNOTATIONS : The High Court will not generally interfere with a final order of sale : H. C. 17/25 (P.L.R. 38, C. of J. 884) ; H. C. 50/31 (P.L.R. 634, C. of J. 287) ; H. C. 15/32 (C. of J. 855) ; H. C. 28/33 (C. of J. 866) but this does not mean that the sale may not be upset in another court, as the purchaser in a sale in execution does not get an indefeasible title : C. A. 41/33 (C. of J. 867) ;) L. A. 75/34 (P. P. 5.iv.36).

FOR PETITIONER : George Elia.

FOR 1ST RESPONDENT : Levin.

J U D G M E N T :

This is a return to a *rule nisi* given by this Court on 23rd December, 1937, calling upon the second Respondent to show cause why the Order

of final sale made by him on the 11th December, 1937, should not be set aside.

I need not go into the many details in connection with the original judgment or rather compromise judgment, which had been placed in the Execution Office for execution in 1927, but it appears that after some 9 or 10 years, that is in February, 1937, the judgment-creditor proceeded to re-execute his judgment. The ordinary course of sale followed and on the 11th December, 1937, a final order for sale was given. In the meantime there had been certain proceedings in the Magistrate's Court for the partition of the property. A judgment for partition was given on the 28th November, 1937, but it would appear that it was not brought to the notice of the Chief Execution Officer by the judgment-debtor until the 14th December, 1937, that is three days after the final order of sale had been given.

Of course, each of these High Court applications has its own peculiarities and each must be treated on its merits, but we wish to make it quite clear that there must be very strong grounds for asking us to upset a final order of sale, and in the present case we find none.

The judgment-debtors have had ample time within which to bring to the notice of the Chief Execution Officer the matters which they are raising now and if his answer were unfavourable to them to apply to the High Court. They have not done so, and it is too late now to come to this Court.

We see no reason to upset the Order of final sale made by the second Respondent on the 11th December, 1937, and the *rule nisi* must therefore be discharged with costs to include £P. 5.— advocate's fees.

Delivered this 3rd day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 214/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :

Hanna Jubran Karam. APPELLANT.

v.

Haj Khalil Khartabil. RESPONDENT.

Mejelle, Art. 1202 — *Window overlooking bedroom — Places frequented by women.*

In dismissing an appeal from the judgment of the District Court of Nablus dated the 15th October, 1937 :

HELD : A bedroom is not one of the places "frequented by women" within the meaning of Art 1202 of the Mejelle.

ANNOTATIONS : See 1 Cyprus Law Reports, p. 84 ; C. A. 79/30 (P.L.R. 559, C. of J. 1757) ; C. A. 101/33 (P. P. 9.xi.34, C. of J. 1085) dealing with the same question.

FOR APPELLANT : George Elia.

FOR RESPONDENT : Rashed Haddad.

JUDGMENT:

1. This appeal arises out of a case before the District Court, Nablus, in which the Appellant sued the Respondent for relief under Art. 1202 of the Mejelle. The Court found as a fact that a window recently erected by the Respondent overlooks a bedroom window of the Appellant, and it was alleged by the Appellant that this bedroom was frequented by the women of his family.

2. The District Court came to the conclusion that he Appellant was not entitled to any relief and we find ourselves in agreement with this finding. Article 1202 of the Mejelle mentions certain places frequented by women, which are entitled to protection, and the places mentioned are the kitchen, the head of a well and the courtyard of a house. These places are mentioned as examples, and the conclusion to be derived from their mention is that the places to which protection is given by the law are places frequented by women in which the women are unable to protect themselves from being seen by outsiders.

3. We do not think, therefore, that a bedroom in a house comes within the purview of Art. 1202 of the Mejelle, and the appeal must be dismissed with costs to include £P. 5.— advocate's fees.

Delivered this 4th day of January, 1938.

Senior Puisne Judge.

HIGH COURT No. 70/37.

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

BEFORE : The Senior Puisne Judge, and Copland, J.

IN THE APPEAL OF :—

Jamil Shawa — PETITIONER.

v.

1. Chief Execution Officer,
2. Behia Abdo Mahassin, Jaffa — RESPONDENTS.

Exemption from sale in execution — Cultivator — Law of Execution, Art. 90.

On the return to a *rule nisi* directing the First Respondent to show cause why his orders dated the 19th and 26th November, 1937, made in Execution File No.. 15932/36 should not be set aside : —

HELD : 1. The fact that the Second Respondent had contracted to sell the property in respect of which exemption was claimed brought the case within the exception of Art. 90 of the Law of Execution and was equivalent in effect to an outright sale.

2. The question of the poverty of the Second Respondent or the importance of the amount of damages awarded against her were not matters which could be dealt with in an application of this kind.

(Rule made absolute).

ANNOTATIONS : In H. C. 67/37 (29 i. 1938), the fact that the house in respect of which exemption was claimed had been offered for sale, was held not to take it out of the provisions of Art. 90 of the Law of Execution.

For exemptions from sale under Art. 90, see annotations to the judgment quoted above.

FOR PETITIONER : Richardson.

FOR RESPONDENT NO. 2 : Akel

JUDGMENT:

This is a return to a rule nisi, which was issued by the Court on the application of the Petitioner, calling upon the first Respondent to show cause why his orders dated 9.11.37 and 26.11.37 should not be set aside.

There is no doubt that the second Respondent had definitely contracted to sell the 2000 dunams in question. That being so, she cannot come now claiming that she is a cultivator and requires a part of this land for her own use.

It seems to us that the exemptions provided for in Art. 90 of the Execution Law must be applied to cases such as this, and that this article was drafted to deal with such cases. There is no doubt in our minds that there has been an "outright sale", and the judgment-debtor cannot therefore benefit of Art. 90.

The question of the judgment debtor's poverty is irrelevant, and

also the amount of the sum of damages awarded under the judgment is equally irrelevant now ; we are not a Court of Appeal.

In our opinion the Chief Execution Officer has misdirected himself in law, and the rule nisi must be made absolute with costs and LP. 5.— advocate's fees.

Delivered this 4th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 220/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :—

Odeh Elias — APPELLANT.

v.

Ahmed Hassan Shaka'a — RESPONDENT.

Bailment — Liability of bailee — Allegation of fraud

In dismissing an appeal from the judgment of the District Court of Nablus, dated the 4th November, 1937 : —

HELD : 1. The Appellant was not alleging a contract of principal and surety between him and the Respondent, the case being simply one of bailment and the Respondent could not be held liable for property which was not included in the contract of bailment.

2. It is not sufficient to allege in the pleadings that fraud has been committed by some person without specifying the person.

FOR APPELLANT : Goitein

FOR RESPONDENT : Zueiter.

JUDGMENT:

1. The facts of this appeal are simple, and simple out of all proportion to the voluminous nature of the record.

2. In the year 1930 it is admitted that the Appellant possessed about 670 jars of olive oil, which were in the custody of the Khayat Brothers at Nablus as bailees. The Khayat Brothers got into difficulties and made an agreement with the present Respondent who took over their stock of oil, and the Appellant agreed that his oil should be transferred at the same time. In the statement of claim

it is stated that the Respondent agreed that he would keep in safe custody all the olive oil, which had been deposited by the Appellant whit the Khayat Brothers. After the oil had been delivered, the Respondent made it quite clear that the only oil belonging to the Appellant delivered to him by the Khayat Bros. was 448 jars odd, and a document was drawn up showing these facts. The Appellant approached one of the Khayat Bros., namely Arif Khayat, with reference to the balance of 221 jars odd of olive oil and Arif Khayat admitted that there was a balance of oil due to the Appellant and paid him then and there the value of 100 jars. The Appellant then sued Khayat Bros. in the Magistrate's Court for the balance of 121 jars odd and succeeded in obtaining judgment against Arif Khayat for 101 jars only. The Appellant attempted to execute this judgment, but failed to obtain any satisfaction.. He then brought an action in the District Court of Nablus against Arif Khayat and the present Respondent. His action was dismissed by the District Court on the ground of *res judicata*. On appeal the case was sent back by this Court for the District Court to pronounce judgment in the case of the present Respondent as the *res judicata* did not apply to him. When the case got back to the District Court, the District Court came to the conclusion that the contract between the Appellant and the Respondent was a contract of principal and surety, and that this contract should be evidenced by some evidence in writing, and as there was no document in writing the case was dismissed. The Appellant has again appealed.

3. It is clear to us from the statement of claim that Appellant was not alleging any contract of principal and surety between himself and the Respondent. The case was one of bailment purely and simply.

4. It is not necessary, however, to send the case back to the District Court because from the statement of claim it is clear that the only contract of bailment between the Appellant and the Respondent was for 448 jars odd of oil, and for that quantity only. There is no admission that the Respondent was responsible for the balance of 221 jars of oil. It is obvious that the Appellant accepted this position in the beginning and that the only persons he held responsible for the balance were the Khayat Bros..

5. As the statement of claim does not disclose that the Respondent was the bailee for any quantity of oil beyond the 448 jars, it is not necessary to ask the District Court to hear any evidence as regards the quantity of oil actually deposited with the Respondent.

6. With regard to the allegation of fraud, it is not sufficient for

a party merely to say in his pleading that a person has been guilty of fraud. The particulars of such fraud should be alleged, and in the present case no particulars of a fraud by the Respondent are alleged in the statement of claim. The particulars alleged in the statement of claim are of a fraud by the Khayat Bros.

7. For these reasons, we decide that the appeal must be dismissed with costs to include £P. 5.— advocates fees.

Dated and delivered this 5th day of January, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 150/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Abdul Hadi, JJ.

IN THE CASE OF :

Mohammad Ali Kurdi. APPELLANT.

v.

Attorney General RESPONDENT.

Forgery — Criminal Code Ordinance, secs. 275, 334(1) — *Misdemeanour — Trial upon information — Theft under £P.* 50. —*Criminal Procedure (Trial Upon Information) Ordinance sec.* 72 — *Amending judgment.*

In allowing an appeal from the judgment of the District Court of Jerusalem dated the 1st December, 1937, whereby Appellant was convicted of charges under secs 275, 334(1) and 336 of the Criminal Code Ordinance ; quashing the judgment of the Court below as to part thereof and declaring the other part a nullity :—

HELD : 1. The District Court has no jurisdiction to try a misdemeanour on information and the conviction of the Appellant for a misdemeanour under sec. 334(1) of the Ordinance is a nullity.

2. Where the sum alleged to have been stolen is under £P. 50, a conviction under sec. 275 of the Ordinance cannot lie.

FOR APPELLANT : Cattan.

FOR RESPONDENT : Crown Counsel.

JUDGMENT:

This is an appeal which comes to us from the District Court of Jaffa, by leave granted by the Chief Justice.

An information was filed against the accused and he was charged in

that information with the offence of forgery under Section 334(1) of the Criminal Code Ordinance. Forgery in its simple form is a misdemeanour, and the District Court in trying cases upon information (that is, not summarily under the Magistrates Courts Jurisdiction Ordinance) has no jurisdiction to try cases of misdemeanour. It had therefore, no jurisdiction to try that count, and the conviction on that count was a nullity, and is set aside as the accused has not been tried by any competent Court.

He was also charged with an offence under Section 275 of the Criminal Code Ordinance. That is a section which enhances the penalties for theft in certain cases. The first part of the section deals with offences of clerks and servants who steal the property of their employers or property coming into their possession on account of their employers, and the second part deals with stealing by directors or officers of corporations or companies, and in each case the offender is liable to heavy punishment.

The Court below convicted the accused under the first part, he being a clerk or servant, but the thing stolen or taken in this case did not amount in value to the sum of £P. 50. The question arises whether on the true construction of the section the Court below was justified in convicting the accused thereunder of taking or stealing a sum of money being less than £P. 50.— In our view the qualification of £P. 50.— applies to the whole of the first limb of the section, and in order to bring the accused as a clerk or servant under this section the thing stolen must be of the value of £P. 50.— It seems to us, therefore, that the Court below was not justified in convicting the accused, and the appeal must be allowed and the conviction under this count quashed.

We have been invited by the Crown Counsel to take upon ourselves the duty of amending the judgment by virtue of the powers vested in us by Section 72 of the Criminal Procedure (Trial upon Information) Ordinance. We feel, having regard to the evidence in this case, it would be difficult for us to do so.

As I have stated, the conviction under the first count (i. e. theft by a servant) is quashed and the conviction under the second count (simple forgery) is a nullity and is set aside.

Dlivered this 5th day of January, 1938.

Chief Justice.

CIVIL APPEAL No. 203/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :—

Salameh Muheisen Misleh el Dawahreh — APPELLANT.

v.

Attieh Sallam en Naami — RESPONDENT.

Application for review — Grounds.

In dismissing an application for review of the judgment of the Supreme Court sitting as a Court of Appeal dated the 25th October, 1937 :—

HELD : No grounds having been put forward in support of the application, the latter must be dismissed.

ANNOTATIONS : Other decisions on review : C. A. 168/33 (P. P. 1.vi.34 ; C. of J. 1575) ; C. A. 26/30 (P. L. R. 624, C. of J. 1067) ; L. A. 131/24 (P. L. R. 138, C. of J. 1548).

APPELLANT : in person.

RESPONDENT : do.

JUDGMENT:

In this case the parties before the Land Court submitted the dispute to arbitration. The arbitrator decided in favour of the Respondent and the award was confirmed by the Court. An appeal to this Court was dismissed.

2. The Appellant now says he wishes a review of the decision of this Court, but has not put forward any grounds in support of his application.

3. The application is therefore dismissed with 500 mils costs.

Dated and delivered this 11th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 225/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior PuisneJudge, Khaldi and Khayat, JJ.

IN THE APPEAL OF :

Mohammad Ahmed Abu Laban — APPELLANT.

v.

Haj Mustafa Sabbagh — RESPONDENT.

Judgment by default — Opposition — Cause for non-appearance — Judgment by Default (Magistrates Courts) Rules, rule 4(3).

In allowing an appeal from the judgment of the District Court of Jaffa, sitting in its appellate capacity, dated the 3rd July, 1937, and remitting the case to the Chief Magistrates Court, Jaffa :—

HELD : That the main issue to be decided by a Magistrate's Court when opposition is made to a judgment by default, is whether the opposer had a good cause for non-appearance. The Magistrate having failed to inquire into the reason for the opposer's absence, the case must be remitted to be decided in accordance with the law.

ANNOTATIONS : See also C. A. 50/33 (P.L.R. 871, C. of J. 1402).

FOR APPELLANT : Muwakkeh.

FOR RESPONDENT : George Elia.

JUDGMENT.

1. In this case judgment by default was given against the Appellant on the 27th April 1937; a copy of the judgment was served upon him on the 2nd May, 1937, and opposition was lodged against the judgment on the 6th May, 1937. The opposition was rejected by the learned Chief Magistrate of Jaffa on the ground that the grounds of defence had not been stated in the document opposing the judgment. On appeal to the District Court, the District Court held that the learned Chief Magistrate was not satisfied that the Appellant had a good cause for non-appearance and dismissed the appeal. The Appellant has obtained leave to appeal from that decision to this Court.

2. In the first place, the District Court had no ground whatsoever to come to the conclusion that the learned Chief Magistrate was not satisfied that the Appellant had a good excuse for his non-appearance because that issue was not determined by the Chief Magistrate. The Chief Magistrate rejected the opposition on other grounds.

3. On reference to the Judgment by Default (Magistrates Courts) Rules on p. 2341 of Vol. III of the Laws of Palestine, we find that Rule 4 para. 3 contains the following words :

> "Upon the hearing the Court shall reject the opposition unless it is satisfied that the opposing party had had good cause for non-appearance at the original hearing".

We conclude from that Rule that the main issue to be decided by a Magistrate's Court when opposition is made to a judgment is whether the opposing party had or had not good cause for non-appearance. As we have already said this issue was never decided by the Chief Magistrate in this case.

4. For this reason, this appeal must be allowed. The judgment of the learned Chief Magistrate and that of the District Court must be set aside and the opposition remitted to the Magistrate's Court to be decided according to law.

Costs will abide the event.

Dated and delivered this 11th day of January, 1938.

Senior Puisne Judge.

HIGH COURT No. 66/37.

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

BEFORE : The Chief Justice and Copland, J.

IN THE APPLICATION OF :

Negib Mansour. — APPLICANT.

v.

1. Chief Execution Officer, Jerusalem,
2. Briendel Navissky. — RESPONDENTS.

Sale of Mortgage — Land Transfer Ordinance, sec. 14 — Postponment of sale.

In discharging an *order nisi* directed to the First Respondent to show cause why his order in Execution File No. 3520/37 should not be varied, and in varying the said order :—

HELD : The President of the District Court acting as a Chief Execution Officer in an application for the sale of mortgaged property has no power to go into matters which are outside the scope of sec. 14

of the Land Transfer Ordinance, but should, in a proper case, adjourn the sale and enable the parties to apply to the competent court.

ANNOTATIONS: See note 3 to H. C. 65/37 (27.i.37).

FOR APPLICANT: George Elia.

FOR 2ND RESPONDENT: Nishry.

JUDGMENT:

This is an application for a *rule nisi* directed to the Chief Execution Officer, Jerusalem, calling upon him to show cause why he should not go into the facts relating to a certain mortgage before ordering foreclosure.

This Chief Execution Officer's Order to which objection is taken is as follows :—

> "I hold that it is not for me as Chief Execution Officer to go into the question of the validity of the mortgages.
>
> On the face of it Mortgagee is entitled to foreclosure.
>
> Order for foreclosure for £P. 400 interest from 28.ii.34 at 9%, costs and advocate's fees of £P. 5.— order not to be acted upon for 1 month to give Mortgagor opportunity to institute any proceeding he may wish in Competent Court".

The question turns upon the interpretation of Section 14 of the Land Transfer Ordinance Cap. 81 which is as follows :—

> "14. Application for the sale of immovable property in execution of a judgment or in satisfaction of a mortgage may be made to the President of the District Court who may order postponement of the sale if he is satisfied that —
>
> (a) the debtor has reasonable prospects of payment if given time or
>
> (b) having regard to all the circumstances of the case, including the needs of the creditor, it would involve undue hardship to sell the property of the debtor".

The primary object of the section is clearly to give power to the President of the District Court to delay a sale of land which otherwise would automatically take place, either under the judgment or the mortgage. In practice these applications have been made to and dealt with by Presidents of District Courts in their capacity as Chief Execution Officers, but how this practice has sprung up is not clear.

It happens — as happened in this case, that the respondent, usually the mortgagor, may have some reason to urge why the sale should not take place other than those contemplated in the section. It is clear

under the section that the President of the District Court has no power to deal with such matters, and the question arises how should he deal with the position thus created.

In our opinion if he is satisfied that there is such a *bona fide* matter with which he cannot deal (i. e. outside the scope of the section) he may adjourn the application in order to give the parties an opportunity to go the appropriate Court, but the question arises in this application — Can he order the sale under a mortgage but postpone the operation of his order ? Having regard to the provision of the Mortgage Law which certainly leans in favour of the Mortgagee we see no reason why he should not do so.

As the application was made to this Court within one month we are of opinion that Applicant should have 7 days from today in which to go to the competent court, and the order of the President of the District Court will be varied accordingly — subject to this, the rule will discharged with costs. Advocate fee £P. 5.—

Delivered this 11th day of January, 1938.

Chief Justice.

HIGH COURT No. 71/37.

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

BEFORE : The Chief Justice and Copland, J.

IN THE APPLICATION OF :

1. Michael Suedan,
2. Anis Suedan. APPLICANTS.

v.

The Director of Land Registration, Jerusalem. RESPONDENT.

Ghor Lands — Statutory discretion of Director of Land Registration — Transfer of land — Land Transfer Ordinance, sec. 4.

In dismissing an application for an order to issue to the Respondent calling upon him to withdraw the refusal of his consent to the transfer by Applicants of their lands registered in their names under Vol 6, Fol. 11, at the Land Registry Office of Beisan (Ghor Lands) :—

HELD : The Director of Land Registration exercised his statutory discretion in refusing his consent to the transfer of land and the High Court would not interfere.

ANNOTATIONS: In H. C. 18—19/32 (P.L.R. 774, C. of J. 1744, P.P. 20.xii.32) it was held that creditors could have Ghor lands sold in satisfaction of their debts.

FOR APPLICANTS: Olshan.

JUDGMENT:

In November, 1921, an agreement known as the Ghor Lands Agreement was entered into between the Government and a number of cultivators occupying certain lands. It is to be found in Bentwich, Volume II at page 500.

For the reason therein recited a new agreement was entered into between the Government and the cultivators on the 25th June, 1935.

That agreement provided, *inter-alia,* — that the grantee should pay a reduced purchase price to be paid by instalments; that the grantee should execute a mortgage in favour of the Government; that the grantee should not dispose of the land held by him until the purchase price had been paid in full; and that, except with the consent of the grantor, no instalment should be paid before it become due.

Notwithstanding that no mortgage had been effected and that the consent of the grantor to the payment in advance of the remaining instalments had not been obtained, the applicant before us was minded to sell his land, and he applied to the Director of Land Registration to open a file for that transaction.

The Director of Land Registration, relying upon Section 4 of the Land Transfer Ordinance (Cap. 81), refused his consent to the transfer.

The matter was brought before us by the Applicant asking for a *rule nisi* under Section 6(b) of the Courts Ordinance, Cap. 28, for an order calling upon the Director of Land Registration to withdraw his refusal.

It seems to us, having regard to the facts which I have set out, that the Director was exercising the statutory discretion vested in him, and we refuse the application.

Given this 11th day of January, 1938.

Chief Justice.

CIVIL APPEAL No. 218/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khayat, JJ.

IN THE APPEAL OF :

Mohammad Taher Mohd. Salah.
Fatmeh Taher Mohd. Salah. APPELLANTS.

v.

Rabah Hassnein Fakhr el Nishasi. RFSPONDENT.

Settlement Officer — Equitable rights to land — Admission in former proceedings.

In allowing an appeal from the judgment of the Land Court of Nablus, sitting in its appellate capacity, dated the 1st November, 1937 ; setting aside the judgment of the Land Court and restoring the decision of the Land Settlement Officer of Kfar Saba :—

HELD : Respondent having in a previous judgment recognised the right of the Appellant to certain lands and undertaken to register them or pay damages, the Appellant had an equitable right to the land entitling him to obtain registration thereof by the Land Settlement Officer.

ANNOTATIONS : As to admissions in former proceedings, see e. g., C. A. 125/26 (C. of J. 1722).

As to equitable rights to land, see L. A. 83/27 (C. of J 749) ; L.A. 102/24 (C. of J. 745) ; L.A. 135/23 (C. of J. 1489) ; L.A. 39/32 (P. P. 23.iv.33, C. of J. 1746) ; L. A. 1/36 (P. P. 30.x.1, 3—5.xi.36).

And as to specific performance, see L.A. 1/36 (*supra*), and *dictum* in para. 13 of the judgment of Manning, J., in C. A. 191/37 (2 Ct. L. R. 169, P.P. 6—9.xii.37).

FOR APPELLANTS : Nasr.
FOR RESPONDENT : Kehaty.

JUDGMENT:

1. This is an appeal from the Land Court, Nablus, which reversed the decision of the Settlement Officer in the Tulkarem area. Before the Settlement Officer the Appellants claimed ownership of one half share out of 13 shares in a certain land. They claimed this half share by virtue of a judgment which had been delieved by the Land Court, Samaria, in 1928. In a case before that Land Court the father of the present Appellants and the present Respondent were parties and the judgment was given by the Land Court as the result of a compromise.

In the judgment it is declared that the present Respondent admitted the ownership of the father of the Appellants to the land which is now claimed by the Appellants and the Respondent with others undertook to transfer this land to the father of the Appellants within two months and to pay all damages caused by delay in registration. It should be unnecessary to say that this judgment is binding upon the parties to this appeal and it seems futile that the present Respondent should contest the claim of the Appellants. Respondent, however, relies on two matters to support his opposition to the claim. The first is that in the judgment of the Land Court, Samaria, there was an undertaking to pay damages for any delay in registration. If this clause may be construed to mean an agreement to pay damages for failure to transfer, we are of the opinion that the judgment gave to the present Appellants a choice of two remedies ; firstly, a claim to the ownership of the land, secondly a claim for damages ; and they were entitled to resort to whichever remedy they chose. Under the Land (Settlement of Title) Ordinance, a Settlement Officer is bound to give effect to equitable rights to land, and there can scarcely be a clearer case than the present, in which the Appellants had acquired an equitable title to the land by virtue of the admission of the Respondent that they are the owners thereof and by virtue of the compromise which was made a judgment of the Land Court. It is noteworthy also that in December, 1932, the present Respondent sought to have the title of the present Appellants registered in the Land Registry. This constitutes a further admission of the Appellants' title and an admission that he himself had no title.

2. The second point relied upon by the Respondent is a judgment of the Land Court, Nablus, delivered in 1934 and confirmed by this Court on appeal. The first observation we have to make on those judgments is that the present Respondent was not a party to the dispute before the Court, and without going into the actual maters decided by the judgments, it is quite clear from reading them that they do not conflict in any way with the present claim by the Appellants made before the Land Settlement Officer.

3. For these reasons, we think that the judgment of the Settlement Officer was right and the reasons of the Land Court, Nablus, for reversing that judgment are not clear.

4. It was stated by the Land Court that the purchasers under the execution sale of this property were entitled to be registered as owners, but these purchasers were not a party to any action either before the Land Settlement Officer or before the Land Court.

5. To sum up, it is clear that the equitable title of the Appellants was properly given effect to by the Settlement Officer and that his decision can be amply supported on that ground alone.

6. The judgment of the Land Court must be set aside and the judgment of the Settlement Officer dated 5.4.37 (Case 37 & 39/Kfar Saba) restored. The Appellants will pay the costs of this appeal to include £P. 5.— advocates fees.

Delivered this 13th day of January, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 151/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Green and Abdul Hadi, JJ.

IN THE APPEAL OF :

Rejeh Tawfiq Abu Hantash — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Advocate of accused — Waiver of witnesses — Inadmissible evidence — Voluntary confession — Motive — Provocation.

In dismissing an appeal from the judgment of the Court of Criminal Assize sitting at Jerusalem, dated the 9th December, 1937, whereby Appellant was convicted of murder contrary to secs. 214(a) and 215 of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. The Appellant having stated in the Court below that he had no witnesses, no new trial could be granted on that ground although he had not been represented by counsel.

2. Part of the evidence against the Appellant was not admissible but there had been sufficient evidence to warrant a conviction.

3. The confessions made by the Appellant had been freely and voluntarily made.

4. There was no evidence of provocation which could reduce the charge from murder to manslaughter.

ANNOTATIONS :

1. See also C. A. 242/37 (31.1.38) and note thereto. Cf. C. R. A. 1/38 (31.1.1938).

3. On voluntary confessions, see A. A. 13/33 (P. P. 23.1.34, C. of J. 806) ;

CR. 1926 (Off. Gaz. 16.vii.26, C. of J. 589) ; CR. A. 67/33 (C. of J. 639) ; CR. A. 111/27 (P. L. R. 245, C. of J. 780).

FOR APPELLANT : Salah.

FOR RESPONDENT : Crown Counsel.

JUDGMENT:

This case has already been twice before this Court, and adjournments were granted owing to the Accused having changed his advocate.

He is now represented by George Eff. Salah, who has argued the case at considerable length, which was desirable, as the Accused was not represented by an advocate in the Court below.

The fact that the Accused was not represented in the Court below is now put forward by George Eff. as a ground of appeal, and he argues that for that reason the trial was unfair to the Accused.

It appears from the record that the Accused desired to be represented by Rashid Jayoussi, who was unfortunately detained at Acre.

The Court of Trial offered to appoint an advocate to represent the Accused, but this the Accused refused.

George Eff. also complains that the Accused was not given an opportunity to call witnesses, but it appears from the record that the Accused stated that he had no witnesses present and that he had not made any application for witnesses.

I do not think that the Accused can now complain of either of these matters or that they caused the trial to be unfair to him.

George Eff. has referred in detail to the evidence, and in particular to one piece of evidence referred to in the judgmnt of the Court, that is, that the girl was told by Zakieh to take the clothes of the murdered man to Zakieh's house. I think that this evidence was not admissible, but if it is disregarded I am of opinion that there was ample evidence upon which the Court could convict.

Apart from evidence in the nature of corroboration there was evidence of several witnesses who stated that the Accused had admitted to them that he had committed the crime, and it is clear that if this evidence is believed it would justify the Court in convicting.

George Eff. has contended that these statements are inadmissible on the ground that they are confessions which were not made freely and voluntarily, but when the evidence is examined it is quite clear that they were made freely and voluntarily.

It is also clear that there was evidence of motive if the Court accepted it, that is, that the Accused had threatened to kill his father if his father persisted in his intention to sell certain land.

George Eff. has suggested that there was evidence of provocation in that the deceased proposed to sell his land, and that he treated the mother of the accused badly.

I am satisfied that there was no evidence of provocation which could reduce the charge from murder to manslaughter.

The appeal therefore is dismissed.

Delivered this 15th day of January, 1938.

Chief Justice.

I concur. I think that there was ample evidence upon which the Court of Assize could act.

British Puisne Judge.

I concur. I think that there was sufficient evidence.

Puisne Judge.

CIVIL APPEAL No. 223/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

Wart Gaspar Aghajaniam — APPELLANT.

v.

Gaspar Aghajanian. — RESPONDENT.

Appeal. — Bond. — Civil Procedure Rules, 1935, secs. 93—4. — Exemption from court fees. — Frivolous actions discouraged. — Findings of fact by lower court.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 22nd October, 1937 :—

HELD : 1. Although Appellant was exempted from paying court fees both in the District Court and on appeal, he would not be exempted from filing a bond or paying a deposit in accordance with secs. 93-4 of the Civil Procedure Rules, 1935, in view of the fact that he had had a fair trial by the court below and that the object of the said Rules is to discourage frivolous actions or continuous litigation.

2. The Appellate court would not interfere with definite findings of fact made by the District Court.

ANNOTATIONS :

1. For dismissal of appeals on the ground of irregularity in the bond under the new Rules, see : C. A. 100/37 (P. P. 30.i.38, 2 Ct. L. R. 223) ; C. A. 180/37 (P. P. 20.xii.37, 2 Ct.L.R. 117, under No. 189/37) ; C.A. 129/37 (2 Ct.L.R. 87).

2. There are numerous decisions to the effect that an appellate court will not upset findings of fact made by the lower court, see *e.g.* : C.A. 241/37 (25.i.38) ; C. A. 245/37 (26.i.38) ; CR. A. 64/37 (1 S. C. J. 467) ; C. A. 12/33 (P. P. 18—20.iii.35, C. of J. 449) ; C. A. 129/35 (2 Ct.L.R. 14). *Cf.* C. A. 22/37 (2 Ct.L.R. 145).

APPELLANT : In person.

FOR RESPONDENT : Atalla.

JUDGMENT:

Mr. Atalla raised a preliminary point that the Appellant has neither filed a bond with his appeal nor has he paid a deposit in lieu thereof in accordance with Sections 93 and 94 of the Civil Procedure Rules, 1935.

The Appellant was exempted from payment of the necessary court fees both in the District Court and here, and from perusal of the proceedings in the Court below, it appears that he has had a fair trial. We are not prepared, therefore, to exempt him from complying with the requirements of the said Rules, the object of which is to prevent people from bringing frivolous actions and continue litigation at the expense of others.

The appeal must be dismissed with costs.

But even on the merits, the Appellant is not likely to succeed as the District Court has made definite findings of fact with which we would not have been prepared to interfere.

Delivered this 17th day of January 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 158/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

1. Khalid Makhlouf
2. Hafeh Rashid Haj Mahmoud. APPELLANTS.

v.

Attorney General. RESPONDENT.

Demanding by threats. — Construction of Criminal law. — Sending letters. — Criminal Code Ordinance, sec. 290.

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 15th December, 1937, whereby each of the Appellants was sentenced to 10 years' imprisonment under sec. 290 of the Criminal Code Ordinance :—

HELD : Although criminal law must be construed strictly, it should be construed with common-sense and reasonably and the facts shown were sufficient to constitute the offence of demanding with threats within the meaning of sec. 290 of the Criminal Code Ordinance.

FOR APPELLANT No. 1 : Sanders.

FOR APPELLANT No. 2 : In person.

FOR RESPONDENT : Saary.

JUDGMENT:

This is an appeal from a conviction of the District Court, Haifa, sentencing each of the two Appellants to 10 years imprisonment on a charge under Sec. 290 of the Criminal Code Ordinance, that is demanding money by written threats.

The evidence against the Appellants consists mainly of statements made by themselves before the Police. The first Appellant Khalid Makhlouf admitted that he wrote the letter at the dictation of the second Appellant, who, together with another person who was acquitted by the District Court, delivered this letter to the person for whom it was intended, namely Subhi Aweida.

It has been argued before us by Mr. Sanders that certain elements are essential to constitute an offence under Sec. 290. We agree it is essential that a person to be convicted must be aware of the contents of the writing, the letter must demand something and the letter must also contain threats to the person to whom it is addressed if the demand is not complied with.

If we take the case of the present letter, we find that it contains a demand for £P. 15.— and also contains threats if that money was not paid. The words in the letter "Beware — do not delay payment" followed by the signature "Black Hand Society" are to our minds amply sufficient to convey to the addressee very clear threats.

Whilst it is true that the Criminal Law must be construed strictly, yet it should also be construed with common-sense and reasonably. As we have said, the expressions used in the letter can only mean one

thing to any reasonable man, and that is threats of injury if the demand is not complied with.

With regard to the other point raised, that it is not sufficient to write the letter but the offender must cause a person to receive it, we are of the opinion that the writing of the letter by the first Appellant at he dictation of the second Appellant then delivering it by the dictator and another man to the addressee must be deemed to be a conspiracy between the three and the writer is therefore equally guilty. Further the first Appellant admitted having written other letters of a similar nature.

In the result, we find that there was ample evidence before the District Court to justify the conviction of the two Appellants and the appeals against conviction must therefore be dismissed.

The only question which we have to consider is whether the sentence imposed upon the first Appellant is excessive in view of his advanced age. Of course, this offence of demanding money by threats is very serious and has become too prevalent in this country. It is difficult to detect these cases, particularly because the addresses of such letters are always reluctant to give information, but once detected the offenders must obviously get severe punishment.

In view, however, of the advanced age of the first Appellant — and he is well over 60 — we reduce his sentence to one of five years imprisonment.

The sentence imposed on the second Appellant, i.e. 10 years imprisonment is confirmed.

Delivered this 17th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL No. 234/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khaldi, JJ.

IN THE APPEAL OF :—

Palestine Land Development Co. APPELLANTS.

v.

Obeid Mousa el Kuheily and 46 others. RESPONDENTS.

Interpretation of ordinances — Conflicting provisions — Cultivators (Protection) Ordinance, secs. 6 and 15.

In allowing an appeal from the judgment of the Land Court of Haifa, sitting as a court of appeal, dated the 12th November, 1937, and remitting the case to the Chief Magistrate with directions :—

HELD : 1. The words "Notwithstanding anything contained in this Ordinance" which appear in sec. 15 of the Cultivators (Protection) Ordinance must be taken in their ordinary meaning and any provisions in the Ordinance which conflict with sec. 15 must be disregarded.

2. An order made by the District Commissioner under sec. 15 is consequently not subject to the limitations imposed by sec. 6 and a judgment for eviction may be given in pursuance of such order.

ANNOTATIONS : For the rule of interpretation adopted in this case and which has been termed by Lord Wensleydale "the Golden Rule of Legal Interpretation", see H. C. 70/34 (P. P. 14. ix. 34). See further, as to interpretation of statutes : C. A. 171/33 (P. P. 7.x.34, C. of J. 1239) ; H. C. 89/34 (P. P. 7.i.35, C. of J., 1934—6, 414) ; M. A. 11/35 (P. P. 1.i.36) ; C. A. 10/36 (P. P. 3.ix.36) ; CR. A. 109/36 (P. P. 12—14.x.36) ; H. C. 67/36 (P. P. 3—4.viii.36) ; L. A. 35/33 (P. P. 10.viii.35, C. of J. 1934—6, 478) ; C. A. 60/35 (1.S.C.J. 22, 1 Ct.L.R.21) ; C. A. 80/36 (1.S.C.J. 166, P. P. 26.v.37, Ct. L. R. 41) ; CR. A. 158/37 (17.1.38) and see C. of J. Vol. VI, pp. 205—6, *sub. tit.* INTERPRETATION OF STATUTES.

FOR APPELLANTS : Horowitz, Solomon.

FOR RESPONDENTS : Atalla.

JUDGMENT :

This appeal comes to us on leave granted by the President Land Court, Haifa, on appeal from the Chief Magistrate.

Leave to appeal has been granted on two points of law set out in the Order of the learned President dated 23.11.37 and it is not necessary to repeat them.

The whole question really turns upon the meaning to be put on the opening words of Sec. 15 of the Cultivators (Protection) Ordinance. These words are as follows :—

> "Notwithstanding anything contained in this Ordinance, the district commissioner may...."

Now, it is a well recognised rule of construction that where words are capable of interpretation they must be interpreted in such a way as to be given a sensible meaning.

We are unanimously of the opinion that the words "Notwithstanding

anything contained in this Ordinance" must mean that if any other provisions in the whole Ordinance conflict with the provisions of Sec. 15, then they must be disregarded.

To our minds it is quite clear that Sec. 15 provides certain remedies where the land is required for, what I may call, public utility purposes. The purposes for which the land may be required under Section 15 are totally different to those for which it may be required under Sec. 6.

We think, therefore, that an Order made by a District Commissioner under Sec. 15 is not subject to the restrictions imposed by Sec. 6, and that if such an Order is produced to a Magistrate's Court, the Magistrate is fully entitled to give judgment for eviction.

The only point to consider is what to do with this case if we allow the appeal, which we do. The best course would be to remit the case to the Chief Magistrate to pronounce judgment in accordance with our rulings.

The appeal is allowed with costs here and below to include £P. 5 advocate's fees.

Delivered this 18th day of January, 1938.

British Puisne Judge.

CVIVIL APPEAL No. 231/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Green and Abdul Hadi, JJ.

IN THE APPEAL OF :

Saleh el Ahmed and others. APPELLANTS.

v.

1. Raja El Rais
2. Palestine Land Development Co. RESPONDENTS.

Joinder — Immaterial irregularity of procedure.

In dismissing an appeal from the judgment of the Land Court of Nablus, sitting as a court of appeal, dated the 28th September, 1937 :—

HELD : The joinder of the first Respondent as a party to the action, although improper, was not a sufficient ground for setting aside the judgment, Appellants having been in no way prejudiced by such joinder.

ANNOTATIONS : On joinder of parties, see H. C. 45/33 (P. P. 30.i.34, C. of J. 1816) ; L. A. 85/28 (C. of J. 1742) ; C. A. 132/28 (P.L.R. 375,

C. of J. 1723) ; C. A. 54/31 (P.L.R. 699, C. of J. 245) ; C. A. 44/26 (C. of J. 1720) ; H. C. 31/36 (P. P. 9.ii.37) ; C. A. 162/32 (C. of J. 263) ; L. A. 62/23 (C. of J. 101) ; L. A. 22/32 (P.L.R. 761, C. of J. 329).

FOR APPELLANTS : Zueiter.

FOR RESPONDENTS 1 & 2 : Eliash.

JUDGMENT:

This appeal comes before this Court on a point of law stated by the President Land Court, Nablus.

The first and second Respondents to this appeal were plaintiffs in an action brought by them in the Magistrate's Court, Nazareth, against the present Appellants. These proceedings were for the dispossession of the Appellants from a land sold by the first Respondent to the second Respondent. The first Respondent did not ask for judgment for himself but in favour of the second Respondent. The Magistrate duly gave judgment in favour of the second Respondent. The Land Court, Nablus, on appeal confirmed the Magistrate's judgment with a small variation which does not now concern us.

The only point in this appeal is whether the first Respondent was a proper party to the action before the Magistrate. We are of the opinion that, technically speaking, his joinder was not correct, but the point is purely academic, because judgment was given in favour of the second Respondent, whose right to bring the action is not disputed.

In the result we have come to the conclusion that the Appellants have not in any way been prejudice by the joinder of the first Respondent to the action, and for this reason the appeal must be dismissed with costs to include £P. 5 advocate's fees.

Delivered this 19th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL No. 236/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne and Khayat, J.

IN THE APPEAL OF :

Simha Zissel Shapira. APPELLANT.

v.

Raphael Yehoshua. RESPONDENT.

Construction — Claim for an account to be read into statement of claim.

In allowing an appeal from the judgment of the District Court of Jerusalem, dated the 15th November, 1937, and remitting the case to the lower court to ascertain whether any amount was due to the Appellant and give judgment accordingly :—

HELD : The District Court should have read into the statement of claim (wherein the Appellant complained that an account had not been rendered to him by Respondent) an application for an account to be made.

ANNOTATIONS : 1. As to the possibility of suing for an account, see C. A. 46/23 (C. of J. 14) ; C. A. 8/31 (P. L. R. 592, C. of J. 19).

2. See and compare the following cases wherein it was held that a plaintiff may not alter the cause of action during the course of the proceedings : C. A. 50/26 (P. L. R. 131, C. of J. 29) ; C. A. 84/34 (P. P. 12.iv.35).

FOR APPELLANT : Olshan, Eisenberg.

FOR RESPONDENT : Ben Aharon.

JUDGMENT:

In this case the Respondent had entered into a contract to buy certain land and on the 13th June, 1934, he agreed with the Appellant to transfer to him all his rights in this contract to purchase land. By clause 3 of the agreement, the Appellant agreed on the price which was to be calculated in the following manner : — The sum of £P. 500 was to be paid to the Respondent as profit apart from the cost of the land to the Respondent and any expenses which he had incurred ; then followed a proviso that the price of each dunam to the Appellant should not exceed LP. 75 and if it exceeded LP. 75, then the Respondent was to be paid only LP. 50 in addition to the cost of LP. 75 per dunam.

2. The Appellant paid altogether to the Respondent the sum of £P. 1514.900 mils and sometime after that payment he came to the conclusion that he had paid too much and he demanded from the Respondent a statement of account. This statement was not rendered and the Appellant then sued the Respondent before the District Court, Jerusalem, for the sum of £P. 439,325 mils.

3. Before the District Court no evidence was taken and the case resolved itself into an argument between the parties as to the interpretation to be placed on clause 3 of the agreement. The Appellant contended that in any event the cost to him should not be more than LP. 75 a dunum plus LP. 50. On the other hand, the Respondent

contended that he at any rate was to have a sum of LP. 500, and that the proviso with regard to £P. 75 operated only with regard to the cost of the land to the Respondent and the expenses incurred. The District Court agreed with the contention of the Respondent and the Appellant's claim was dismissed.

4. Having heard the arguments of Mr. Olshan on behalf of the Appellant and Mr. Ben-Aharon on behalf of the Respondent, we have come to the conclusion that the District Court was right in its interpretation to clause 3 of the agreement. There is no doubt that it was open to Mr. Olshan to press the construction that was placed on clause 3 by the Appellant, but that does not mean that the clause is ambiguous and it was not considered ambiguous by the District Court. It is quite clear to us that the intention of the parties was that the Respondent was to have the sum of LP. 500 in any event in addition to what the rights in the land cost him, but that that cost was subject to the proviso that it should no exceed LP. 75 per dunum, plus a sum of LP. 50.

5. In his statement of claim the Appellant complained that no account had been rendered to him by the Respondent but he did not ask for any relief in this respect. We think, however, that the Court below ought to have read into the statement of claim an application by the Appellant that an account should be made between the parties, so that it might be escertained whether any sum was due to the Appellant in accordance with the terms of the agreement.

6. While, therefore, holding that the District Court was right in its interpretation of clause 3 of the agreement, we think that the case must be remitted for the District Court to take an account between the parties on its interpretation of the agreement and if any sum is found due to the Appellant to give judgment for that sum.

7. The Order will therefore be that the judgment of the District Court be set aside and the case remitted with directions as above. Each party will bear his own costs of this appeal.

Delivered this 20th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 238/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Abdul Hadi, JJ.

IN THE APPEAL OF :

Nifjeh el Mousa el Khalil, on behalf of the heirs of Khalil Mousa el Ayyoub — APPELLANT.

v.

1. Ahmad Mohammad.
2. Mahmoud Mohammad. — RESPONDENTS.

Ownership of land — Prescriptive title — Land Code, Art. 78 — Land (Settlement of Title) Ordinance, sec. 51 — C. A. 195/37 ; L. A. 13/34 — Evidence of possession.

In allowing an appeal from the judgment of the Land Court of Nablus, dated the 13th November, 1937, and remitting the case for a new trial :—

HELD : As the Appellant was not seeking to prove ownership by prescription but claimed title by virtue of inheritance, neither party having a registered title, the Land Court should have heard evidence of possession from which ownership might be implied.

Followed : C. A. 195/37 (3 Ct. L. R. 41) ; L. A.. 13/34. See also C. A. 244/37 (26.i.1938) ; C. A. 239/37 (24.i.38)..

ANNOTATIONS : It has long been settled that, apart from the cases contemplated by Art. 78 of the Land Code and sec. 51 of the Land (Settlement of Title) Ordinance, possession alone cannot be relied upon to establish title to land. See C. A. 80/37 (1 S.C.J. 307) ; C. A. 152/37 (2 Ct. L. R. 94) and *dictum* in C. A. 239/37 (24.i.38).

There are a number of decisions, however, even prior to the judgment in C. A. 195/37 (*supra*), to the effect that evidence of possession is material in establishing a title to land claimed on grounds other than prescription. See L. A. 76/25 (P. L. R. 87, C. of J. 1472) ; L. A. 13/34 ; L. A. 56/35. This principle, which seems to have been lost sight of in L. A. 25/32 (P.L.R. 766, C. of J. 1097), and was never clearly enunciated, was affirmed in C. A. 195/37 and followed in the present case.

See and *cf.* L. A. 34/28 (P.L.R. 301, C. of J. 1216).

FOR APPELLANT : Ibrahim Sa'adeh.

FOR RESPONDENTS : Abdel Qader Shibli.

JUDGMENT:

In this case, the Appellant took an action in the Land Court of Nablus claiming the ownership of certain land. It was alleged that the land devolved on the Appellant by inheritance and that the Respondents had interfered with the Appellant's rights in the land.

The only defence put forward by the Respondents was a defence of *res judicata,* but the Court below did not deal with this issue and dismissed the Appellant's action on the ground that a plaintiff "cannot sue in a land case relying to prove his ownership on prescriptive possession alone".

In the present case the Appellant was not seeking to prove ownership by prescription. No title by prescription can exist in Palestine except under Aticle 78 of the Land Code and Section 51 of the Land (Settlement of Title) Ordinance.

In a recent case before this Court, Civil Appeal No. 195/37, Salameh Hammad Abu Khusah and others against Salameh Ahmad Abu Sweireh and others, all the authorities were reviewed by this Court and it was decided that the proper decision to be followed in cases of this kind is the decision of Issa and others against Shehadeh and another, Land Appeal No. 13 of 1934. In that case the Court said :—

> "In the present case neither party has any registered title nor has any document of title been produced by either side. It follows that the parties may submit evidence of possession and may ask the Court to infer title from the fact of possession".

The present case is a similar case to that, that is, neither party in the present case has a registered title to the land in dispute.

The Appellant was therefore entitled to submit evidence of possession before the Land Court at Nablus and that Court was wrong in rejecting her claim without hearing her evidence.

The issue as to *res judicata* was not discussed by the Court below and we say nothing with regard to it.

In the circumstances, the judgment of the Land Court must be set aside and the case remitted for a new trial. Costs of this appeal to include £P. 5.— advocate's fees will abide the event.

Delivered this 24th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 239/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Abdul Hadi, JJ.

IN THE APPEAL OF :—

1. Hassan Mahmoud el Mohammad,
2. Yousef Mahmoud el Mohammad,
3. Amin Hassan Hussein,
4. Said Mohammad Hussein,
5. Mohammad Deeb Mufleh,
6. Said Abdel Majid. APPELLANTS.

v.

1. Jibran Fuad Said, on behalf of the heirs of his father,
2. Yousef Mohammad Ali Fahoum, on behalf of the heirs of his father,
3. Mohammad Tawfiq el Fahoum, on behalf of the heirs of his father. RESPONDENTS.

Title to land — Written title — Possession — L. A. 13/34.

In allowing an appeal from the judgment of the Land Court of Nablus, dated the 13th November, 1937, and remitting the case for a new trial :

HELD : Where neither party has a registered title and the plaintiff does not rely solely on possession in setting up his claim, evidence of possession may be adduced in support of a claim of ownership to land.

Followed : L. A. 13/34.

ANNOTATIONS : See annotations to C. A. 238/37 (24.1.38).

FOR APPELLANTS : Hanna Atalla.

FOR RESPONDENTS : Cattan.

JUDGMENT:

This appeal arises out of a dispute as to the ownership of land which came before the Land Court of Nablus.

The Appellants alleged that sometime ago their ancestors sold certain lands to the Respondents' ancestors but that when these lands were sold two plots, named "Jazair" and "Western Haddaf" were not included in the transaction of sale. The Appellants alleged that the Respondents had interfered with their ownership of these two plots and are claiming ownership in themselves.

After hearing argument, the Land Court dismissed the claim of the Appellants on the ground that mere possession of land cannot be a basis of a claim of ownership.

It is not clear whether the Respondents in this case have any registered title of the two plots of land in dispute and there was no definite finding by the Court below on this point. We must assume therefore that neither party to the present dispute possesses any registered title to the land and, if this is the case, the proper authority to be followed, is the case of Issa and others against Shehadeh and another, Land Appeal No. 13 of 1934, in which it was laid down that when neither party has a registered title, evidence of possession may be submitted and ownership may be inferred from the fact of possession. This seems the only fair course to adopt in Palestine where disputes frequently occur as to the ownership of land which is not registered and as to which no documents of title exist. It frequently happens that persons in possession of land are deprived of possession either by an order of a Magistrate or by an order of a District Commissioner and then have to go to a Land Court to have the dispute as to the ownership settled. The only court which could determine the question is the Land Court, and it would be unfair that a person, who has been merely temporarily dispossessed by such an order, should be entirely deprived of redress because he has no registered title.

In the present case it was said that the Appellants' claim was entirely based on the fact that they had been in possession of the land for a period exceeding the period of limitation. If that was so, the proper order of the Court below should have been that the Appellants had no cause of action. However, if the statement of claim is looked at as a whole, it is clear that the Appellants did not confine themselves to the length of time for which they have been in possession of the land, but that they relied also on payment of taxes and on the circumstances in which the other land was formerly transferred to the Respondents.

We think that they were entitled to call evidence before the Land Court. The judgment of the Land Court must therefore be set aside and the case remitted for a new trial. Costs of this appeal, to include LP. 5.— advocate's fees will abide the event.

Delivered this 24th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL No. 241/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene and Abdul Hadi, JJ.

IN THE APPEAL OF :

Rubin Abdel-Wahhab Riyali. APPELLANT.

v.

Muhammad Yasin Hafuth el- Majdalani,
on behalf of the estate of Yasin Hafuth. RESPONDENT.

Appeal — Finding of fact by lower court.

In dimissing an appeal from the judgment of the District Court of Jaffa, dated the 16th November, 1937 :—

HELD : The finding of the lower court was corect and was based on ample evidence.

ANNOTATION : See note 1. to C. A. 223/37 (17.1.1938). The value of the present judgment is weakened by the expression of opinion that the finding of the lower court was right, when the ground that there had been sufficient evidence before the court of trial should have sufficed to dismiss the appeal.

FOR APPELLANT : Mouake'.

FOR RESPONDENT : Sein el-Din.

JUDGMENT:

This is an appeal from the judgment of the District Court of Jaffa by the Appellant suing on a promissory note for £P. 350.— and the Court below held that the holder of the note did not obtain the document *bona fide* and dismissed the claim.

This Court is satisfied that the Court below had ample evidence before them that the third party obtained the note *mala fide* and we are satisfied they were right in so holding.

This appeal must be dismissed with costs and £P. 5 advocate's fee.

Delivered this 25th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL No. 244/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Saleemeh Sheikh Mohammad Soufan,
2. Khadijeh Sheikh Mohammad Soufan. APPELLANTS.

v.

Hussein Mohammed el Dukka. RESPONDENT.

Possessory title — C. A. 195/37 — Evidence of possession.

In allowing an appeal from the judgment of the Land Court of Nablus, dated the 1st December, 1937, and remitting the case to the lower court to hear the case anew :—

HELD : In a dispute as to the ownership of land, neither party having a registered title, evidence of possession may be adduced by either party in support or in rebuttal of the plaintiff's claim.

Followed : C. A. 195/37 (3 Ct. L. R. 41).

ANNOTATIONS : See C. A. 238/37 (24.i.1938) and cases quoted in annotations thereto.

FOR APPELLANTS : Bushnak.

FOR RESPONDENT : Seifi.

JUDGMENT:

This appeal arise out of a dispute as to ownership of land which came before the Land Court of Nablus.

Neither party had a registered title or title deed to the land in dispute.

The Land Court decided that there was no need to go into the facts of possession and dismissed the action.

This case is on all fours with Civil Appeal No. 195 of 1937 and in our opinion the judgment of the Land Court should be set aside and the action remitted to it to hear such evidence as the Appellants may adduce in support of their claim, and, if necessary, such evidence as Respondent may adduce in rebuttal and to decide the dispute in accordance with the law. Costs of this appeal to include £P. 5.— advocates' fees to abide the event.

Delivered this 26th day of January, 1936.

British Puisne Judge.

CIVIL APPEAL No. 245/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Sheikh Salameh Mossallam Said. APPELLANT.

v.

Faraj Sweilem el Nattar. RESPONDENT.

Appeal — Findings of Land Court based on sufficient evidence — Travelling expenses.

In dismissing an appeal from the Land Court of Jerusalem, dated the 23rd November, 1937 :—

HELD : 1. There were no reasons in the appeal to upset the conclusions of the Land Court before which there had been sufficient evidence to justify the findings.

2. The plaintiff's rights were not affected by an alleged erroneous finding of the Land Court.

3. Respondent's representative must be allowed travelling expenses (although Respondent appeared in person).

ANNOTATIONS : See C. A. 223/37 (17.1.1938), note 1.

FOR APPELLANT : El Ousta.

RESPONDENT : in person.

JUDGMENT:

This is an appeal from the judgment of the Land Court of Jerusalem sitting at Beersheba.

There are no reasons in this appeal which effect the result to which the Land Court reached, as there was sufficient evidence before the Court below to justify it in arriving at the conclusions to which it did.

The statement by the Court below in its judgment that Plaintiff's father purchased the land jointly with Defendant's father, instead of saying that Plaintiff's father purchased the land jointly with Mussallam Abu Kheidra who, it is contended, has sold it to Defendant's father does not affect the Plaintiff's rights.

The Appeal must be dismissed with costs to include LP. 1.— travelling expenses of Respondents representative.

Delivered this 26th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL No. 230/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Khayat, JJ.

Odeh Salem Mustafa. APPELLANT.

v.

1. Mrs. Afrosinie Gaitanopoulos,
2. Mrs. Sultaneh Alessantopoulos. RESPONDENTS.

Magistrates Courts Jurisdiction Ordinance, 1935. — *Jurisdiction in actions relating to the title to immovable property.*

In dismissing an appeal from the judgment of the District Court of Jerusalem, sitting as a court of appeal, dated the 28th October, 1937, setting aside the judgment of the Magistrates' Court :—

HELD : In view of the provisions of the Magistrates Courts Jurisdiction Ordinance, 1935, Appellant could not, by suing for rent as an alleged co-owner of immovable property, establish his title to such property in a magistrates' court.

FOR APPELLANT : Atalla.

FOR RESPONDENTS : Cattan.

JUDGMENT:

The facts out of which this appeal arises are as follows :—

Three persons including the two Respondents leased a house in Jerusalem to the British Commercial Agent.

The Appellant brought an action in the Magistrate's Court against the said Agent for rent, alleging that he has the owner of one-third of the leased premises. There was no contract between the British Commercial Agent and the Appellant, and the Magistrate took the course of making the actual lessors of the premises a party to the action. By taking this course, it became incumbent on the learned Magistrate to determine whether the Appellant actually owned one-third of the premises. The lessors strongly contested his title. The learned Magistrate decided in favour of the Appellant and gave judgment in his favour against the British Commercial Agent.

The latter did not appeal. Two of the lessors filed an appeal in the District Court of Jerusalem. The District Court reversed the decision of the learned Magistrate on the ground that, in deciding in favour of the Appellant, he had given a decision with reference to the owner-

ship of land and that by the Magistrates Courts Jurisdiction Ordinance, he was prohibited from giving any such decision. We are in full agreement with the decision of the District Court in this respect.

Hanna Eff. Atalla, for the Appellant, has argued that this result works considerable hardship to his client, as it forces him to become a plaintiff in a Land Court action in order to establish his title to his one third share in the property. Even if this be so, it cannot upset the clear terms of the Magistrates Courts Jurisdiction Ordinance which deprive a Magistrate of the jurisdiction to give any decision regarding the ownership of land.

The decision of the District Court will be confirmed and this appeal will be dismissed with costs to include £P. 5.— advocate's fees.

Delivered this 27th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 246/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Khayat, JJ.

IN THE APPEAL OF :

Raphael Palatnik. APPELLANT.

v.

1. Itzhak Huri,
2. Joseph Azar,
3. Baruch Azar Shamai,
4. Abraham Azar Shamai. RESPONDENTS.

Sale of land — Interpretation of contract — Warranty of title — Void contract — Severability.

In allowing an appeal from the judgment of the District Court sitting in Tel-Aviv, dated the 10th November, 1937, and quashing the judgment of the court below :—

HELD : The undertaking of the Respondent to transfer two plots of land in one of which he had no title, could be severed and the Appellant was entitled to the refund of the purchase price paid by him on account of the last mentioned plot.

ANNOTATIONS :

1. As to the return of the purchase price under a void agreement of sale, see C. A. 90/32 (P.L.R. 846, C. of J. 1793 — entered as C. A. 90/33) ; L. A. 51/26 (C. of J. 1491) ; C. A. 29/33 (P. P. 8.vi.34, C. of J. 1108) ; C. A. 27/32 (P. P. 19.vii.34, C. of J. 434) and see C. A. 105/28 (P.L.R. 273, C. of J. 392).

2. As to severability of agreements, see C. A. 89/30 (P.L.R. 574, C. of J. 421) ; C. A. 192/33 (P. P. 27.xii.34, C. of J. 1110) and compare C. A. 17/31 (C. of J. 426) ; C. A. 105/32 (P. L. R. 810, P. P. 14.xii.32 & 8.v.33, C. of J. 1172) and C. A. 15/31 (C. of J. 1638).

FOR APPELLANT : Felman.

FOR RESPONDENTS : Aizen.

JUDGMENT:

This appeal is concerned with the interpretation of a contract for the sale of land between the Appellant and the Respondents.

The Respondents undertook to sell certain land to the Appellant and the opening words of the contract constitute a description of the property sold which is divided into two categories : categories "A" and "B". Category "A" is a plot of land registered in the name of the Respondents, category "B" was not registered in the name of the Respondents, but in clause 1 of the contract the Respondents asserted that the land in category "B" belonged to them under an assignment of right and that this land was occupied by the Municipality of Tel-Aviv on behalf of the Respondents and the Respondents undertook to order the Municipality of Tel-Aviv to transfer the land in category "B" to the Appellant or his nominee.

The purchase price of the property was agreed on at £P. 1.700 mils per square pic with respect to the whole area to be transferred and the whole purchase price amounting to £P. 2035.290 mils was paid to the Respondents by the Appellant.

After the contract had been entered into, it was discovered that the Municipality of Tel-Aviv held no land whatever on behalf of the Respondents. Consequently no rights as regards that land were transferred to the Appellant, and the Appellant took action in the District Court of Tel-Aviv for the recovery of the price of the land in category "B", namely £P. 786.896 mils and also for £P. 750.— liquidated damages under the terms of the agreement. The District Court rejected the claim of the Appellant on the ground that, by asking the Municipality of Tel-Aviv to transfer its rights in the land to the Appellant,

the Respondents had fulfilled the necessary condition of the contract. We are unable to understand how the District Court arrived at this decision, because if the Municipality of Tel-Aviv had no rights in the land in category "B", any order to them by the Respondents with respect to that land would be merely a barren order and of no avail to the Appellant.

The proper way to look at the issues between the parties is to consider clause I of the agreement as divisible into two portions: the first portion containing a declaration by the Respondents that certain land belonged to them under an assignment and was held by the Municipality of Tel-Aviv on their behalf; and the second portion consisting of an undertaking by the Respondents to order the Municipality to transfer that land to the Appellant. If, as happens to be the case, the declaration in the first portion was a misrepresentation, then the second portion cannot create any obligation and that part of clause I becomes merely a void agreement. This being so, the Appellant was clearly entitled to a refund of the money which he had paid owing to the misrepresentation of the Respondents.

In the appeal before us, the Appellant has waived any claim to damages under the contract. From what has been said, it is clear that this contract is a divisible contract concerning, as it is, one plot of land actually owned by the Respondents and actually transferred to the Appellant, and another plot of land with regard to which the contract must be said to be void. In these circumstances, there can be no doubt that the contract may be in part rescinded and that the Appellant is entitled to be placed in the same position as he was before the contract was made.

For these reasons the judgment of the District Court must be set aside and there will be substituted for it a judgment that that part of the contract with reference to the land, category "B", shall be rescinded and that judgment shall be entered for the Appellant for £P. 786.896 mils together with his costs in the Court below. The Appellant will have the costs of this appeal to include £P. 5.— advocates fees.

Delivered this 27th day of January, 1938.

Senior Puisne Judge.

HIGH COURT No. 65/37.

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

BEFORE : The Senior Puisne Judge and Khaldi, J.

IN THE APPEAL OF :

Gedaliah Fein. PETITIONER.

v.

1. Relieving President, District Court, Jerusalem,
2. Abraham Mordecai Horowitz,
3. Noah Weintraub. RESPONDENTS.

Foreclosures and orders for sale of mortgages — Land Transfer Ordinance, sec. 14 — Jurisdiction of President District Court as Chief Execution Officer — Law of Execution, Arts. 1, 36 — Law of Execution applied to mortgages by established practice.

On the return to a *rule nisi* in an application for an order to issue to the First Respondent directing him to show cause why his order dated the 4th November, 1937, in Execution File No. 315/37 should not be set aside, and why he should not proceed with the foreclosure of the mortgaged property :—

HELD : 1. The President (or Relieving President), of the District Court has power to order the sale but not the foreclosure of mortgaged property.

2. The jurisdiction of a President, District Court, under sec. 14 of the Land Transfer Ordinance is that of a Chief Execution Officer and, although it is clear from the wording of Arts. 1 and 36 of the Law of Execution, that the provisions therein contained do not apply to mortgage debts, in view of an old and well established practice, Art. 36 should be applied in the present and similar cases.

3. The procedure to be followed in this file is, therefore, that the mortgagor should be given sufficient opportunity to apply to the competent court. The production of an alleged receipt by the mortgagor does not affect the procedure to be followed.

(Rule made absolute).

ANNOTATIONS :

1. See the Land Transfer (Amendment) Ordinance, 1938, bill (Pal. Gaz. No. 750, 20.i.38).

2. See also H. C. 66/37 (11.i.38) ; H. C. 90/32 (P. P. 26.iv.33, C. of J. 291) ; H. C. 49/33 (C. of J. 37) ; H. C. 110/36 (1 S. C. J. 401) ; H. C. 111/36 (1 S. C. J. 403) ; H. C. 44/35 (P. P. 19.vi.35) ; H. C. 47/34 (C. of J. 1934—6,391 ; C. A. 64/32 (P. L. R. 885, P. P. 4.i.33, 27.vi.33, C. of J. 1074), & c.

FOR PETITIONER : Amdur.

FOR RESPONDENTS :

No. 1. No appearance.

No. 2. } Neaman.
No. 3. }

JUDGMENT:

1. The Petitioner in this case was the mortgagee of certain property, the respondents Horowitz and Weintraub being the mortgagors. The petitioner alleged that there had been default in the payment of principal and interest due and, as far as can be judged from the proceedings before us, he applied to the Relieving President of the District Court of Jerusalem for an order of foreclosure. This application was made under Section 14 of the Land Transfer Ordinance, 1920, which is as follows :—

> "14. Application for the sale of immovable property in execution of a judgment or in satisfaction of a mortgage may be made to the President of the District Court who may order postponement of the sale if he is satisfied that —
>
> (a) the debtor has reasonable prospects of payment if given time, or
>
> (b) having regard to all the circumstances of the case, including the needs of the creditor, it would involve undue hardship to sell the proporty of the debtor".

It is clear from the terms of this provision that the President of a District Court has jurisdiction to order only the sale of immovable property in satisfaction of a mortgage, he has no jurdisdiction to order foreclosure. It seems to me that in the circumstances the application ought to have been amended, or that, if not amended, it ought to have been dismissed for want of jurisdiction.

2. The Relieving President, however, heard the application. The petitioner contended that, as the first instalment had not been paid on the due date, the whole amount had become due. The mortgagors alleged that the instalment had been paid and produced a receipt. The petitioner denied his signature to the receipt. The Relieving President held that he had no jurisdiction to determine the issue raised as to the genuineness of the receipt and dismissed the application.

3. The petitioner then applied to this Court for an order directing the Relieving President to proceed with the application for foreclosure.

An *order nisi* was granted, but not in the form as prayed. The order called on the Relieving President to show cause why the application should not be restored and only temporarily delayed pending the aplication of the mortgagors to a Court having jurisdiction in accordance with Article 36 of the Execution Law.

4. This article reads as follows :—

> "36. When the debtor claims that payment, compromise or release on account of the judgment-debt has been made after judgment or has been made outside the Execution Office, if the creditor denies this, the Execution Officer will call for proofs to establish the claim, and if he finds the claim capable of proof he will grant sufficient time to the judgment-debtor to apply to a Court having jurisdiction, and if it appear that he has applied to the Court within such time, execution will be stayed pending the result of the case".

Article 1 of the Execution Law indicates the matters which are dealt with by the Execution Office and is as follows :—

> "Decrees issued by all Sharia Civil or Mercantile Courts, decrees granted by Criminal Courts concerning private rights, and agreements and orders, execution of which is effected under the law by the Execution Office, will be carried out by that Office. The decree-holder may apply to any Execution Office for execution of his decree."

5. It is noteworthy that there is no mention in Article 1 of mortgages, but it might be argued that a mortgage is an agreement, execution of which is effected under the law by the Execution Office.

As far as the sale of the mortgaged property is concerned this may be so, as there is a series of decisions holding that a President of a District Court, in exercising his powers under Section 14 of the Land Transfer Ordinace, is merely an Execution Officer. The use of the words "debtor", "judgment debt" and "judgment" in Article 36 make it clear, however, that Article 36 does not apply to mortgages. I am informed by my brethren of the Supreme Court who were here before the British Occupation that, notwithstanding this, it was always the practice to apply the Article by analogy to sales of immovable property under a mortgage when there was a dispute between the parties as to a payment of principal or interest. It would scarcely be correct to decide now that such a well established practice is wrong, and I feel bound to decide that the Article must be applied in the present case. I do not agree with the learned Relieving President that the production of an alleged receipt by the mortgagors makes any difference as to the procedure to be followed. The *order nisi* must therefore be made

absolute, and the petitioner will have the costs of the application to include £P. 5 advocate's fees. The learned Relieving President should make it clear to the parties that the application before him is one for sale and not one for foreclosure.

Delivered this 27th day of January, 1938.

Senior Puisne Judge.

HIGH COURT No. 67/37.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE :

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

IN THE APPLICATION OF :

Salim Daoud Za'rour. PETITIONER.

v.

1. Chief Execution Officer, Jaffa.
2. Ferah Hanna Dabeet.
3. Sultaneh Nina Shnoudi. RESPONDENTS.

Compensation in case of murder — Sale in execution — Exemption of debtor's dwelling from sale — Law of Execution, Art. 90 — Discretion of Chief Execution Officer.

In issuing an order to the First Respondent directing him to show cause why his order dated the 27th February, 1937, in Execution File No. 308/36, Ramleh, should not be set aside :—

HELD : 1. The Law of Execution is applicable to debts irrespective of how they may have arisen and no distinction can be made between ordinary debts and a debt payable as compensation in lieu of diyet.

2. When application is made by the debtor for the exemption of his dwelling from sale under Art. 90 of the Law of Execution, the Chief Execution Officer should ascertain whether the house is suitable to the position of the debtor.

3. The fact that the house had formerly not been occupied by the debtor did not prevent him from claiming the exemption thereof from sale. Nor should any account be taken of an abortive attempt to sell the house before execution proceedings were initiated.

ANNOTATIONS : For exemptions from sale under Art. 90 of the Law of Execution, see : H. C. 25/36 (P. P. 5.viii.36, C. of J. 1934—6, 409) ; H. C. 68/37

(2 Ct. L. R. 199) ; H. C. 68/34 (P. P. 21.x.34) ; H. C. 79/28 (P. L. R. 385, C. of J. 1298) ; H. C. 76/30 (P. L. R. 505, C. of J. 694) ; H. C. 24/31 (P. L. R. 573, C. of J. 695) ; H. C. 39/33 (P. L. R. 848, C. of J. 699) ; H. C. 12/37 (1 S. C. J. 416 ; 1 Ct. L. R. 26) ; H. C. 58/33 (C. of J. 1934—6, 390).

Compare H. C. 70/37 (4.i.1938) where it was held that property in respect of which the debtor applied for exemption could be sold in view of the fact that the debtor had previously negotiated for the sale of the property. Note, however, that the exemption in that case was claimed in respect of cultivated lands and that the words "or sold outright" which appear in the latter part of Art. 90 of the Law of Execution do not apply to dwelling houses.

FOR PETITIONER : Germanus.

FOR RESPONDENTS :

No. 1. No appearance

No. 2. } Malak.
No. 3. }

JUDGMENT:

The Petitioner and his two sons were convicted of murder and ordered to pay LP. 200.— compensation to the heirs of the murdered man. The compensation was not paid and the heirs took proceedings for execution before the Chief Execution Officer at Jaffa. The Petitioner relying on Article 90 of the Execution Law, sought to have his dwelling-house exempted from the sale in execution. His application was refused on two grounds ; firstly, that a distinction should be drawn between an ordinary debt and the compensation payable by a murderer, and secondly, that the sale of the dwelling-house would not prejudice the mode of life of the wife and daughter of the petitioner. The petitioner has obtained a *rule nisi* to the Chief Execution Officer to show cause why the dwelling-house should not be exempt from sale.

2. I shall deal at once with the grounds on which the decision of the Chief Execution Officer was based. I do not think that any distinction can be drawn between the debt in this case and an ordinary debt. Once the Execution Law is applied, its provisions must be in force with respect to the debt for which execution is sought, irrespective of how that debt may have arisen.

3. With regard to the second ground, the procedure laid down in Article 90 has not been followed. A debtor's dwelling-house is exempt from sale if it is suitable to his position, and it is the duty of the Chief Execution Officer to decide what dwelling-house is suitable for the debtor's position. If the dwelling-house is so suitable, it is exempt from

being sold in execution. If it is of such a nature that, in the opinion of the Chief Execution Officer it is too large or too luxurious for a person in the position of the judgment-debtor, then it may be sold in execution, but the practice is that in such a case a part of the sum realised has to be set aside to purchase a suitable dwelling-house for the judgment-debtor.

4. In the present case it is not clear whether the Chief Execution Officer has directed his attention as to whether the dwelling-house is suitable to the position of the judgment-debtor. This should have been done before any order was made for its sale in execution.

5. Two other points were taken in the argument before us. The first was that the house in question had not been occupied by the judgment-debtor before the murder. Were I left to my own interpretation of the relevant article I should say that this point was fatal to the house being exempt from a sale in execution, as in the strict sense it certainly was not the dwelling-house of the judgment-debtor and has only been made so since the debt became due. I have, however, consulted my brethren who are conversant with the usual practice under the Ottoman Law and they are all agreed that the house must in the circumstances be regarded as a dwelling-house. The second point is that an attempt was recently made by the petitioner's family to sell this house and it is said that this shows they do not need the house as a dwelling-house. The answer to this is that the house was not sold, it was the property of the judgment-debtor when execution proceedings were started, and as his dwelling-house it was subject to the procedure laid down in Article 90 of the Execution Law.

6. The petitioner is entitled to an order to the Chief Execution Officer, Jaffa, that he refrain from selling the dwelling-house of the petitioner until he is satisfied that it is not a suitable dwelling-house for the petitioner's family, having regard to the position of the petitioner. If he is so satisfied, he should use his discretion as to what proportion of the proceeds of sale should be set apart for the provision of a dwelling-house for the family of the petitioner. The petitioner will have the costs of this application to include LP. 5.— advocate's fees.

Delivered this 29th day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 235/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :

Simon Baer Lande. APPELLANT.

v.

Abraham Ryndsunski. RESPONDENT.

Appearance — Advocates Ordinance, sec. 5 — Appearance as a friend — Party left unrepresented.

In allowing an appeal from the judgment of the District Court sitting in Tel-Aviv, dated the 16th November, 1937, and remitting the case with directions :—

HELD : 1. Where a person applies for leave to appear in a representative capacity as a friend under sec. 5 of the Advocates Ordinance, it is not necessary for the party represented to attend personally in court.
2. Where a party is left unrepresented the court should give him an opportunity to appear or appoint an advocate.

ANNOTATIONS : It was held in C. A. 33/33 (P. P. 2.i.34, C. of J. 92) that where a defendant is left unrepresented as the result of defective delegation of a power of attorney, the court should have the defendant summoned personally. The present case goes further in applying this principle to a plaintiff.

See also CR. A. 96/27 (P.L.R. 218, C. of J. 79) and *cf.* CR. A. 151/37 (15.i.38).

FOR APPELLANT : Mr. Saul Lande, son of Appellant.

FOR RESPONDENT : Gratch.

JUDGMENT:

1. When this case came before the District Court, Tel-Aviv, on the 16th November, 1937, the Plaintiff was represented by his son holding a power of attorney. Dr. Joseph objected to the Plaintiff being represented by his son and the Court upheld his objection, and holding that there had been no appearance on behalf of the Plaintiff struck out the case. The Plaintiff has appealed to this Court.

2. The revelant provision in Section 5 of the Advocates Ordinance, Chapter 2 of the Laws of Palestine, enacts that "no person who is not the holder of valid licence to practise as an advocate in Palestine shall

have the right to be heard on behalf of any other person at any hearing before a Court or in any other judicial proceeding in Palestine". There are two exceptions to this rule under the provisos (a) and (b) to the Section. Proviso (a) does not arise in the present circumstances and the proviso (b) enacts that "any person may with the leave of the Court or Judge address the Court as a friend on behalf of a party not represented by an advocate".

3. It is admitted that the Plaintiff's son who represented him in the Court below and in this Court is not an advocate. The question then arises as to whether he should be allowed to appear as a friend under proviso (b) to the Section ; at the hearing of this appeal this Court tacitly granted him permission to so appear.

4. In dealing with proviso (b) the Court below said "The right of a party who appears in person to get a friend to address the Court on his behalf is safeguarded by Section 5 proviso (b) but that is not the application here". From an analysis of this passage of the judgment, it seems to us that the Court below may have misdirected itself as to the actual meaning of the words in proviso (b) and have read into these words that it is necessary that the party himself should appear in person before he can ask leave of the Court for a friend to address the Court on his behalf. If the Court below so held, we think it was wrong. There is no necessity for a party to appear in person as long as the Court is satisfied that the person applying is applying as a friend and the Court decides to grant the necessary leave. As there may have been a misdirection in this respect we think that the proper course to take is to allow this appeal, to set aside the judgment of the Court below and to remit the case to the District Court for retrial with directions to consider whether the Appellant's son should be allowed to appear on his behalf and if it decides not to allow him to appear, to give an opportunity to the Appellant to appear in person or be represented by an advocate.

There will be no costs of this appeal.

Delivered this 31st day of January, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 242/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :

1. Kamel Khalil el Abeed.
2. Sadiq Ismail el Abeed.
3. Rashid Ismail el Abeed.
4. Ibrahim Mohammad Abu Taha. APPELLANTS.

v.

1. Fatmeh Abed el Abeed.
2. Naarah Abed el Abeed. RESPONDENTS.

Appeal — Application to hear evidence — Record of proceedings.

In allowing an appeal from the judgment of the Land Court of Jaffa sitting as a court of appeal from the decision of the Land Settlement Officer, dated the 20th November, 1937, and remitting the case to the Land Court to deal with the other grounds of appeal from the decision of the Land Settlement Officer :—

HELD : The Court was bound by the record of the proceedings before the Land Settlement Officer and, there being no mention therein of an application to call witnesses, the Respondents could not ask to have the case sent back to the Land Settlement Officer for Eevidence to be heard.

ANNOTATIONS : See, to the same effect, C. A. 36/29 (C. of J. 10) ; CR. A. 151/37 (15.i.38). See *per contra* CR. A. 1/38 (31.i.1938).

FOR APPELLANTS : Nasri Nasar.

FOR RESPONDENTS : Moghannam.

JUDGMENT:

1. This appeal arises out of a dispute before the Land Settlement Officer in the Jaffa Settlement Area. The dispute was settled in favour of the present Appellants and the present Respondents appealed to the Land Court. The Land Court dealt with one ground of appeal only, namely that the evidence of certain witnesses had been applied

for before the Land Settlement Officer but had not been heard. In the written reply to this ground of appeal, the present Appelants distinctly deny that there was anything to show that the Respondents had made any application for any witnesses. The Land Court, having perused the statement of appeal and the reply thereto, stated as follows in their judgement :—

> "From the record before us it is not clear whether the parties desired to call witnesses. The Appelant has stated in his grounds of appeal that he did desire to call witnesses. This being so we consider that the case should be remitted to the Settlement Officer..."

2. With regard to that passage of that judgment, we have to make the following observations : Firstly, that as far as the record is concerned, there is not the slightest intimation that the Respondents ever applied for witnesses to be called. It has been denied by the Appellants and it is still denied before this Court that there was any application before the Land Settlement Officer to call witnesses.

3. We therefore consider that we are bound by the record of proceedings as made by the Land Settlement Officer, and must come to the conclusion that there was no application before him to call witnesses. This disposes of the reason for remitting the case to the Land Settlement Officer.

4. We set aside the judgment of the Land Court and remit the case to it to deal with the other grounds of appeal.

5. The Appelants will have the costs of this appeal to include LP. 2.— advocate's fees.

Delivered this 31st day of January, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 159/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khaldi, JJ.

IN THE APPEAL OF :

Sadek Qassem el Said. APPELLANT.

v.

The Attorney General. RESPONDENT.

Evidence — Intention — Sentence.

In dismissing an appeal from the judgment of the District Court of Nablus, dated the 22nd December, 1937, whereby the Appellant was convicted of manslaughter contrary to secs. 213 and 214 of the Criminal Code Ordinance, 1936, and sentenced to twelve years' imprisonment :—

HELD : The plea that the Appellant was entitled to an acquittal on the ground that the lower court did not believe the evidence against the second accused which was substantially the same as that against the Appellant, could not be upheld as the second accused had been acquitted upon considerations of intention.

FOR APPELLANT : Goitein.

FOR RESPONDENT : Crown Counsel.

JUDGMENT.

For the accused Mr. Goitein has submitted that it appears that the Court did not believe the evidence against the second accused and acquitted him, and that as the evidence against the first accused (Appellant) is substantially the same he also should have been acquitted. We think the fallacy of this argument is that it appears that the Court did believe the evidence against the second accused as it refers to his holding the deceased in the course of a more general dispute, but it acquitted him upon considerations of intention with which we are not now concerned. The submission therefore fails.

With regard to the sentence against which an appeal is also lodged while making it very clear that this court has no intention of encouraging crimes of violence we feel that in the circumstances the sentence

of 12 years imprisonment may be excessive and we consequently reduce it to one of 10 years imprisonment.

The appeal is therefore dismissed and the sentence so reduced.

Delivered this 31st day of January, 1938.

Chief Justice.

CRIMINAL APPEAL No. 1/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khaldi, JJ.

IN THE APPEAL OF :

Abdallah Hassan Abu Zind. APPELLANT.

v.

The Attorney General. RESPONDENT.

New evidence on appeal — Alibi — Criminal Procedure (Trial Upon Information) Ordinance, sec. 71(b).

In allowing an appeal from the judgment of the District Court of Nablus, dated the 20th December, 1937, whereby Appellant was convicted of robbery contrary to secs. 287 and 288 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment :—

HELD : In view of the fact that an important witness who had not been summoned during the proceedings in the court below was available, the case should be remitted for the witness to be heard.

ANNOTATIONS : In L. A. 37/34 (P. P. 14.iv.35) ; L. A. 28/27 (P.L.R. 160, C. of J. 157) and CR. A. 16/35 (P. P. 15.vii.35) cases were also remitted owing to new evidence having been adduced on appeal. See also C. A. 199/37 (2 Ct. L. R. 141). But see CR. A. 151/37 (15.1.1938) and C. A. 242/37 (31.1.1938). But *cf.* M. A. 10/36 (1 Ct. L. R. 13) ; L. A. 48/30 (C. of J. 787).

FOR APPELLANT : Moghannam.

FOR RESPONDENT : Crown Counsel.

JUDGMENT.

This case is rather exceptional in that as Mr. Moghannam has pointed out the accused man is not a man of high intelligence and was undefended before the Court of Trial, and the Court of Trial decided against him by a majority.

It is now said that there is another witness, a man of standing who may be able to throw some light on the matter. It is quite true that the accused did not ask for that witness to be summoned, but it is also clear that he suggested that he (the accused) was at the complainant's house the day following the commission of the offence, and Muhammad Sa'id Eff. Halbuni Mayor of Beisan the witness in question was also there.

We feel that owing to the circumstances of this case it is right that the defence should have an opportunity of producing this witness before the Court.

By virtue of the power vested in us by Section 71(b) of the Criminal Procedure (Trial Upon Information Ordinance), we direct that the case go back to the District Court, to hear the evidence of the Mayor of Beisan and determine the issue whether or not the Mayor of Beisan saw the accused in company with the complainant the morning following the commission of the offence.

Delivered this 31st day of January, 1938.

Chief Justice.

CIVIL APPEAL No. 221/37

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khaldi, JJ.

IN THE APPEAL OF :

Hasharon Kvutzat Poalim Lehityashvut Shitufit Bearavon Mugbal, Ramat David. APPELLANTS.

v.

The General Manager, Palestine Railways, Railway Administration, Haifa. RESPONDENTS.

Negligence — Inflammable material allowed to remain near railway — Liability for consequent damage — Government Railways Ordinance, sec. 30(2).

In allowing an appeal from the judgment of the District Court of Haifa, dated the 14th November, 1937 :—

HELD : The Respondents having been guilty of negligence in allowing inflammable material to remain on their property immediately adjoining the Railway Line, they were liable for the damage which the Appellants suffered as the result thereof, irrespective of the cause of the fire.

ANNOTATIONS : See also C. A. 163/37 (2 Ct. L. R. 115) ; C. A. 97/37 (1 S. C. J. 317, P. P. 15.vii.37, 1 Ct. L. R. 76).

FOR APPELLANTS : Solomon.

FOR RESPONDENTS : Salant, J. G. A.

JUDGMENT:

We are of the opinion that this appeal must be allowed.

On the findings of fact made by the Court below, that Court should have entered judgment for the Appellants. We have no doubt that the Defendants were negligent in allowing inflammable material to remain on their property immediately adjoining the Railway Line, and on the authority of the case which has been cited to us by Mr. Salomon — Smith v. London South Western Railway Co. L.R. 6 C.P. (1870‡1) p.. 14, a very strong case indeed, we find that the Palestine Railway Administration are responsible for the damage caused to the Appellants. The Respondents cannot avail themselves of the provision of Sec. 30(2) of the Government Railways Ordinance (Cap. 44) since the fire was due to their negligence in allowing this inflammable material to remain in their own property, and whether

the fire arose through sparks emitted by the locomotive or not is in these circumstances immaterial.

Since the value of the crops destroyed is not disputed, we enter judgment in favour of the Appellants against the Respondents for the amount claimed, namely LP. 311.650 together with interest from date of action, i.e. October, 1936, with costs here and below to include LP.5.— advocate's fees.

Delivered this 18th day of January, 1938.

British Puisne Judge.

CIVIL APPEAL No. 248/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Yousef Habib. APPELLANT.

v.

Menachem Lichtenstein. RESPONDENT.

Civil Procedure Code, Art. 80. — Ground of appeal not raised in lower Court — Corroboration.

In dismissing an appeal from the judgment of the District Court of Haifa sitting as a court of appeal, dated the 19th November, 1937, confirming the judgment of the Chief Magistrate of Haifa, dated the 16th September, 1937, and in amending the judgment of the lower Court :—

HELD : 1. The first ground of appeal, *viz.* that there had been no documentary evidence to prove the claim, could not be entertained as it had not been raised in the District Court.

2. Corroboration of the Respondent's evidence as regards his claim in a share of the profits had been afforded by the evidence of the second defendant in the Magistrate's Court and by the Appellant's own evidence but there had been no corroboration of the Respondent's evidence regarding his alleged expenses.

ANNOTATIONS :

1. This ruling was laid down in C.A. 160/35 (1 S.C.J. 53) and followed in C.A. 74/36 (1 S.C.J. 159, 1Ct.L.R. 6) ; See also P.C.L.A. 13/37 (3 Ct.L.R. 15) ; C. A. 175/37 (3 Ct. L. R. 23) ; C. A. 250/37 (8.ii.38) ; C. A. 1/38 (9.ii.38).

2. The authorities on corroboration are considered at length in the notes to CR.A. 160/37 (21.ii.38).

FOR APPELLANT : Koussa.

FOR RESPONDENT : Levitsky.

JUDGMENT:

This appeal arises out of the following facts :—

The Appellant and the Respondent and one Mansour entered into an agreement to buy cement and sell it at a profit and to share the profits. After the cement had been sold, the Respondent was paid as his share of profits LP. 260.—. He took an action in the Magistrate's Court, Haifa, against the present Appellant and Mansour for LP. 189,675, balance alleged to be due to him on the transaction. The learned Chief Magistrate gave judgment in his favour for LP. 166.341 mils.

2. The Appellant has appealed from that judgment and the first ground of appeal which we propose to deal with is that no document was produced by the Respondent on which he could found his claim, and that in accordance with Art. 80 of the Civil Procedure Code such written document is necessary. The only observation we have to make on this ground of appeal is that it was not made a ground of appeal in the appeal to the District Court, and therefore we do not propose to consider it now on appeal from the District Court to this Court.

3. The remaining grounds of appeal we consider together under the heading of corroboration. It is alleged that there is no corroboration to the facts alleged by the Respondent. The Respondent gave evidence that the cement was bought for LP. 2082.800 ; that custom duty totalled LP. 1714.450, and that the cement was sold at LP. 5179.500 ; the profit being therefore LP. 1382.250. He says that under the agreement he was to get 30% of these profits. It may be said at once that he is corroborated as to that by the evidence of Mansour, who was one of the defendants in the action before the Chief Magistrate. Mansour admits that the profits were approximately LP. 1300. The Appellant himself admits that he paid LP. 260.— to the Respondent as his share of the profits, which he says were only 20%. If LP. 260.— were 20% of the profits, then the profits would be LP. 1300.—.

4. Both Courts below were satisfied on the evidence that the Respondent's share in the profits was 30%, and we see no reason to disagree with their findings in this respect. We are satisfied that the Respondent should have received LP. 390.— as his share in the profits and having received already LP. 260.—, he is entitled to a balance of LP. 130.—.

5. The learned Chief Magistrate included in his judgment a sum of one third of LP. 35.— alleged to have been paid by the Respondent

as expenses. There is no corroboration whatsoever as regards this LP. 35.—, and we think that the learned Chief Magistrate should have disallowed any claim in that respect.

6. For these reasons, the appeal will be dismissed, but the judgment of the learned Chief Magistrate will be varied by making it a judgment for LP. 130.—, costs and interest. The Respondent will have the costs of this appeal to include LP. 5.— advocate's fees.

Delivered this 1st day of February, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 2/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Hussein Rabah el Hablawi — APPELLANT.

v.

Attorney General — RESPONDENT.

Attempted robbery — Evidence — Weight and cogency of evidence — Admissibility of evidence — Application to call witnesses — Sentence.

In dismising an appeal from the judgment of the District Court of Jaffa, dated the 5th January, 1938, whereby Appellant was convicted of attempted robbery, contrary to secs. 287, 288, 23, and 29 of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment :—

HELD : 1. The Appellate Court will not interfere with findings of fact of the lower Court which had heard evidence on the point. So also, the cogency and weight of the evidence are entirely matters for the Court below and the Appellate Court will not interfere with the sentence even though it is of the opinion that the case against the Appellant was weak.

2. The Appellant's advocate having agreed in the lower Court that a witness was ill and unable to attend Court, it was not open to the Appellant now to say that the witness's written deposition had been wrongly admitted.

3. There being no mention in the record of an alleged application by Appellant to have certain witnesses called in addition to those who had already been heard, this ground of appeal could not be entertained.

ANNOTATIONS :

1. See note 1. to CR.A. 6/38 (2.ii.38).
2. See C.A. 218/37 (1938 1 S.C.J. 19) & first note.
3. See C.A. 242/37 (1938 1 S.C.J. 51) & note.

FOR APPELLANT : Elia.

FOR RESPONDENT : Crown Counsel.

JUDGMENT:

1. The Appellant was convicted on the 5th January, 1937, on a charge of jointly with other persons breaking into a house and attempting to steal certain articles therefrom. He has appealed against this conviction, and the first ground of appeal is that the evidence was not sufficient to justify his conviction. The principal witness for the prosecution stated that the night in question was a moonlight night, and it is urged that there was no moon that night. There was no conclusive proof before the Court below that that night was not a moonlight night, and this matter therefore was dealt with on the evidence by the Court below. With regard to the allegation that the rest of the evidence was insufficient, we are of the opinion that the case against the Appellant was weak, but at the same time we do not propose to interfere with the conviction on that ground because the weighing of the evidence and its cogency was entirely a matter for the Court below.

2. The second ground of appeal is that evidence was wrongly admitted. A witness who gave evidence at the preliminary investigations before the Magistrate was alleged by the prosecution to be dangerously ill and unable to attend the Court to give evidence. These facts were agreed to by the advocate for the Appellant and the deposition of this witness was consequently read and put in as part of the evidence for the prosecution. We do not think that in the circumstances it is open now to the Appellant to say that this evidence was improperly admitted.

3. The third ground of appeal is that the Appellant desired to have the evidence of a certain witness present taken and that the Court did not call him as a witness. With regard to this, there is nothing whatsoever in the record to show that the Appellant or his advocate made any application for the relevant witness to be called. The record shows that the Appellant called four witnesses and that the case for the defence was closed. We feel sure that if any such application

to call any witness had been made, a note would have been made by the presiding judge.

4. The last ground of appeal is in connection with the sentence ; a sentence of five years. It is said that this sentence is excessive. We do not think in the circumstances of the case, where it is alleged that shots were fired after the house had been broken into, that this sentence is too great.

5. For these reasons, we think that the appeal must be dismissed, and the conviction and sentence affirmed.

Delivered this 1st day of February, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 4/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Abdul Hadi, JJ.

IN THE APPEAL OF :

Abdul-Rahim Muhammad Nassar. APPELLANT.

v.

The Attorney General. RESPONDENT.

Defence Regulations — Interpretation Ordinance — Jurisdiction of Civil and Military courts.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 10th January, 1938, whereby the Appellant was found guilty of being in possession of ammunition contrary to sec. 8(a) of the Emergency Regulations No. 4 (1936) as amended by No. 3(i) of the Emergence Regulations No. 5 (1936), sec. 5 of the Emergency Regulations No. 8 (1936), sec. 10 Defence Ordinance, 1937, and sentenced to 5 years' imprisonment :—

HELD : In view of sec. 5 of the Interpretation Ordinance the Appellant was properly tried by a civil court notwithstanding the prior establishment of the Military courts.

ANNOTATIONS : See also CR. A. 6/38 (2.ii.1938).

FOR APPELLANT : Asal.

FOR RESPONDENT : Crown Counsel.

JUDGMENT:

The only point raised before us is the interpretation of the Defence Regulations in the light of the Interpretation Ordinance.

It has been said that at the time the accused was tried, namely the 10.1.38, the District Court had no jurisdiction to try him as Military Courts had already been established by a Gazette dated 11th November, 1937, which became operative on the 18th November, 1937. The substance of the argument is that the accused should have been tried by a Military Court as the Civil Courts had no jurisdiction. As I pointed out to counsel for the accused during the hearing, even if we were to agree with him, the effect of our decision will be to declare the proceedings a nullity and the Appellant will be liable to be tried by a Military Court which can hardly be said to be favourable to the accused owing to the increased penalty to which he would be liable. In our view having regard to sec. 5 of the Interpretation Ordinance, the accused was properly tried by the Civil Court.

The appeal is dismissed and the conviction and sentence affirmed.

Delivered this 2nd day of February, 1938.

Chief Justice.

CRIMINAL APPEAL No. 5/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Green and Abdul Hadi, JJ.

IN THE APPEAL OF :

Said Issa Hasboun. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Irregularities of trial not causing injustice — Sentence in excess of maximum — Criminal Procedure (Trial Upon Information) Ordinance, secs. 65, 72.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 11th January, 1938, whereby the Appellant was convicted of being in possession of firearms contrary to sec. 36(2)(a) and (f) of the Firearms Ordinance, and sec. 23 of the Criminal Code Ordinance, 1936, and sentenced to five years' imprisonment :—

HELD : 1. There were cerain irregularities at the trial but they resulted in no injustice to the Appellant.

2. The Appellant having, presumably as the result of an oversight, been sentenced to five years' imprisonment whereas the maximum to which he was liable was only three years, the sentence would be amended accordingly.

ANNOTATIONS :

1. This is based upon sec. 65 of the Criminal Procedure (Trial upon Information) Ordinance (Cap. 36) but has also been adopted in civil cases. See C. A. 231/37 (1938 1 S. C. J. 28).

2. *Cf.* CR. A. 150/37 (1938 1 S. C. J. 11).

FOR APPELLANT : Moghannam.

FOR RESPONDENT : Crown Counsel.

JUDGMENT:

The Appellant was charged with an offence against the Firearms Ordinance.

There were certain irregularities at the trial but we are satisfied that they resulted in no injustice to him, except that by an oversight (due it appears to a clerical mistake) he was sentenced to five years' imprisonment, whereas the maximum to which he was liable is three years only.

By virtue, therefore, of the powers vested in us by Sections 65 and 72 of the Criminal Procedure (Trial Upon Information) Ordinance, we dismiss the appeal but reduce the sentence to one of three years' imprisonment to run from the date of conviction.

Delivered this 2nd day of February, 1938.

Chief Justice.

CRIMINAL APPEAL No. 6/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Abdul-Hadi, JJ.

IN THE APPEAL OF :

Issa Jaber Abu Iswai. APPELLANT.

v.

The Attorney General. RESPONDENT.

Weight of evidence — Jurisdiction of Civil and Military courts — Recommendation for mercy.

In dismissing an appeal from the judgment of the District Court of Jerusalem, dated the 11th January, 1938, whereby the Appellant was convicted of being in possession of ammunition contrary to sec. 8(a) of the Emergency Regulations No. 4 (1936) as amended by sec. 4 of the Emergency Regulations No. 8 (1936) read with sec. 10 of the Defence Ordinance, 1937, and sentenced to five years' imprisonment :—

HELD : 1. There had been sufficient evidence before the Court below to justify the conviction, more than one witness having been heard.

2. The District Court has jurisdiction to try offence against the Emergency Regulations committed, but not tried before the establishment of Military Courts.

ANNOTATIONS :

1. See C. A. 223/37 (1938 1 S. C. J. 23), note 2 ; C. A. 251/37 (8.ii.38) ; C. A. 16/38 (24.ii.38) and see CR. A. 2/38 (1.ii.38) which goes further than earlier authorities by refusing to interfere with a finding of fact admittedly arrived at on scanty evidence.

2. See also CR. A. 4/38 (2.ii.1938) where the trial took place after the establishment of Military Courts.

FOR APPELLANT : Asal.

FOR RESPONDENT : Crown Counsel.

JUDGMENT.

We think that there was evidence before the Court below to justify a conviction. It is clear that there was more than one witness, and the appeal on that point therefore fails.

As to the second ground of appeal, nemely that the District Court had no jurisdiction to try the case, we have already decided today that the District Court had jurisdiction to try offences against the Defence Regulations committed, but not tried, before the establishment of Military Courts.

The appeal must be dismissed, and the conviction and sentence are affirmed.

The District Court has added a recommendation that the case may be brought to the notice of His Excellency the High Commissioner for the reduction of the sentence, and that recommendation will be forwarded.

Delivered this 2nd day of February, 1938.

Chief Justice.

CIVIL APPEAL No. 249/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Joseph Weiss — APPELLANT.

v.

1. Simon Zedkin
2. David Pritzker. — RESPONDENTS.

Interpretation — Building contract.

In dismissing an appeal from the judgment of the District Court of Haifa, sitting as a court of appeal, dated the 27th October, 1937 :—

HELD : The sum payable under the contract was to be calculated in accordance with the "remark", the sum specified being only an estimate by the parties at the time the contract was made.

FOR APPELLANT : Shapiro.

FOR RESPONDENT : Margolin.

JUDGMENT:

The only question in this case turns upon the interpretation of a clause providing for the payment of an architect under a building contract. The clause is as follows :—

> "In consideration of the said works the Employer shall pay the Architect, as hereinafter set out in detail, the sum of £P. 313.— approximately, in cash by instalments as follows :—
>
> Remark : The final sum shall be fixed at 4 per cent of the total sum of the cost of the building, but not less than a sum to be arrived at by multiplying the area of the building, including all the storeys thereof, as approved by the competent authorities, by the tariffs of the union, which are attached to this contract and form an integral part therof."

The learned Chief Magistrate held that the Plaintiff, the architect, was entitled to a sum representing 4 per cent of £P. 12,000, being the cost of the building.

Against that judgment the Defendant unsuccessfully appealed to the District Court, and now appeals to this Court.

In my judgment, the amount payable was to be calculated in

accordance with the "Remark", and the sum of £P. 313 was an estimate only by the parties at the time the contract was entered into as to the amount which would be payable.

The appeal, therefore, is dismissed with costs, Advocate's fees £P. 5.

Delivered this 7th day of February, 1938.

Chief Justice.

CIVIL APPEAL N.o 253/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :—

Zeev Kraus. APPELLANT.

v.

David Shapira. RESPONDENT.

Contract — Return of Deposit —Land Transfer Ordinance, sec. 11 — Disposition of land and agreement to sell — C .A. 147/26 — Interpretation of contract — Repudiation — Damages.

In allowing an appeal from the judgment of the Distrit Court of Haifa, sitting as a court of appeal, dated the 24th November, 1937, and setting aside the judgment of the Magistrate's Court, Haifa :—

RELD : The Appellant being entitled, by the terms of the contract, to demand the return of the purchase price, this did not amount to a repudiation of the contract for which he could be liable for damages.

C. .A. 147/26 (P. L. R. 116, C. of J. 378) distinguished.

ANNOTATIONS : The *dicta* in this judgment would appear to overrule the decisions in C. A. 31/37 (1 S. C. J. 256, 1 Ct. L. R. 51) and C. A. 50/26 (P. L. R. 131, C. of J. 29) which held that a purchaser of immovable property is always entitled to demand the return of the purchase price before formal transfer. (See also C. A. 147/26 *supra*). These decisions purport to be based upon sec. 11 of the Land Transfer Ordinance and are in conflict with L. A. 87/30 (C. of J. 1789) in which it was held that a purchaser under a valid agreement of sale of land was not entitled to sue for the return of the purchase price. They also conflict with the following decisions which distinguish between a void disposition under sec. 11 and a valid agreement to sell : C. A. 13/26 (C. of J. 278) ; C. A. 147/26 (*supra*) ; C. A. 105/28 (P. L. R.. 373, C of J. 393) ; L. A. 45/29 (C. of J. 1499) ;. C. A. 24/30 (C. of J. 397) ; C. A. 89/30 (P. L. R. 574, C. of J. 421) ; C. A. 136/31 (C. of J. 431) ; C. A. 83/33 (P. P.

4.iv.34, C. of J. 1108) ; L. A. 1/36 (P. P. 30.x., 1—5, 8.xi.36, C. of J. 1934—6 340) and C. A. 32/37 (1 S. C. J. 258, 2 Ct. L. R. 12).

The question of the return of the purchase price under a valid agreement for sale is therefore still unsettled.

FOR APPELLANT : Gavison.

FOR RESPONDENT : Olshan.

JUDGMENT:

By a contract dated 12.12.34, David Shapira (the Defendant in the action and the Respondent before us) agreed to transfer certain lands to Zeev Kraus (the Plaintiff in the action and the Appellant before us). Clause 4 of the agreement provided :

> "The vendor hereby undertakes to transfer the land, particulars of which appear in Clause 1 of this contract, in the name of the purchaser at the Haifa Land Registry within two months after Mr. Mishel Habib will transfer all the land in the name of the vendor at the Haifa Land Registry, provided that before the transfer the purchaser has paid to vendor all the instalments as scheduled in Clause 3 of this contract".

Clause 8 further provided :

> "The purchaser waives beforehand on any claim with regard to commission of breach by the vendor in case the vendor is unable to transfer to him the land because of a delay (hindrance) caused on the part of Mr. Adeeb Mishel Habib, the government or any official institution, in such a case the vendor undertakes to pay back to the purchaser the money he has received plus 10 per cent".

Twenty pounds was paid on the signing of this contract.

The land was not transferred, and Kraus went to the Magistrate's Court asking for the return of his twenty pounds. It is not suggested that Habib had transferred the land to Shapira..

The only question to my mind, therefore, was — was Kraus entitled to invoke Clause 8 of the contract ? In other words, had there been such a delay (or interference) as was contemplated by that clause.

It is not very clear from the "precis of claim" upon what the Plaintiff based his claim, but he does refer to the "contract existing between him and the Defendant", and it seems that in the course of the case reference was made to Clause 8 of the contract.

The Magistrate found that the Plaintiff was entitled to the return

of his twenty pounds, and against that finding no appeal was lodged. For whatever reason, therefore, the Magistrate may have so found, that question is settled.

It seems from the Magistrate's judgment that he was of opinion that Section 11 of the Land Transfer Ordinance, Chapter 81, applied. In this I think he misdirected himself, as the contract in question was not a disposition of immovable property but an agreement to transfer in the Land Registry, a form of contract which is well known in this country.

The Magistrate held that the Plaintiff was entitled to the return of the deposit by reason of the provisions of that Section, and went on to hold that the Plaintiff must pay the Defendant damages, in accordance with the contract, for breach of the contract.

In my opinion, it is clear, if a contract is null and void damages cannot be recovered for its breach.

We were told in argument that there is a decision of this Court to the contrary effect, but we did not consider it in detail, and I do not know what the facts in that case may have been.

The Plaintiff appealed against the Magistrate's judgment ordering him to pay damages, and in ground (e) of his appeal set out — "and whereas he (the purchaser) has waited several years for the transfer and this was not done, he was fully entitled to receive his money back".

The District Court dealt with the matter in a long judgment, the material paragraph of which appears to me to be paragraph 9, which is as follows : — "The fact that the Appellant (Plaintiff) has claimed the money which he has paid on account of the purchase price, does entitle the Respondent to consider him as having repudiated the contract and to seek any remedy which may be open to him. See in this respect the judgment of the Supreme Court in Civil Appeal No. 147 of 1926". The case in question is reported in the Palestine Law Reports, page 116.

I take this to mean that the District Court was of opinion that because the Plaintiff in the action had brought his action to recover the money paid under the contract, he had thereby repudiated the contract and become liable in damages.

This seems to overlook the words of Clause 8 of the contract from which it is clear that the parties contemplated that, in certain circumstances, Kraus should be entitled to the return of the money paid.

In my opinion, he was clearly entitled to go to the Court and say those circumstances had arisen without thereby repudiating the contract.

The case to which the District Court referred should, in my opinion, be applied with care in the light of the precise terms of the contract which is being interpreted, and the facts of the case, as not every action brought for the return of purchase money paid in advance amounts to repudiation entitling the other party to damages.

The appeal is therefore allowed, the judgment of the Dsitrict Court is set aside, and that part of the judgment of the Magistrate ordering the Plaintiff to pay damages is also set aside — with costs. Advocate's fees LP. 5.—.

Chief Justice.

I concur in the conclusion arrived at by the learned Chief Justice in his Judgment to the effect that the appeal be allowed, and the Judgment of the District Court set aside as well as that part of the Judgment of the Magistrate's Court directing the Appellant to pay to the Respondent LP. 20.— damages.

The Magistrate in ordering the Respondent to return the amount received by him from the Appellant did not rely on the contract between the parties but based his Judgment on the legal right which the Magistrate assumed the Appellant had to reclaim money paid on account of what the Magistrate considered to be a disposition contrary to the Land Transfer Ordinance, 1920.

Having so held the Magistrate further held that by demanding the money to which in his view the Appellant was entitled by law, the latter committed a breach of contract. For this inconsistency alone that part of the Judgment cannot stand.

Puisne Judge.

In my opinion the appeal should be allowed. Both the Magistrate's Court and the District Court, after having decided that the Appellant is entitled to the return of the price, cannot consider him as having committed a breach of contract and liable to pay damages.

I therefore agree with the conclusions of my brethren.

Delivered this 7th day of February, 1938.

Puisne Judge.

HIGH COURT No. 7/38.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE :

BEFORE : The Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

(Ex Parte).

Muhammad Rashid Mansour Tayeh. PETITIONER.

v.

1. Chief Execution Officer, Ramallah,
2. Salem Samaan Isiadeh. RESPONDENTS.

Jurisdiction of courts — Chief Execution Officer — Judgment-debt to be paid by instalments.

In dismissing an application for an order directed to the First Respondent to show cause why his order dated the 25th December, 1937, should not be set aside :—

HELD : 1. The Petitioner's remedy against the judgment of the Magistrate was by way of appeal to the District Court.

2. The Chief Execution Officer's order for the payment of a debt of LP. 75 in monthly instalment of 250 mls. was reasonable.

ANNOTATIONS :

1. See notes to H. C. 12/38 (22.ii.38).

2. The Chief Execution Officer has a discretion to order the payment of a judgment-debt by instalments and, so long as his discretion is exercised reasonably, the High Court will not interfere with his orders : See *e. g.* C. A. 16/27 (P.L.R. 126, C. of J. 282) ; H. C. 57/37 (2 Ct. L. R. 161) ; H. C. 26/37 (1 S.C.J. 430) ; H. C. 83/35 (P.P. 10.i.36, C. of J. 1934—6 90) ; H. C. 1/29 (P.L.R. 345, C. of J. 283) ; H. C. 78/33 (C. of J. 873). *Cf.* H. C. 50/32 (P.L.R. 764, C. of J. 1525) & H. C. 88/36 (P.P. 15.xi.36).

PETITIONER : In person.

ORDER.

The Petitioner's remedy was to appeal against the judgment of the Magistrate's Court to the District Court as a Court of Appeal. He has not done so, and is asking us to upset the Magistrate's judgment, which we are not empowered to do.

The Chief Execution Officer has ordered that the debt in question,

some LP. 75.—, be paid by the Petitioner in monthly instalments of 250 mils, this seems to be reasonable.

The application must be dismissed.

Delivered this 7th day of February, 1938.

Chief Justice.

CIVIL APPEAL No.. 232/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :—

Dr. K. Loewenthal. APPELLANT.

v.

Said el Shehabi. RESPONDENT.

Hire — Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1935, — Stables as "premises" — Eviction — Admissibility of evidence — Parties.

In dismissing an appeal from the judgment of the District Court of Jerusalem, sitting as a Court of appeal, dated the 28th October, 1937 :—

HELD : 1. An order of ejection was properly granted as there was no contract of lease between the Appellant and the owners of the property of whom Respondent was one.

2. A stable constitutes "premises" within the meaning of the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance.

3. Sec. 10 of the Ordinance applies only to cases where there is a contract of tenancy.

ANNOTATIONS : See also C. A. 61/36 (1 S. C. J. 116 ; 1 Ct. L. R. 1).

FOR APPELLANT : Krongold.

FOR RESPONDENT : Goitein.

JUDGMENT.

The facts in this case were that a person named Darwish rented a building to the Appellant, which the Appellant used for the purpose of stabling his horses. Sometime later it transpired that the said Darwish was only a part owner of the building rented. The present Respondent was also a part owner and took proceedings in the Magistrate's Court,

Jerusalem, to have the Appellant ejected on the ground that there was no contract of lease between the Appellant and the owners of the property. The learned Magistrate dealt with this issue in its simple aspect and on the ground that Darwish had rented the building to the Appellant without the consent and permission of the Respondent, he made an order for eviction.

2. The Appellant appealed to the District Court, Jerusalem, and when the case came before that Court the issues were complicated by questions arising under the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance No. 12 of 1935. The District Court rejected the contentions of the Appellant but granted leave to appeal to this Court.

3. We may say at the outset that we are in complete agreement with the decision of the learned Magistrate. The only question before him was the question as to whether there was a contract of lease between the Appellant and the Respondent, and it having been proved that no such contract existed, the Appellant was in reality a mere trespasser in the building, and therefore the order of ejection was correct.

4. A question was raised by Mr. Krongold on behalf of the Appellant as to whether a stable is "premises" within the meaning of the Ordinance just referred to. It is not necessary to decide this question, but as both sides have taken some time in arguing the matter, we propose to decide the point, and we hold that a stable is premises within the meaning of the said Ordinance.

"Premises" are defined in the Ordinance to mean any premises other than dwelling houses, and we take the term to mean any building other than a dwelling house, which is capable of being the subject of a contract between a landlord and a tenant. In this case the Appellant is a riding master and uses these stables for the purpose of his business, and we have no doubt that they are premises within the meaning of the ordinance.

5. Mr. Krongold's second argument has been dealt with already. He relied on Section 10 of the said Ordinance which says that "no court or judge or execution officer shall give any judgment or make any order for the ejection of any tenant from any premises, notwithstanding that such tenant's contract of tenancy has expired, unless ....." and then follows a series of exceptional cases where an order for eviction might be made. We have already said that we agree that there was no contract of tenancy in this case. We think that the section means that there must be a proper contract of tenancy

and not a voidable contract such as existed in the circumstances of the present case.

6. The third ground of appeal was that the Magistrate's Court took into consideration the findings in another case. This is so, as the judgment of the Magistrate's Court begins "Whereas it was proved in the orignal case that the third person had rented the defendant." This clearly shows that the learned Magistrate took into consideration certain facts which had been proved in the case of other defendants. From the form of the judgment, however, we have no doubt that it must be taken that the Appellant consented to the learned Magistrate taking this course, and in the circumstances we hold that it was not incumbent on the learned Magistrate to go into the facts a second time.

7. The last ground of appeal is that originally there were 14 or 15 defendants concerned in the action taken by the Respondent, each of them occupying separate premises, some of them occupying dwelling houses (in which circumstances other legal considerations might arise) and that there ought to have been 14 or 15 separate actions. We do not think that this ground can affect the decision, as the course which the case took ended by its being heard between the Respondent and the Appellant alone, and therefore this objection cannot affect the manner in which the proceedings were conducted.

8. For these reasons, we think that the appeal must fail, and it is accordingly dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 8th day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 250/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khaldi, JJ.

IN THE APPEAL OF :

Abdallah Mukhles. APPELLANT.

v.

Husein Shalaby. RESPONDENT.

Liquidated damages and penalty — Grounds of appeal.

In dismissing an appeal from the judgment of the District Court of Haifa, sitting as a court of appeal, dated the 24th November, 1937 :—

HELD : A point raised for the first time in the grounds of appeal and which was pleaded neither in the Magistrates Court nor on appeal to the District Court would not be entertained.

ANNOTATIONS : See C. A. 248/37 (1.ii.1938) and note 1 thereto.

FOR APPELLANT : Khamra.

RESPONDENT : In person.

JUDGMENT:

This point raised by the Appellant now, namely that there should be a distinction between penalty and damages and that the Court below should have only awarded actual damages, has not been raised either before the Magistrate or before the District Court.

We do not therefore propose to deal with this point in the present appeal, and in the absence of any other grounds of appeal, the appeal must be dismissed with LP. 1.— costs to the Respondent.

Delivered this 8th day of February, 1938.

British Puisne Judge.

CIVIL APPEAL No. 251/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

Abdul Raheem Haj Ibrahim. APPELLANT.

v.

Abdul Rahman el Hajj. RESPONDENT.

Limitation — Findings of fact — Turkish kushans.

In dismissing an appeal from the judgment of the Land Court of Nablus, dated the 8th December, 1937 :—

HELD : 1. A finding by the lower Court on a question of limitation, which was based on evidence heard by the lower Court will not be interfered with.

2. The Turkish kushans produced by the Appelant did not affect the defence set up by the Respondent.

ANNOTATIONS : See note 1 to CR. A. 6/38 (2.ii.38).

FOR APPELLANT : Cattan.

FOR RESPONDENT : Khoury and Kamhich.

JUDGMENT:

In this case the Appellant before the Land Court of Nablus claimed to be co-owner of certain land with the Respondent. The defence set up by the Respondent was a defence of limitation, namely that he had been in adverse possession as sole owner of the land claimed for the period laid down by law. The Land Court heard the evidence of a number of witnesses and also inspected the land and came to the conclusion that the Respondent had made out his defence and that therefore the Plaintiff was too late in making his claim. This finding of the Land Court, having been made after hearing evidence, and evidence in support of the Respondent's defence, we do not propose to interfere with.

2. It was alleged by Mr. Cattan for the Appellant that certain Kushans in the Turkish language before the Land Court were not properly understood by the members of the Court and that this led to a mistake in the judgment. We do not see how a mistake as regards the correct translation of these Kushans could affect the defence of limitation, and my two brethren with me in this case, who are acquainted with the Turkish language, have perused these Kushans and assure me that they cannot affect the defence as set up by the Respondent.

3. For these reasons, the appeal must be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 8th day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 1/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: The Chief Justice, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF:

Ghregorio Osio,
Custodio Franciscana de Terra Santa, Tiberias. APPELLANT.

v.

The Mayor & Councillors of Tiberias.
Through the Mayor, Zaki Eff. el Hadif. RESPONDENTS

Recovery of possession — Title to land — Failure to plead point in lower Court.

In allowing an appeal from the judgment of the Land Court of Nablus, sitting as a court of appeal, dated the 4th October, 1937, and delivered the 15th October, 1937 ; and in restoring the judgment of the Magistrates Court :—

HELD : In this claim for recovery of possession the question of title not having been seriously raised by the Respondent, the Magistrate had jurisdiction to hear the case.

ANNOTATIONS : See note 1 to C. A. 248/37 (1.ii.38).

FOR APPELLANT : Salomon and Nuammer.

FOR RESPONDENTS : Levitsky.

JUDGMENT:

We are of the opinion that this appeal should be allowed.

It is quite clear from the statement of claim that the Plaintiff (Appellant) asked for recovery of possession, and the Magistrate, having heard arguments and evidence at some length, come to the conclusion that the Plaintiff had made out his case, and gave judgment in his favour.

It has been argued by Mr. Levitsky that the Land Court, Nablus, was correct in reversing the judgment of the Magistrate, as the matter was one involving title and not within the jurisdiction of the Magistrate.

We do not agree with this contention. It does not appear from the judgment of the Magistrate that the question of title was raised nor that this matter was seriously contested by the Respondents.

We hold that the District (*Sic.* Land) Court was wrong, and its judgment must be set aside. The judgment of the Magistrate is accordingly restored.

The Respondents will pay the costs of this appeal to include LP. 5 advocate's fees.

Delivered this 9th day of February, 1938.

Chief Justice.

HIGH COURT CASE No. 1/38.

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

BEFORE : The Chief Justice and Frumkin, J.

IN THE CASE OF :

Ishak Omar Hijasi. PETITIONER.

V.

1. Chief Execution Officer, Jerusalem
2. Mr. Haim Shoukerman. RFSPONDENTS.

Chief Execution Officer — Attachment — Property registered in another's name — Application to propert court — Applications to High Court to be made quickly.

Application for an order directed to the First Respondent calling upon him to show cause why his order dated the 11th June, 1937, in Execution File No. 5351/35, Jerusalem, should not be set aside, refused.

In execution proceedings conducted by the Second Respondent against the Petitioner's brother, the Second Respondent obtained an order of attachment on a house registered in the name of the Petitioner's brother but the upper storey whereof was alleged by the Petitioner to belong to him.

The Petitioner applied to the First Respondent for the removal of the attachment from the upper storey. On the 11th June, 1937, the First Respondent made the following order :

"The objector should go to a competent court to prove his exclusive ownership of upper storey and execution to proceed".

On the 9th January, 1938, Petitioner applied to the High Court for the cancellation of the First Respondent's order.

The Second Respondent pleaded that the application amounted to a petition for a declaration of title and could not be entertained by the High Court. He relied upon L. A. 8/33 (C. of J. 1754) and L. A. 42/33 (P. P. 14.i.35, C. of J. 813).

HELD : In view of the fact that there had been a genuine dispute as to the ownership of the property in question, the First Respondent's order was justified.

ANNOTATIONS : See L. A. 8/33 (*supra*) ; L. A. 42/33 (*supra*) and 2 Cyprus Law Reports, 168.

FOR PETITIONER : Ades.

FOR RESPONDENTS :

1. No appearance.
2. Kehaty.

ORDER.

The only point involved is whether the Chief Execution Officer has properly made his Order of the 11th June, 1937. We are quite satisfied that there is a genuine dispute as to the ownership of the property in question. The Chief Execution Officer was therefore justified in making his Order.

With regard to the question of giving time to the Petitioner to enable him to go to the Land Court, it should be observed that the Order of the Chief Execution Officer was made on the 11th June, 1937, and the application to this Court was only lodged on the 9th January, 1938. We do not propose to assist a party who has allowed six months to elapse before making application to this Court. Applications to the High Court should be made quickly.

The rule is discharged, with costs to include LP. 2 advocate's fees.

Given this 9th day of February, 1938.

Chief Justice.

CIVIL APPEAL No. 222/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

1. Habiba (Eva) Setty,
2. Salman Ezra Setty,
3. David Hai Setty,
4. Menashe Naji Setty,
5. Jacob Setty,
6. Farha (Flora) Setty (in her personal capacity and as guardian for Nos. 7 and 8),
7. Joseph Hai Setty,
8. Edward Isaac Setty. APPELLANTS.

v.

Eliahu Baarawi. RESPONDENT.

Promissory note — Aval — First endorser — Guarantor and endorser same person — Bills of Exchange Ordinance, secs. 57, 90 — French Code of Commerce, Art. 142 — Discharge of person guaranteed.

In allowing an appeal from the judgment of the District Court of Jerusalem in its appellate capacity, dated the 28th October, 1937, confirming the judgment of the Magistrate of Jerusalem, dated the 21st September, 1937 :—

HELD : 1. If there is an endorser, in default of a statement on whose account an aval on a promissory note is given, it is deemed to be given for the first endorser, even if the first endorser and the guarantor are the same person.

2. If the person guaranteed is discharged the guarantor pour aval, whether a third party or not, is also discharged.

ANNOTATIONS : See notes to C. A. 252/37 (12.ii.38).

FOR APPELLANTS : Nos. 1 to 5 — Levanon.
No. 6 — in person and on behalf of Nos. 7 and 8.

FOR RESPONDENT : Amdur.

JUDGMENT:

The Appellants — the Defendants in the action — are the heirs of a deceased man, Saleh Yousef Setty.

The Plaintiff (Respondent) brought his claim in the Magistrate's Court upon a promissory note which he said was assigned to him for consideration and which he said the deceased Setty had guaranteed for payment by aval.

Unfortunately the action has taken a devious course and has been twice before the Magistrate and twice on appeal to the District Court, and has now reached us.

One would have thought that the original proceedings before the Magistrate could have been straight-forward. The Plaintiff should have put in his note, proved the signature, if not admitted and proved the facts entitling him to call upon the giver of the aval. According to the Magistrate's judgment the Defendants confined themselves to a counter-claim, which we now know was a claim for the return of the note based on the allegation that it was handed to the Plaintiff for collection. It may be noted that this allegation clearly involved a defence also, i.e. that the Plaintiff was not the holder or assignee. The Defendants also apparently wished to set up the defence of lack of consideration. These matters, and any other defences, should have

been put forward, investigated and decided. Failing this, the Magistrate had recourse to Article 1746 of the Mejelle, but how that provision could assist in deciding the questions of fact and law involved I find it difficult to understand.

I can find no allegation in the earlier stages that the signature of the deceased man was not genuine although doubts are thrown upon it in this Court, but we cannot speculate about it at this stage.

At the second hearing before the Magistrate, questions of fact were considered, with the result that the advocate for the Appellants now agrees that it is not open to him to contend that the note was handed to the Plaintiff for collection or that there was no consideration. We must regard this case, therefore, upon the basis that the Plaintiff was the holder of a promissory note whereby one, Hashem Yunis el Husseini, promised to pay after a year to the order of Saleh Yousef Setty (the deceased man) the sum of £ 100.—,which note was endorsed on the back "Saleh Setty" in Hebrew and Arabic, and which on its face bore the endorsement — "The above mentioned sum is under my guarantee. Saleh Setty", which is admitted to be the common form of an aval.

The case therefore turns upon Section 57 of the Bills of Exchange Ordinance, Chapter 10. That section is not found in the English Act upon which the Ordinance is modelled. It imports the continental principle of aval, with some modification of that principle as it is found in French law.

It is clear that the object of the aval is to guarantee payment by a party to the bill and in default of a statement on whose account it is given, it is deemed to be for the drawer. It may be of interest to note that this differs from the French law whereunder, by Article 142, Code of Commerce, the guarantor is bound with and in the same manner as the drawer and endorsers. To extend the principle of aval to promissory notes Section 90 Bills of Exchange Ordinance must be invoked. That section provides that : —

> "(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order".

Whatever the results of that sub-section may be its provisions are clear, and I am of opinion that if there is an endorser, in default of a statement on whose account an aval on a promissory note is given, it is deemed to be given for the endorser.

This case is complicated by the fact that the first indorser (Saleh Setty) is also the giver of the aval, and was therefore guarantying himself.

The Appellants (Defendants in the action representing Setty) were sued on that basis — the statement of claim setting out that the late Saleh Setty had "also guaranteed for the payment of the note by aval", and in his reply to the notice of appeal in this Court the Respondent (Plaintiff) states : —

> "If notwithstanding the above there is a point of law, it is answered that an endorser may as an additional guarantee sign his name as bon pour aval and that there is nothing in law which prevents it. Furthermore, as a matter of mercantile practice it is always done so as it enhances the chances of negotiation for it frees the holder of fulfilling such duties as he is bound to fulfil towards the endorser, namely, presentment and protest".

It seems that in a similar case, reported in Mr. Shems' book at page 245 the District Court at Haifa held — "There would be no purpose if the Respondent had guaranteed himself. His signature on the face of the note must have therefore been affixed for the purpose of guarantying the maker."

In view of the provisions of the law to which I have referred, I do not think this view is tenable. If the giver of the aval had intended it to be on account of the maker he should have made a statement to that effect.

It is admitted before us that upon the facts of the case, Saleh Setty was not liable as an endorser.

The first question for us is, therefore, is a party to a promissory note or bill, signing an aval guarantying himself, in any different position to any other person or party giving an aval guarantying him ? I do not think that he is.

We have therefore to enquire — is the giver of an aval under any greater liability than the party he guarantees ?

Sub-section (3) of Section 57 of the Bills of Exchange Ordinance provides : —

> "The giver of an aval is jointly and severally liable with the party whose signature he has guaranteed : he is liable although the engagement of the part whom he has guaranteed is invalid for any reason other than defect of form : when the giver of an aval pays the bill he has a right of recourse against the party whom he has guaranteed and against the parties liable to that party".

It is argued by the Respondent that invalidity of engagement is

wide enough to include non-liability or discharge arising after the guaranty was given — in other words, although the party guaranteed may not be liable by reason of some act or omission subsequent to the giving of the guaranty it remains of full effect. I do not think that that is the meaning of the sub-section. In my opinion, invalidity of engagement means an invalidity existing at the time when the guaranty was given. It follows, therefore, that if the party guaranteed is discharged from his liability for any reason — e.g. non-presentation— the guarantor is also discharged.

It may be that if this view is taken, a party guarantying himself by a simple aval cannot thereby increase his own liability, but that is a matter for the consideration of persons taking the bill.

On the facts of this case, as the Appellants (as representnig Saleh Setty) are not liable by reason of his being the first endorser, they are not liable by reason of the aval which he gave.

In my opinion this appeal should be allowed and judgment entered for the Defendants, with costs, Advocates' fees.

Delivered this 10th day of February, 1938.

Chief Justice.

I concur.

British Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 252/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE CASE OF :

Zvi Feinberg. APPELLANT.

v.

Jacob Botkovsky. RESPONDENT.

Promissory note — Aval stamp — Bills of Exchange Ordinance, secs. 57(3), 64 — Material alteration — First endorser — Liability of guarantor and maker.

Appeal from the judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 26th July, 1937, dismissed.

The Appellant signed a note as guarantor on the face of the intrument. A rubber aval stamp was subsequently affixed to his signature without his knowledge, and the Appellant argued that, as his intention at the time of signature had been to be a guarantor as endorser and not by aval, the subsequent addition of the aval stamp constituted a material alteration of the note which released him from his liability thereon. Alternatively he pleaded that his liability was that of an endorser and that he should be released from liability on the ground that he had received no notice of dishonour.

HELD : 1. The Appellant was not an endorser as the note was payable to Respondent's order and the Appellant had signed the note before the Respondent.

2. There is no distinction in law between an ordinary guarantor of a note and that of a guarantor pour aval and the addition of an aval stamp is therefore not a material alteration.

ANNOTATIONS :

2. For the liability of endorsers pour aval, see C. A. 3/34 (P.P. 15.1.36, C. of J. 1934—6 67) ; C. A. 80/28 (P.L.R. 352, C. of J. 944) C. A. 80/27 (C. of J. 256). *cf.* C. A. 12/33 (P. P. 18, 20.iii.35, C. of J. 449) ; C. of J. 222/37 (10.ii.38) ; C. A. 146/36 (P. P. 5.viii.37, C. of J. 1934—36 438, 2 Ct.L.R. 17).

FOR APPELLANT : Kelly.

FOR RESPONDENT : Agranat.

JUDGMENT:

This is an action on a promissory note signed by a person who is not a party to this appeal to the order of the Respondent. On the foot of the note there appears the signature of the Appellant and above it a rubber stamp to the effect that it is a guarantee pour aval.

2. The Appellant admits that he signed this note as a guarantor for the maker upon the latter's request but alleges that his intention was to be a guarantor as an endorser and not a guarantor pour aval and that the rubber stamp was affixed after his signature and without his knowledge and consent.

3. He further argues that the stamp constitutes a material alteration of the note in the meaning of section 64 of the Bills of Exchange Ordinance (Cap. 10) and is therefore void and alternatively that his liability is that of an endorser and thus he could not be sued, there being no notice served on him for non-payment.

4. The Appellant succeeded in the Magistrate's Court but failed in the District Court and obtained leave to appeal to this Court on two points of law. We are mainly concerned with the point whether

or not the addition of the words indicating an aval above his signature constitutes a material alteration of the note or not..

5. The defence of the Appellant that he signed the note as an endorser is unacceptable for the simple reason that the promissory note was payable to the order of the Respondent who himself and himself alone could be the first endorser. The signature of the Appellant however was already on the note before its delivery to the Respondent.. It is clear therefore that the signature was according to the admission of the Appellant himself that of a guarantor and not that of an endorser.

6. There is no distinction in our law between an ordinary guarantor of a note and that of a guarantor pour aval ; and in these circumstances we hold, therefore, that by the addition of the words above the signature no material alteration of the bill was effected ; by putting his signature as guarantor the Appellant assumed joint and several liability with the maker under Section 57(3) of the said Ordinance.

7. The appeal must therefore be dismissed and the judgment of the District Court confirmed with costs to include LP. 5.— advocate's fees for Respondent.

Delivered this 12th day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 215/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Khayat, JJ.

IN THE CASE OF :

1. S. Gertel,
2. L. L. Gluckman,
3. M. Litwinsky. APPELLANTS.

v.

Gabriel Chelouche. RESPONDENT.

Construction of road — Voluntary association — Acting committee — Liability of constituent persons — Engineer's certificate — Oral evidence — Alteration of method of performance — Code of Civil Procedure, Arts. 80-1 *— Morris v. Barron — Construction of contract — Interest.*

Appeal from the District Court of Tel-Aviv, dated the 26th of July, 1937, (Civil Case No. 429/36) dismissed. Cross appeal allowed.

Appellants, who represented a voluntary association formed for the purpose of constructing a road, entered into a contract with Respondent who was appointed to execute the works.

A memorandum attached to the contract provided that the contract should be binding on the Appellants only if they succeeded in collecting all the moneys required for the road within a certain time.

The form of contract was adopted from the standard Public Works Department and provided that payments were to be made against certificates signed by the District Engineer of the Public Works Department in Jaffa. Payments were in fact made against certificates signed by the engineer of the Appellants.

Extra work was necessitated owing to heavy rains.

HELD : 1. The circumstances of the case showed that the Appellants did not act as agents. There was no necessity to sue them in a representative action.

2. Oral evidence is admissible to prove a forbearance resulting in an alteration of the mode of performance.

3. The findings of fact of the lower Court on excavations and ditches must be confirmed.

4. Interest from the day of the action is payable on all sums claimed and awarded.

Followed : Morris *v.* Baron (1918) A. C. 1.

ANNOTATIONS : An application for leave to appeal to the Privy Council is now under consideration.

FOR APPELLANTS : Joseph, Horowitz.

FOR RESPONDENT : Eliash.

JUDGMENT.

This appeal is concerned with the making of a road from Tel Litwinsky to the main road between Jaffa and Petah Tiqva. A committee was formed to negotiate for the construction of the road by a competent Engineer. It was known as Hashachar Road Committee and for all relevant purposes connected with the negotiations, it was represented by the three appellants. They selected the respondent as the Engineer to construct the road and a written contract was drawn up for the purpose. In November 1936 the respondent alleging that the road had been completed and that there was a sum still due to him for its construction, took action against the appellants for LP. 1,824.709. The District Court of Jaffa rejected part of his claim but entered judgment in his favour for LP. 1062.260. m.

Both parties have appealed from this decision. The respondent appealed on the ground that he had not been awarded interest on the LP.1062.260 m. from the date of action. Mr. Horowitz for the appellants admits that the court below omitted to include interest in its judgment and that if the respondent is entitled to any sum he is also entitled to interest on that sum as from the date of action. In view of this, it is not necessary to consider further the respondent's appeal and I turn to the grounds on which the appellants challenged the decision of the Court below.

In the Court below a preliminary objection was taken that there was no cause of action against the appellants. The Court held that there was ; and the first ground of appeal urged by Mr. Horowitz is that this decision was wrong. He says that the contract was made by the Hashachar Road Committee and that the three appellants were merely agents for the Committee and therefore not personally responsible for any sum due to the respondent. The respondent's action was, he added, ill-conceived, he might have applied for a representative action against the appellants or sued them for a proportionate part of the sum alleged to be due but be could not make them liable as principals to the contract. He relied on the opening words of the contract which set out that the contract was between the respondent and the Hashachar Road Committee represented by the appellants and on certain correspondence between the parties which showed that the respondent addressed all his relevant inquiries to the Committee.

The District Court based its decision on the fact that the relevant documents did not suggest that there were any other members of the Committee besides the three appellants. This does not appear to be correct. The contract itself showed that there was a Committee and that it was merely represented by the appellants. The true principle which ought to determine the issue is whether the appellants made themselves personally liable to pay to the respondent whatever might be found due to him under the contract. I think that an examination of the relevant documents shows that they did. In the first place, they were the parties who gave the order to the respondents to construct the road. The contract and the correspondence are signed by them. Secondly, there is a memorandum attached to the contract as follows : "This contract shall be binding on the employers only if they will succeed to collect all the money required for the execution of this road from the persons interested in the said road and this will be ascertained after three weeks from to-day.". This memorandum is initialled by the three appellants. Then on the 18th December, 1934, the Committee wrote

to the respondent informing him that "we have collected all the monies and pledges for the Hashachar Road, the contract between us with all its details in connection with the construction of the road will come into force". This letter was signed "Hashachar Road Committee" and immediately below these words appeared the signatures of the three appellants.

The facts of the case were therefore that the Hashachar Road Committee was a voluntary association formed for a temporary purpose, namely the construction of a road. The Committee was not a legal entity and could not be sued in its name. If work was done on its behalf the liability to pay for that work was on the persons by whom the order for the work was given, that is the appellants. Furthermore the appellants led the respondent to believe that they were the persons who had collected the funds for the construction of the road and that it was to them that he was to look for payment. The circumstances show that the appellants were not mere agents for an indeterminate body but they were actively concerned as principals in giving the order. In his opening address Mr. Horowitz stated that the inhabitants of the settlement had had a meeting with regard to the construction of the road and had formed a Committee of nine or ten for the purpose. This Committee chose an executive committee of three (the Appellants) to deal with all matters concerning the construction of the road. In connection with this I refer to the following quotation from Vol. 7, Halsbury's Laws of England, page 341 : "A distinction is to be drawn as regards the inference of authority in such cases between the members of of a provisional Committee who merely lend the sanction of their names to the project and the members of the Acting Committee appointed for the purposes of carrying the scheme into effect". I have no doubt that the appellants rendered themselves personally liable on this contract to the respondent and that there was no necessity for the respondent to make them defendants in a representative action or to sue them merely for a proportionate part of the balance alleged to be due.

Mr. Horowitz's second ground of appeal is put in this way. Clause 24 of the contract lays it down that payments are to be made on certificates signed by the Engineer and clause 45 says that engineer means the District Engineer of the Public Works Department in Jaffa. The present payment demanded by the respondent has no certificate of this engineer to support it. Mr. Horowitz says a certificate is a condition precedent to any payment to the respondent and that therefore the present claim must fail.

On the other hand Mr. Eliash for the respondent points out that all previous payments to the respondent were made on the certificate of Mr. Okrainitz, the engineer of the appellants. He says that this indicates a mutual agreement between the parties that Mr. Okrainitz, and not the Public Works Engineer, should be the engineer to certify the payments. To this Mr. Horowitz replies that clause 25 of the contract provides that all payments before the final payment are merely payments on account and may be reviewed before the final payment and that the appellants are entitled to insist on the certificate of the Engineer as provided for in the contract. The contention of M. Eliash prevailed with the Court below.

From an examination of the evidence it is easy to see what happened. The parties adopted the standard form of a Public Works Department Contract and in such contracts a clause such as clause 45 always appears. From the course of business it is clear that it was never the intention of the Parties that the Public Works Engineer should be the Engineer to certify the payments. Mr. Noble, who was the Engineer in question, was never consulted by either party as to his consent to act as certifying Engineer ; he never acted as such. Nevertheless the contract is there, agreed to by both parties ; but I am quite satisfied that there was an understanding between them that the Engineer need not be the Public Works Engineer but that the necessary certification might be done by the appellants' Engineer. The inference as to this understanding arises from the evidence and Mr. Horowitz has contended that evidence leading directly or indirectly to this inference was inadmissible as contradicting a very definite clause in an agreement which had been reduced into writing. In the case Morris vs. Baron 1918 A. C. 1, at page 30, Lord Atkinson says in his speech that a distinction must be drawn between the oral variation of a contract required by law to be in writing and cases "in which one party at the request of and for the convenience of the other forbears to perform the contract in some particular respect strictly according to its letter". He goes on to say that "in such a case the contract is not varied at all but the mode and manner ofi its perfarmance is, for the reasons mentioned, altered".

The Ottoman Law has strict rules forbidding the admission of oral evidence to contradict documents which by law or custom are reduced to writing, but the same principle as suggested by Lord Atkinson (*supra*) must apply. The agreement must be examined to see whether the oral variation is in reality a variation of substance or whether it is a mere voluntary forbearance to insist on some particular term which is merely a mode of performance. I do not think that any distinction

is to be drawn between a forbearance which has actually been agreed to orally and one which it is clear has been exercised by the tacit consent of the parties. The principle is of even greater effect in a case such as the present where forbearance has been due to a mutual mistake in the drawing up of the contract. On this view of the matter, I find myself in agreement with the judgment of the Court below. There was a mutual forbearance by both parties to insist on the certificate being given by the Public Works Engineer and an agreement that it might be given by the appellants' Engineer. Evidence was rightly admitted to prove this. It is, therefore, unnecessary to consider the authorities cited by Mr. Horowitz from Hudson on Building Contracts for the purpose of showing the necessity of a final certificate before any payment can be made.

The third ground of appeal relates to the interpretation of an item in the estimates with respect to excavation and filling. The respondent had contended that the excavation and filling meant an excavation and filling up to 15 cm. only and that all excavation and filling beyond this had to be paid for as an extra. The appellants argued that the item included all the excavation and filling necessary for the construction of the road. The dispute was of a technical nature and the District Court heard evidence as to what these terms include in a contract of this nature. It decided in favour of the respondent and I see no reason to differ from its conclusion.

The fourth ground of appeal relates to a question of fact. Certain ditches were made by the respondent owing to heavy rain and part of his claim was for the extra cost of having them dug. The appellants denied that their engineer had given any order for the digging of these ditches. The District Court found on the evidence that the appellants themselves had sanctioned the digging of these ditches. It found also that the appellants' engineer had ordered the digging. I have perused the evidence and I am unable to see that either of these findings is justified by the evidence. It may be gathered from exhibit M, on which the District Court relied, that the appellants ordered the ditches to be dug, but they did not order them as extras but as something which they thought should be done in accordance with the specification in the contract. Further, there is no clear admission from the appellants' engineer that he ordered these ditches to be dug. What is, however, clear from the evidence is that the work of digging the ditches was an extra (see clause 3 of the general specification) and was indispensably necessary for the preservation of the road. On this ground, I think

that the decision of the District Court awarding the respondent the cost of these ditches should not be interfered with.

For these reasons the appeal of the appellants fails. The cross-appeal of the respondent succeeds and the judgment of the Court below will be varied by adding to the amount awarded interest at the legal rate from the date of action. The respondent will have the costs of this appeal to include LP. 15.— advocate's fees.

Delivered this 17th day of February, 1938.

Senior Puisne Judge.

I concur.

British Puisne Judge.

HIGH COURT No. 4/38.

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

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

IN THE CASE OF :

Amneh Mohammed Abu Leila. — PETITIONER.

v.

1. Chief Execution Officer, Jaffa,
2. Ibrahim Abed Shehadeh. — RESPONDENTS.

Mortgages — Applicability of Execution Law — Land Transfer Ordinance, sec. 14 — Order of sale — President District Court as Chief Chief Execution Officer — Practice.

In making absolute an order *nisi* calling upon the First Respondent to show cause why he should not apply the Execution Law in the proceedings in Execution File No. 2992/35, Jaffa, for the sale of immovable property under a mortgage :—

HELD : Under the law as it stands at present the Execution Law must be applied when the President of a District Court is dealing with an application for the sale of immovable property in satisfaction of a mortgage.

ANNOTATIONS : Earlier proceedings in this case before the Chief Execution Officer (C. E. O., Jaffa 406/35) were reported in P. P. 14.xi.37.

See the provisions of the Land Transfer (Amendment) Ordinance bill (*Gazette* No. 750 of the 20.i.38) and the "Objects and Reasons" appended to the draft bill.

To the same effect, see H. C. 110/37 (1 S.C.J. 401) ; followed in H. C. 111/37 (1 S.C.J. 403).

The following is the series of decisions referred to in the judgment holding that a President of a District Court sits as a Chief Execution Officer in application for the sale of mortgaged property : H. C. 60/37 (P. P. 14, 15.xii.37, 2 Ct.L.R. 206) ; C. A. 16/27 (P.L.R. 126, C. of J. 282) ; C. A. 67/28 (P.L.R. 346, C. of J. 498) ; H. C. 66/37 (1938, 1 S.C.J. 15, P.P. 14.ii.38, 3 Ct.L.R. 10) ; H. C. 65/37 (1938, 1 S.C.J. 43, P.P. 17, 18.ii.38, 3 Ct.L.R. 34).

It had already been held in H. C. 29/32 (C. of J. 856) and in H. C. 65/37 (*supra*) that the Law of Execution was applicable in such proceedings.

FOR PETITIONER : Elia.

FOR RFSPONDENT 1 : No appearance.

FOR RESPONDENT 2 : Nasser.

JUDGMENT:

1. This is a return to a rule nisi to the Chief Execution Officer, Jaffa, calling upon him to show cause why he should not apply the Execution Law in certain proceedings for the sale of immovable property under a mortgage.

2. By Section 14 of the Land Transfer Ordinance p. 884 of the Laws of Palestine, Vol. II., it was enacted that applications for the sale of immovable property in execution of a judgment or in satisfaction of a mortgage may be made to the President of the District Court. If one applies one's common-sense to the wording of the section, it must be realised that if a person can make an application to the President of the District Court for the sale of property under a mortgage, then the President has the power to grant the necessary order for sale. Apart from this there is a series of decisions of this Court that when a President of a District Court is exercising his powers under that section he is not a Court, but is merely exercising the functions of a Chief Execution Officer. The practice, therefore, has been that in applications for the sale of immovable property in satisfaction of a mortgage the Execution Law has been treated as being the proper law applicable. This has been the practice in Palestine since the Occupation and it has been sanctioned as correct by a number of decisions of the Supreme Court sitting as a High Court of Justice. This being so, we see no reason why the practice should now be interfered with, and we hold that under the law as it stands at present the Execution Law must be applied when the President of a District Court is dealing with an application for the sale of immovable property in satisfaction of a mortgage.

3. The rule will, therefore, be made absolute and the Petitioner will have the costs of this application to include LP. 5.— advocate's fees.

Delivered this 15th day of February, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 13/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Khaldi, JJ.

IN THE APPEAL OF :

Ahmed Nimr Said el Nijem. APPELLANT.

v.

The Attorney General. RESPONDENT.

Unlawful sexual intercourse — Criminal Code Ordinance, sec. 151(1) (a), (c) — Female under the age of 16 — Criminal Procedure (Trial Upon Information) Ordinance, sec. 52 — Conviction for offence other than that set out in the information.

In allowing an appeal from the judgment of the District Court of Haifa, dated the 10th of January, 1938, whereby Appellant was sentenced to four years| imprisonment onder sec. 152(1) (c) of the Criminal Code Ordinance :—

HELD : The Court cannot convict for an offence which is not set out in the information if the evidence docs not support the new charge.

ANNOTATIONS : See the following decisions on the amendments of informations : CR. A. 15/24 (C. of J. 531) ; CR. A. 66/25 (C. of J. 533) ; M. A. 37/27 (P.L.R. 180, C. of J. 1277) ; A. A. 2/29 (P.L.R. 362, C. of J. 604) ; CR. A. 142/29 (P.L.R. 436, C. of J. 611) ; M. A. 9/32 (P.L.R. 740, C. of J. 620) ; A. A. 8/33 (C. of J. 635) ; M. A. 13/33 (C. of J. 577) ; A. A. 2/34 (C. of J. 1934—6 221). (CR. A. 71/23, C. of J. 585), is now obsolete — *Vide* sec. 28(8) of the Criminal Procedure (Trial Upon Information) Ordinance.

FOR APPELLANTS : Hawa.

FOR RESPONDENT : Crown Counsel (Hogan, Belle).

JUDGMENT.

In this case the Appellant was charged before the District Court of Haifa with having had intercourse with a female under the age of 16 contrary to section 152(1)(c) of the Criminal Code Ordinance.

The Court having heard the evidence came to the conclusion that the female concerned was over the age of 16 but found as a fact that the intercourse had been against her will and accordingly proceeded to convict the Appellant of an offence under section 152(1)(a) of the Criminal Code Ordinance and sentenced him to imprisonment for 4 years.

2. The first ground of appeal is that it was not open to the Court below to convict under section 152(1)(a) when the charge against the Appellant was under section 152(1)(c) and Mr. Hogan who appeared for the Respondent relied on section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, Chapter 36, of the Laws of Palestine. This section reads as follows :—

> "The court may find an accused person guilty of an attempt to commit an offence charged, or of being an accomplice or accessory thereto, or may convict him of an offence not set out in the information if such offence be covered by the evidence in the case and by the findings of facts necessary to establish an offence charged."

The important words in this section are the last words, "if such offence be covered by the evidence in the case and by the findings of facts necessary to establish an offence charged."

3. In this case the necessary findings of fact to establish the offence charged were firstly that the Appellant had had intercourse with this girl, and secondly that this girl was under the age of 16. These findings of fact did not cover a charge under section 152(1)(a) because in a charge under that section the question of whether a girl was under the age of 16 would be entirely immaterial, and a further finding of fact as to lack of consent would be necessary. We therefore decide that it was not open to the Court below to convict the Appellant under a charge under section 152(1)(a).

4. This disposes of the appeal but we wish to say that on the facts given in evidence before the Court below we think that the verdict was not a reasonable one and could not be supported even if the original charge had been under section 152(1)(a).

The appeal is allowed and the conviction and sentence quashed.

Delivered this 7th day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 247/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Mohammad Jabr Abu Hijleh.. APPELLANT.

v.

1. Taha Suleiman Abu Taha,
2. Ali Suleiman Abu Taha,
3. Habaa Ismail Abu Hijleh. RESPONDENTS.

Inspection of land — Rules of Court : 16.xi.26 ; 16.iii.28 — *Civil Procedure Code, Art.* 63 — *Rule of practice — C. A.* 130/36 — *Poyzer v. Minors — Powers of Chief Justice to make rules — Failure of a co-defendant to appear — Burden of proof — Evidence not before lower Court.*

In dismissing an appeal from the judgment of the Land Court of Nablus, dated the 27th November, 1937 :—

HELD : 1. The procedure on inspection set out in Art. 63 of the Code of Civil Procedure was a rule of practice and procedure — not one of substantive law, and its repeal by rules of court was *intra vires* the Chief Justice.

2. Where, in a claim concering land, one of several defendants fails to appear, judgment determining rights to the land cannot be given until the facts are investigated.

3. No account will be taken of a fact which was not before the lower Court, such Court having heard evidence which justified their conclusions.

Followed : Poyzer *v.* Minors, 7 Q.B.D. 329.

Distinguished : C. A. 130/36 (P.P. 4.vi.37, 2 Ct.L.R. 166).

ANNOTATIONS : See the following cases on inspection of land : L. A. 14/27 (C. of J. 877) ; C. A. 65/27 (P.L.R. 188, C. of J. 878) ; L. A. 53/28 (P.L.R. 351, C. of J. 879) ; L. A. 147/26 (C. of J. 875) ; L. A. 2/24 (C. of J. 1012) ; L. A. 6/24 (C. of J. 1013) ; L. A. 66/24 (C. of J. 1013) ; L. A. 92/26 (C. of J. 1014) ; H. C. 84/27 (P.L.R. 244, C. of J. 1017) ; H. C. 70/29 (C. of J. 1018) ; L. A. 24/30 (P.L.R. 557, C. of J. 1019) ; L. A. 26/30 (P.L.R. 558, C. of J. 506) ; L. A. 9/33 (P.P. 28.v.34, C. of J. 1565) ; L. A. 60/22 (C. of J. 1775) ; L. A. 11/32 (P.L.R. 757, C. of J. 800) ; C. A. 205/37 (2 Ct.L.R. 183).

The distinction between a rule of practice and a rule of substantive law was also drawn in CR. A. 160/37 (7.ii.38).

FOR APPELLANT: Goitein.

FOR RESPONDENTS: No. 1. In person.
No. 2. do.
No. 3. no appearance served.

JUDGMENT:

This appeal arises out of a Land dispute in which the Appellant claimed certain land before the District Court of Nablus. He based his claim on a Kushan and the Land Court found that he had failed to show the identity of the land to which the kushan referred. His claim was therefore dismissed and he has appealed to this Court.

2. Mr. Goitein, who argued the appeal for the Appellant, put his first ground of appeal in this way. He said that an inspection of the land had been ordered by the Court and that this inspection was carried out under the provision of Rule 4 of Rules of Court made by the Chief Justice and published in the Official Gazette of the 16th of November, 1926, and subsequent rules also made by the Chief Justice and published in the Official Gazette of the 16th March, 1928.

3. Rule 5 of the first rules mentioned enacts that Art. 63 of the Ottoman Civil Procedure Code shall no longer have effect in Palestine. This article deals with inspections ordered by the Court and provides that a member of the Court shall be appointed as a deputy to make the inspection. The subsequent rules made by the Chief Justice did not make it necessary that a member of the Court should make the inspection. The inspection is carried out by persons agreed on by the parties. Mr. Goitein says that Art. 63 is not a mere rule of practice or procedure but is substantive law and that therefore the Chief Justice had no authority to make a rule declaring it no longer to be in force. In the recent case of Diko v. Hanim and others Civil Appeal No. 130/36 it was held by this Court that the Chief Justice has no power to make rules altering the substantive law and the question to be decided now is whether the repeal of Art. 63 of the Ottoman Civil Procedure Code is an alteration of the substantive law or of a mere rule of practice or procedure. The point is a nice one, but I have come to the conclusion that the said article is merely a rule of practice and procedure. In the case of Peyser v. Minors 7 Q. B. Div. 329 Lush LJ. said "Practice in its larger sense, like procedure which is used in the Judicature Acts, changes the mode of proceeding by which a legal right is enforced as distinguished

from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product." Article 63 seems to me to be a mere method adopted by the Court in order to get before it a report derived from an inspection of the property. Mr. Goitein said that Art. 63 gives the parties a right to have the inspection carried out by a member of the Court and that the new rules made by the Chief Justice have deprived the parties of this right. This is so, but at the same time, it is clear that Art. 63 merely a rule of procedure regarding the inspection of the property and any change in the method of inspection or in the persons who are to carry out the inspection is merely an alteration of the procedure. For this reason I am of opinion that the rules made by the Chief Justice were *intra vires*. This ground of appeal fails.

4. The second ground of appeal is that a person named Habsa who was a defendant in the Court below did not appear and that therefore the Appellant should have got judgment against him by default. I do not agree. The action was an action concerning a claim to land in which the 3 respondents were said to be interested and even if one of the Respondents failed to appear no judgment determining the rights to the land could be given until the facts had been investigated. This ground of appeal must also fail.

5. The third ground of appeal is that the defendants should not have been heard at all as they were relying on a sale outside the tabu. In view of the judgment of the Court below which was based on the fact that the Appellant could not connect the land he claimed with the land set out in his kushan, this ground of appeal need not be considered as the burden of proof was on the Appellant and there was no need in the circumstances for the Respondent to put up any defence.

6. The last ground of appeal is that there had been a report from the Execution Office and that an inference might be drawn from this report that the Appellant's claim to the land was a genuine one. The answer to this is that the only evidence put before the Court below was the report of the inspection and that this report amply justified the conclusion arrived at by the Court below. For these reasons the appeal must be dismissed. Nos. 1 and 2 Respondents will have the costs of the appeal.

Delivered this 17th day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 6/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice and Greenė, J.

IN THE APPLICATION OF :

Nathan Sheinkar. APPLICANT.

v.

Dov Segalovitch. RESPONDENT.

Arbitration — Leave to appeal — Sec. 15(3) *Arbitration Ordinance — Application to enforce award — Opposition — Effect of failure to apply for the setting aside of the award — English practice — Arbitration Rules* 2(1) (f), (g).

In granting leave to appeal from the judgment of the District Court of Tel-Aviv under sec. 15(3) of the Arbitration Ordinance :—

HELD : Following English practice and the Arbitration Rules, where the opposer to an application for the enforcement of an award does not apply for the award to be set aside, the Court may only refuse to enforce the award.

ANNOTATIONS : See in addition to the authorities quoted in the judgment, the British and Empire Digest, Vol. II, p. 569, cases 2005 *sq.*, p. 578, case 2091—5 and annual supplement.

The arbitration rules referred to in the judgment are repealed by sec. 6 of the Arbitration Rules 1937 (*Gazette* No. 728 — 14.x.37).

FOR APPLICANT : Fellman.

FOR RESPONDENT : Hamburger.

ORDER.

This is an application under Section 15(3) of the Arbitration Ordinance for leave to appeal to this Court from a judgment of the District Court of Tel-Aviv, setting aside an award.

The Applicant applied to the District Court for leave to enforce an award. The Respondent filed an opposition in which he asked for the rejection of the application and non-confirmation of the award, but he made no request in the opposition that the award be set aside.

The attorney for the Applicant argued before us that in such a case the District Court was not moved to set aside the award and could therefore only refuse to enforce it.

It is clear according to English practice that upon an application to enforce an award if the objection is that the award should be set aside, the objector should move to set it aside. See Halsbury, 2nd Edition, Volume 1, paragraph 1123 at page 670. See also the Arbitration Rules, Drayton, Volume III, p. 2323, rule 2(1) (f) and (g), which clearly contemplates separate applications.

Leave to appeal is therefore granted. Applicant to have his costs, including LP. 3.— advocate's fees.

Delivered this 17th day of February, 1938.

Chief Justice.

CIVIL APPEAL No. 228/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

Muhammad Ibn Ahmed Ayoub. APPELLANT.

v.

1. Safiyeh Bint Ayoub Sheikh,
2. Ghazaleh Bint Ayoub Sheikh. RESPONDENTS.

Title to land — Long possession — Co-heirs — Land (Settlement of Title) Ordinance, sec. 51 ; *Land Code, Art.* 78.

In dismissing an appeal from the judgment of the Land Court of Jaffa, sitting at Gaza, dated the 2nd November, 1937 :—

HELD : 1. Long possession by a co-heir cannot destroy the title of other heirs.

2. There is no such action in Palestine as an action claiming title to land on the ground of long possession apart from the cases contemplated by sec. 51 of the Land (Settlement of Title) Ordinance and Art. 78 of the Land Code.

ANNOTATIONS :

1. This principle is well established and is subject to the qualification that the heirs must hold from a common ancestor. See L. A. 56/24 (P.L.R. 41, C. of J. 1212) ; L. A. 65/27 (C. of J. 956) ; L. A. 66/28 (P.L.R. 356, C. of J. 958) ; L. A. 36/30 (C. of J. 959) ; L. A. 31/30 (C. of J. 1219) ; L. A. 6/33 P. P. 17.i.34, C. of J. 1224) ; L. A. 121/26 (P.L.R. 234, C. of J. 1271) ; L. A. 111/24 (C. of J. 1864) ; L. A. 54/36 (2 Ct.L.R. 65). *Cf.* L. A. 71/35 C. of J. 1934—6 445).

2. See annotations to C. A. 238/37 (1938 1 S.C.J. 32) and add the following

cases at the end of the first paragraph of the notes: L. A. 19/23 (C. of J. 1470); L. A. 76/25 (P.L.R. 87, C. of J. 1472); L. A. 135/26 (C. of J. 1729) where earlier authorities are reviewed. See also L. A. 1/31 (C. of J. 1140) and L. A. 2/31 (C. of J. 1141) and *cf.* C. A. 238/37 (*supra*); C. A. 85/37 (1 S.C.J. 310); C. A. 239/37 (1938 1 S.C.J. 34) and C. A. 244/37 (1938 1 S.C.J. 37).

FOR APPELLANT: Muwakkeh.
RESPONDENT. 1: in person.
RESPONDENT 2: said to be dead, her son Mustafa present in Court.

JUDGMENT:

This appeal arises of a land dispute before the Land Court, Jaffa. The allegation of the Appellant in his statement of claim is that his grandfather was the registered owner of two vineyards and two gardens and that when his grandfather died the property passed to the Appellant's father, to the two Respondents and to other persons who are not concerned in the dispute. The Appellant says that his father took possession of the whole of this property on the death of the grandfather and that he cultivated it and planted trees.

He now claims that because he and his father cultivated it and planted trees on it for a long period, he is therefore in a position to oust the Respondents from their share in the property.

The Appellant and the Respondents are co-heirs of this property and no long possession of the Appellant could destroy the title of the Respondents. The facts being stated as they were in the statement of claim, the Land Court was justified in declining to hear any evidence and in dismissing the claim of the Appellant.

As a number of cases of this kind are continually coming before this Court, we wish to say again that there is no such action in Palestine as an action claiming title to land on the ground of long possession except in two cases namely under Section 51 of the Land (Settlement of Title) Ordinance when the dispute is before a Settlement Officer, and under Section 78 of the Ottoman Land Code.

For these reasons, we are of the opinion that this appeal should be dismissed. The judgment of the Land Court is confirmed and the Respondents will have the costs of this appeal to include LP. 2.— travelling expenses.

Delivered this 21th day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 243/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

1. Rizk Mahmoud Ahmed Khalaf,
2. Mohammad Said Suleiman el Bakker,
3. Musa el Nasir. APPELLANTS.

v.

1. Fadl Abbas el Fahoum,
2. Nayef Amin el Fahoum. RESPONDENTS.

Arbitration — Powers of arbitrator in giving award concerning title to land — Letter from President Land Court — Objections to confirmations of awards — Hearing on Friday where parties are Moslems — Mistake patent on face of award — Onus of proof.

In dismissing an appeal from the judgment of the Land Court of Nablus, dated the 12th November, 1937, confirming the award of the A/District Commissioner, Samaria, dated the 12th December, 1935 :—

HELD : 1. The fact that the President, Land Court had written to the arbitrator to inform him that he could give a final decision in the dispute did not vitiate the award.

2. There was no merit in the plea that the Appellants' case could not properly be placed before the Court on the ground that it took place on a Friday, the Appellants being Moslems.

3. Having regard to the conduct of the arbitration proceedings, the question of onus of proof did not arise.

ANNOTATIONS : 2. The following decisions may be compared : C. A. 77/34 (P. P. 8.iv.35) ; C. A. 16/34 (P. P. 15.iii.35).

FOR APPELLANTS : Bustany.

FOR RESPONDENTS :

No. 1. Cattan and Salah.

No. 2. Barghouti.

JUDGMENT:

This appeal arises out of a dispute with regard to land. The parties agreed to submit the dispute to arbitration and agreed that Mr. Foot, the A/District Commissioner, Samaria, should act as sole arbitrator.

We are all of opinion that the arbitrator went very carefully and

conscientiously into the dispute and on the 12th December, 1935, he made an award. He came to the conclusion that the plaintiffs had been before the War in full ownership of the land in dispute and that the defendants (present Appellants) had failed to satisfy him as regards the defence of limitation which they set up. He had some doubts as to whether he could give a final decision in the dispute, but he made it quite clear that if he were empowered to give a final decision his decision would be in favour of the Respondents. The President of the Land Court, Nablus, informed Mr. Foot by a letter dated the 22nd February, 1936, that he was empowered to give a final decision in the dispute and that he might reserve any question of law for the opinion of the Land Court. The writting of this letter by the President of the Land Court has been criticised by the advocate for the Appellants. We are all of opinion that it was a proper and necessary letter in the circumstances. Having received this letter Mr. Foot drew up another award giving decision in favour of the Respondents. Confirmation of this award was opposed by the Appellants before the Land Court, Nablus, but the Land Court decided against them and they have now appealed to this Court.

We wish to say that there are too many cases of this description coming before this Court, where the parties definitely agree to submit their dispute to arbitration and then the unsuccessful party exercises every known ingenuity in order to pick holes in the award.

In the present appeal, the first ground raised by the Appellants is that the case before the Land Court, Nablus, was heard on a Friday, that the Appellants were Moslems and that consequently the advocate had no opportunity to present his arguments in full. We are unable to understand how these circumstances prevented him from submitting his full arguments to the Court, and this ground of appeal must fail.

The second ground of appeal is that the arbitrator made a mistake in law patent on the face of the award with regard to the onus of proof. In the dispute before the arbitrator, the Appellants relied in the first instance on Kushans which they said covered the land in dispute, and the arbitrator found that these Kushans did not refer to this land. They then fell back on the second line of defence, that is the defence of limitation, saying that they had been in undisputed possession of this land for over 10 years. The arbitrator heard evidence on both sides and came to the conclusion that this defence of limitation had not been made out. As he heard the evidence of both sides and had no doubt as to what his decision should be, looking

at the evidence as a whole, we do not think that the question of onus of proof arose.

The other ground of appeal merely referred to the letter which had been written by the President of the Land Court to the arbitrator, and we have already dealt with this matter.

This appeal must be dismissed, the judgment of the Land Court and the award of the arbitrator are confirmed, and the Appellants will pay the costs of this appeal to include LP. 5.— advocate's fees for each Respondent.

Delivered this 21th day of February, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 160/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, the Senior Puisne Judge and Khayat, J.

IN THE APPEAL OF :

1. Ali Ahmed Jarad,
2. Yousef Abdul Muhsen Abu Rukbeh,
3. Rifai Hassanein Rifai,
4. Khalil Mahmoud Lidawi Shahin. APPELLANTS.

v.

Attorney General. RESPONDENT.

Corroboration — Law of Evidence Amendment Ordinance, 1936 — *Effect of repeal — Mejelle, Art.* 1685 — *Applicability of English Common Law — Interpretation Ordinance, sec.* 5 — *Retroactive legislation — Queen v. Griffiths — The Ydun — Vested rights — Delayed legislation — Insufficiency of proof not a defence — Corroboration of the evidence of an accomplice R. v. Beebe, R. v. Baskerville — Judge and jury — Mahadeo v. The King — Hinkis v. A. G.*

In allowing an appeal from the judgment of the Court of Criminal Assize sitting at Jaffa, dated the 23rd December, 1937, whereby each of the accused was sentenced to death under secs. 214(c), 215 and 23 of the Criminal Code Ordinance, 1936 :—

HELD : 1. The provisions of the Mejelle relating to evidence are repealed by the Evidence Ordinance and, insofar as that Ordinance may be defective, English Common Law is to be applied. The amending Ordinance does not revive the provisions of the Mejelle.

2. The provisions of the Interpretation Ordinance, as supplemented by English principles of construction, make it clear that offences should not be created by giving, in the absence of express provisions, a retroactive operation to legislation and that a defence open to a man at the time the act complained of was done should not so be taken away.

3. The presumption against a retroactive construction has no application to enactments which affect only the procedure and practice of the courts.

4. The amendment of the law of evidence does not affect the ingredients of the offence charged nor has an accused person a vested right as regards the quantum of evidence which may be required to prove him guilty of an offence. Lack of corroboration or insufficiency of proof is not a defence though it may provide an answer to the charge.

5. Notwithstanding the amendment of the law of evidence, the Palestine Courts should not convict on the uncorroborated evidence of an accomplice.

Followed : Queen v. Griffiths (1891), 2 Q.B.D. 145.
The Ydun (1899), probate.
R. v. Beebe, 41 T.L.R. 635.
Mahadeo v. The King, P.C. 79/35.
R. v. Baskerville (1916), 2 K.B. 638.
Hinkis v. A.G. A.A. 2/30 (P.L.R. 441, C. of J. 467).

ANNOTATIONS :

1. See also CR.A. 14/38 (26.ii.38).

2—3. On the interpretation of statutes, see annotations to C.A. 234/37 (1938 1 S.C.J. 26).

4. See also C.A. 247/37 (17.ii.38) where the provisions of the repealed Art. 63 of the Code of Civil Procedure were held to constitute rules of procedure and *cf.* C.A. 130/36 (P.P. 4.vi.37, 2 Ct.L.R. 166) where the import of the terms "practice" and "procedure" were considered in connection with the repealed Art. 159 of the Code of Civil Procedure.

5. This decision settled an important question arising as the result of the amendment of the Evidence Ordinance.

Prior to the replacement of sec. 6 of the Evidence Ordinance no judgment could be given on the uncorroborated evidence of a single witness and in determining the *quantum* of corroboration required in any particular case reference was made to English authorities. In English law, however, the general rule is that "a single testimony of one credible witness is sufficient to prove any fact". (Shotter *v.* Friend, 1690, 3 Mod. Rep. 283) and corroboration is required only in certain specified cases. The evidence of an accomplice does not require corroboration in English law but the jury must be warned of the danger of convicting on the uncorroborated evidence of an accomplice and, if the jury have been warned, the conviction will not be quashed unless it is unreasonable (R. *v.* Baskerville).

With the repeal of the provision in the Evidence Ordinance requiring corroboration, the law of Palestine appeared to be similar to English law, in making the corroboration of an accomplice a question of "reasonableness". It differed, however, regarding the necessity for directing the jury. The decision of the Privy Council in Mahadeo *v.* The King, given in a case where there was no jury, was therefore relevant in Palestine and was followed in the present case. The necessity for corroboration is therefore now a rule of law.

See also CR. A. 24/37 (1 S. C. J. 442).

English authorities on the corroboration of the evidence of accomplices are collected in the British and Empire Digest, Vol. XIV, p. 535, Nos 6056—6078.

The following are the Palestine cases on corroboration: CR. A. 24/37 (*supra*); CR. A. 81/37 (2 Ct. L. R. 54); CR. A. 78/37 (2 Ct. L. R. 56); CR. A. 96/37 (P. P. 2.vii.34, 2 Ct. L. R. 108); CR. A. 21/35 (P. P. 2.vii.35; C. of J. 1934—6 255); CR. A. 20/35 (P. P. 5.vii.35, C. of J. 1934—6 253); A. A. (P. P. 22.vii.34); CR. A. 64/35 (P. P. 11.iii.36, C. of J. 1934—6 260); M. A. 14/35 (P. P. 23.ix.36); CR. A. 38/37 (1 S. C. J. 452); CR. A. 62/37 (1 S. C. J. 456); CR. A. 37/37 (1 S. C. J. 451); CR. A. 29/37 (1 S. C. J. 447); CR. A. 11/37 (1 S. C. J. 432); M. A. 9/34 (C. of J. 1934—6 228); CR. A. 39/26 (Off. Gaz. 16.vii.26, P. L. R. 90, C. of J. 465); A. A. 9/28 (P. L. R. 281, C. of J. 466, 457); A. A. 2/30 (*supra*); M. A. 21/31 (C. of J. 477); CR. A. 86/31 (C. of J. 478); L. A. 26/30 (P. L. R. 558, C. of J. 506);)C. A. 110/32 (C. of J. 67); C. A. 106/33 (P. P. 5.viii.34, C. of J. 821); A. A. 9/29 C. of J. 607); A. A. 14/30 (P. L. R. 466, C. of J. 614); A. A. 9/29 (C. of J. 607); A. A. 14/30 (P. L. R. 466, C. of J. 614); M. A. 31/28 (C. of J.. 686). And see CR. A. 248/37 (1.ii.38).

FOR APPELLANTS: No. 1. Abcarius Bey.
Nos. 2, 3 & 4: Cattan.

FOR RESPONDENT: Crown Counsel.

JUDGMENT:

This appeal raises several important points of law.

The Law of Evidence Amendment Ordinance No. 68 of 1936, which was passed and published on the 18th of September, 1936, but not brought into operation upon that date, provided that during such time as it should be in operation a new section should be substituted for Section 5 (now Section 6) of the Evidence Ordinance, Chapter 54, which had the effect of providing that corroboration of a single witness should not be necessary in criminal cases. This Ordinance was brought into operation by a notice in the Gazette as from 11th October, 1937.

Abcarius Bey submitted that the Evidence Ordinance, notwithstanding the present Section 2, did not repeal the provisions of the Mejelle and that the effect of the 1936 Amendment was to revive

Article 1685 of the Mejelle, which in ordinary cases required the evidence of two males, or one male and two females..

We do not agree with that view. We think that the Evidence Ordinance replaced the archaic provisions of the Mejelle, and, in so far as that Ordinance may be defective, English Common Law is to be applied, and in practice, the Courts have taken that view.

As stated, the Amendment Ordinance came into operation on the 11th October, 1937, and the question arises whether an accused person can be convicted upon the uncorroborated evidence of one witness (possibly with certain exceptions) if tried after that date for an offence committed before that date.

Section 5 of the Interpretation Ordinance, Chapter 69, deals with the effect of repeals and shortly provides for the preservation of rights and liabilities, and its provisions are like enough to those of the English Interpretation Act to enable the English principles of construction to be called in aid.

It is clear from the English authorities that offences should not be created by giving, in the absence of expressed provisions, a retroactive operation to legislation and that a defence open to a man at the time the act complained of was done should not so be taken away (see Queen *v.* Griffiths, 1891, 2 Q.B.D., 145). For example, if Section 181 of the Criminal Code Ordinance was amended by the deletion of one of the defences set out therein, *prima facie* I do not think such an amendment would be retroactive so as to make a bigamous marriage contracted before the date of such an amendment an offence, if it was not an offence at the time when it was contracted.

It is also clear from English authorities that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts, The Ydun 1899, Probate.

The evidence which may be adduced at the trial may be on a narrow borderline between these two principles and we have not found any modern authority directly in point.

The amendment of the law of evidence with which we are concerned does not affect the offence or the ingredients of the offence, and we do not think an accused person has any vested right as to the kind or *quantum* of evidence which the Court may require to prove him guilty of an offence. We think that that must be governed by the law in force at the time of the trial.

It is also clear from the English authorities that apparent hardship may be overcome by delaying the operation of amending legislation. As already stated, although the 1936 Amendment Ordinance was published in September of that year, it was not brought into operation until October, 1937, more than a year later, so that persons concerned might well have expected that the amount of proof required in criminal cases might at any time be reduced.

It may be said that lack of corroboration, if corroboration is required, is a defence, and that therefore to take away the requirement is to take away the defence. With that we do not agree. We do not think that insufficiency of proof is a defence, although it may be an effective answer to the charge.

Assuming that at the date of the trial in this case the Court was entitled to act upon the evidence of one witness, the question arises, should it, having regard to the substance of English Common Law, do so upon the uncorroborated evidence of an accomplice or accomplices ?

In the case of R. *v.* Beebe (41 T.L.R. 635) where a number of previous authorities, including R. *v.* Baskerville, 1916, 2 K.B. 658, were considered, two propositions were clearly laid down. The first was that the warning to the Jury must be that it is always dangerous to convict on the uncorroborated evidence of an accomplice. The word "always" is important. The second was that it was a misdirection for the Judge to direct the Jury in the following terms : "If you are quite certain that that girl is telling the truth, and nothing but the truth, so that you are satisfied in your heart and conscience, although it is uncorroborated you ought to act upon it".

When a Judge gives the necessary warning to the Jury, he has done all that the law requires him to do. He has no further control of the situation. The Jury may disregard his warning. But when there is no Jury the setting is entirely different. In the present case it was the duty of each Judge to warn himself that it is always dangerous to convict on the uncorroborated evidence of an accomplice. Having done so was he in a position to restrain himself from doing what it is always dangerous to do ? If, knowing that it is always dangerous, he proceeds to convict, was he acting in an unreasonable manner so that the conviction should not be supported on appeal ? As stated, the word 'always" is important. Does it afford any loophole for a Judge to consider that the particular circumstances of some case justify him in taking a dangerous course ? Further, he cannot direct himself

that he ought to convict merely because he is quite satisfied that the accomplice is telling the whole truth and nothing but the truth.

In the case of Mahadeo *v.* The King, Privy Council Appeal No. 79/35, the Judical Committee of the Privy Council dealt with this point. The case was tried before the Chief Justice of Fiji sitting with assessors, that is, there was no Jury, and fell to be governed by the English Common Law. In such a case the presiding Judge is a Judge of fact as well as of law, and the final decision rests with him. In the course of its judgment the judicial Committee said :

> "It is well settled that the evidence of an accessory, which Sukraj plainly was on his own showing, must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it and further that evidence of one accomplice is not available as corroboration of another, (The King *v.* Baskerville (1916) 2 K. B. 638). This rule as to corroboration, as was pointed out in the case just cited, long a rule of practice, is now virtually a rule of law, and in a case like the present it is a rule of the greatest possible importance".

It is to be noted that the rule is not stated, as it usually is, in the form of a necessary direction to a Jury, but as an absolute rule of law, and it may well be inferred that the rule must always take this form when a Judical Officer is a Judge of fact as well as of law. Later in the Judgment, their Lordships referred to the rule as a fundamental rule of practice necessary for the due protection of prisoners and the safe administration of criminal justice.

We are of opinion, therefore, that the Courts of this country should not convict solely upon the uncorroborated evidence of an accomplice.

In the case before us it was not suggested that there was any corroboration of the evidence of the accomplice against accused two and three. Their appeal therefore is allowed.

As regards accused No. 4 it was admitted by the prosecution that the Court of Trial was under a misapprehension with regard to him when it stated that he actually accompanied the deceased part of the way home. It is clear, therefore, that this episode, whatever effect it might have had, must be disregarded, and we do not think that the other matters found by the Court with regard to him amount to corroboration. His appeal, therefore, is allowed.

With regard to accused No. 1 the Court of Trial set out a number of matters which they regarded as corroboration.

The requirements of corroboration by an accomplice were laid down

in R. *v.* Baskerville, to which referrence has already been made, and are set out in Hinkis *v.* the Attorney General, Criminal Assize Appeal, No. 2 of 1930, Palestine Law Reports, 441. We have considered the evidence in this case and we are not satisfied that the requirements of the principles therein laid down have been satisfied. The appeal of this accused also, therefore, is allowed.

Other arguments were addressed to us upon the facts of the case and as to the liability of the Accused thereon, but in view of the opinions which I have expressed, it is unnecessary to deal with them.

Delivered this 21st day of February, 1938.

Chief Justice.

CIVIL APPEAL No. 28/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Khayat, JJ.

IN THE CASE OF :

Anis Bustani. APPELLANT.

v.

Yosef Ben Hanania. RESPONDENT.

Judgment on default of appearance — Grounds for non appearance — Parties to be heard — Penalty and liquidated damages.

In allowing an appeal from the judgment of the District Court of Haifa, sitting as a Court of appeal, dated the 29th September, 1937, and remitting the case to the Magistrate's Court, Haifa, with directions :—

HELD : The District Court, on appeal, should have considered whether the Appellant's failure to appear in the Magistrate's Court on the day of the judgment had a valid excuse to support it, as the judgment of the Magistrate's Court had not been given on the merits.

ANNOTATIONS : On failure to appear see C. A. 225/37 (1938 1 S. C. J. 14 and annotations, 3 Ct. L. R. 39). See also C. A. 235/37 (1938 1 S. C. J. 49) and annotations.

FOR APPELLANT : Hawa.

FOR RESPONDENT : Na'man.

JUDGMENT:

The facts out of which this appeal arises are as follows:

The Respondent took an action against the Appellant in the Magistrate's Court of Haifa. At the first hearing on the 2nd March, 1937, the Appellant raised a preliminary objection to the jurisdiction of the Magistrate. The learned Magistrate then adjourned the case and on the adjourned day, 10th March, 1937, the Appellant failed to appear. The learned Magistrate continued the hearing in his absence and gave judgment against Appellant for LP. 57.— and costs.

It has transpired and it is not denied now that the Appellant was ill on the 10th March, 1937, and so ill that he was unable to attend Court. He appealed to the District Court of Haifa and his appeal was dismissed. But the District Court did not consider the question as to whether his failure to appear at the Magistrate's Court had a valid excuse to support it. The advocate for the Respondent before us has been generous enough to agree that the proper course to take in the circumstances is that the case should be remitted to the Magistrate so that both sides may be heard and a judgment be given on the merits. It is unnecessary for us to consider the other grounds on which the decision of the District Court has been challenged. In remitting the case to the Magistrate we give a direction that he should consider the question as to whether the LP. 50.— mentioned in the contract is a penalty or liquidated damages, and if he finds the amount to be a penalty to assess the damages.

Our order, therefore, is that the judgment of the District Court should be set aside and that the case be remitted to the Magistrate for a new trial.

The costs of this appeal to include LP. 5.— advocate's fees will abide the event.

Delivered this 22nd day of February, 1938.

Senior Puisne Judge.

HIGH COURT CASE No. 12/38.

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

BEFORE : The Chief Justice and Copland, J.

IN THE APPLICATION OF :

"Pardess" Cooperative Society of Orange Growers, Ltd. — PETITIONER.

v.

1. The Chief Execution Officer, Tel-Aviv,
2. Zesa Khans. — RESPONDENTS.

Jurisdiction of High Court — Other remedy open to Applicant.

Application for an order to be issued to the first Respondent directing him to show cause why his order dated the 28th January, 1938, in Execution File No. 14751/37, should not be set aside, refused.

An attachment was made through the Magistrate's Court on moneys alleged to be due from the Petitioners to one Lerer, against whom the Second Respondent had filed action. The Petitioners alleged that they were not indebted to Lerer but neglected to endorse the notice of attachment to that effect. After confirmation of the attachment the First Respondent called upon the Petitioners to pay the amount attached. The Petitioners contended that they could not be bound by their silence as Art. 76 of the Law of Execution applied and it was for the Second Respondent to prove the existence of the debt. The First Respondent held that Art. 287 of the Code of Civil Procedure applied.

HELD : The Petitioner could not come to the High Court for relief as other remedies had been open to him.

ANNOTATIONS : See also H. C. 7/38 (7.ii.38).

It is now a well establish principle that the High Court will not grant relief to a petitioner who could avail himself of another remedy : See H. C. 99/35 (P. P. 9.1.36) ; H. C. 15/36 (P. P. 13.viii.36) ; H. C. 91/35 (P. P. 8.1.36, C. of J. 1934—36 457) ; H. C.. 60/35 (P. P. 28.vi.35, C. of J. 1934—6 456) ; H. C. 81/27 (P. L. R. 243, P. P. 30.i.35, C. of J. 1756) ; H. C. 51/27 (C. of J. 972) ; H. C. 15/30 (P. L. R. 455, C. of J. 1835) ; H. C. 84/28 (C. of J. 973) ; H. C. 16/24 (C. of J. 971) ; H. C. 45/33 (P. P. 30.i.34, C. of J. 1816) ; H. C. 5/25 (unreported).

FOR PETITIONERS (ex parte) : Harari.

ORDER.

The Petitioner had a remedy by appealing or opposing the judgment confirming the provisional attachment. He did not avail himself of that remedy and he cannot come to this Court for relief.

We therefore refuse the application.

Given this 22nd day of February, 1938.

Chief Justice.

CIVIL APPEAL No. 254/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Khayat, JJ.

IN THE CASE OF :

Joseph Albina.. APPELLANT.

v.

Carolina el Batarse. RESPONDENT.

Contract — Undertaking to pay husband's debt — Breach of contract — Damages — Relief — Transfer of debt under the Mejelle — Claim for debt — Counterclaim.

Appeal from the judgment of the District Court of Jerusalem, dated the 28th December, 1937, allowed.

In consideration for the advance of a sum of LP. 721.896, the Respondent undertook to pay to the Appellant the sum of LP.473024 due to the Appellant from the Respondent's husband and to mortgage certain property to the Appellant to secure the difference between the two amounts. The Respondent having failed to register the mortgage, the Appellant brought an action against her in the District Court. In reply to a question of the Court, the Appellant's advocate stated that he was not claiming damages and his action was dismissed.

HELD : 1. It is clear that the Appellant's advocate was referring to "damages" as understood in Ottoman Law and not in the wider sense of English Law. The District Court having made a finding as to the breach of the contract should have given relief to the Appellant.

2. When the Respondent took over the debt of her husband, the liability of the latter was, in accordance with Ottoman Law, extinguished. The Appellant was therefore entitled to sue the Respondent for the debt.

ANNOTATIONS :

1. See C. A. 236/37 (1938 1 S. C. J. 29) and *cf.* note 2 on p. 30.

2. On transfer of debt (*hawale*), see C. A. 89/33 (P. P. 18.xi.34, C. of J. 820) ; H. C. 4/28 (C. of J. 1492). See also Cyprus Law Reports xi., p. 124 ; iv., p. 48 ; ix., p. 115.

FOR APPELLANT : Mizrahi.

FOR RESPONDENT : Salah.

JUDGMENT.

On the 28th of August 1930, the Appellant and the Respondent's husband entered into an agreement. That agreement may be stated in simple terms to have been as follows :—

The Appellant undertook to advance to the Respondent a sum of LP. 721.896 mls. The Respondent on the other hand undertook to pay to the Appellant a debt of LP. 473.024m. owing by her husband to the Appellant and also undertook to effect a mortgage of certain property as security for the difference between the two amounts. An action on the contract by the Appellant came before the District Court of Jerusalem. The District Court found as a fact that the Respondent had committed a breach of her agreement by refusing to mortgage the property which she had agreed to mortgage. The District Court in the course of the proceedings asked the Appellant's advocate whether he was claiming damages, and the Appellant's advocate replied in the negative. It is quite clear to us that when the Appellant's advocate made that reply he was referring to the term "damages" as understood in the Ottoman Law and not the term as more widely understood in English Law. The District Court need not have concerned itself with what the Appellant was claiming. If it found on the facts proved that he was entitled to relief, then it should have given him that relief. When the Respondent took over and undertook to pay to the Appellant the debt of her husband the effect of that undertaking in accordance with the Ottoman Law and the terms of the contract was that the husband was entirely released from his obligation and that the Appellant in consequence had no further right or recourse against him for that debt. The Appellant had a right to sue the Respondent for the debt and this was what his action was in reality. If the Respondent alleged any debt due to her by the Appellant or any breach of contract by him she should have counter-claimed.

For these reasons we think that this appeal should be allowed, the

judgment of the District Court should be set aside and judgment entered for the Appellant for the sum of LP. 473.024 mls. with legal interest on the said sum from the date of action, costs in the Court below to include LP. 5.— advocate's fees and costs of this appeal to include LP. 5.— advocate's fees.

Delivered this 23rd day of February, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 16/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Mansoura Hassan Naser. APPELLANT.

v.

Hassan Ibrahim el Hassen, on behalf of the estate of his father Ibrahim el Nassen. RESPONDENT.

Decision on findings of fact — Appeal — Bond for appeal.

In dismissing an appeal from the judgment of the Land Court of Nablus, dated the 29th November, 1937 :—

HELD : 1. The Court would not, on appeal, interfere with the conclusions of the Land Settlement Officer who had considered the facts of the case.

2. The bond was *prima facie* defective.

ANNOTATIONS : For appeals on findings of fact, see annotations to CR. A. 6/38 (2.ii.38) and for defective bonds, see C. A. 223/37 (1938 1 S. C. J. 23 and note 1, 3 Ct.. L R. 25).

FOR APPELLANT : Nasr.

FOR RESPONDENT : Zueiter.

JUDGMENT:

As my brother Frumkin has pointed out in the course of argument, it seems quite clear that the Settlement Officer went into the facts of this case and considered them and came to certain conclusions. That being so, we do not think that his decision should be interfered with.

With regard to the other point raised, that is, the deposit, *prima facie* the bond which was delivered was defective, but having regard to the view which we take, it is unnecessary to discuss the effect of that bond, if defective.

The appeal will be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 24th day of February, 1938.

Chief Justice.

CIVIL APPEAL No. 37/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

Jamal Abdul Hadi el Kasem. APPELLANT.

v.

Subhi el Ayyoubi. RESPONDENT.

Khalit — Right of way — Co-ownership.

In dismissing an appeal from the judgment of the Land Court of Nablus, dated the 5th January, 1938 :—

HELD : The Appellant was not a co-owner with the Respondent although he enjoyed a right of way over the Respondent's land, such right of way having originated in settlement proceedings.

APPELLANT : In person.

RESPONDENT : In person.

JUDGMENT:

In this appeal from the Land Court, Nablus, the Appellant claimed priority in Respondent's land, as a "Khalit" in a right of way across the land of Respondent. The Land Court found that the Appellant had a right of way across the Respondent's land to enable him to get to his own land but that this was not an ancient right and that it had its origin in settlement proceedings. The contention of the Appellant was that because he had this right of way, he and the Respondent were co-owners. The Land Court rejected this contention

of the Appellant and we think that it was right. The Appellant's right of way was a mere servitude vested in himself, the land on which the right of way existed belonged to the Respondent in its entirety and the Respondent could not be said to be a co-owner in any land which belonged to himself alone.

This appeal must, therefore, be dismissed with LP. 1 advocate's fee, and costs for Respondent.

Delivered this 24th day of February, 1938.

Senior Puisne Judge.

HIGH COURT No. 9/38.

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

BEFORE : The Senior Puisne Judge, and Copland, J.

IN THE APPLICATION OF :

Joseph Weinberg. — PETITIONER.

v.

The District Commissioner, Jerusalem District. — RESPONDENT.

Petition writer — Petition Writers (Licencing) Ordinance — Misconduct — Judicial function — Hearing — R. v. Dublin Corporation.

In making absolute an order *nisi* directed to the Respondent to show cause why his order dated the 7th December, 1937, cancelling the Petitioner's licence as petition writer and directing him to deliver his licence at Respondent's office should not be set aside :—

HELD : The Respondent was exercising functions of a judicial nature and should therefore have given the Petitioner an opportunity of defending himself against the allegation of misconduct.

Followed : R. *v.* Dublin Corporation (2 L. R. W. 371).

ANNOTATIONS : In C. A. 62/37 (P. P. 6.viii.37, 2 Ct. L.. R. 133) it was held that civil courts should refuse to recognize decrees issued by religious courts *ex parte*, as being contrary to natural justice. See also H. C. 34/31 (P. L. R. 595, C. of J. 1203), and see *In Re* Two Solicitors (1937 4 All. E. L. R. 453).

Compare the powers of a District Officer under the Emergency Regulations (*e. g.* H. C. 87/36, P. P. 15.x.36, C. of J. 298).

FOR PETITIONER : Olshan.
FOR RESPONDENT : No appearance.

JUDGMENT:

This is a return to an order nisi to the Respondent to show cause why his order cancelling the Petitioner's licence as a petition writer should not be set aside. On the return day the Respondent failed to appear and no affidavit had been filed by him in reply to the petition. The Petitioner was a licensed petition writer under the Petition Writers (Licensing) Ordinance. Under that Ordinance the District Commissioner has the power to cancel a licence for misconduct or the use of improper or abusive language in petitions. On the 7th December, last year the District Commissioner of the Jerusalem District cancelled the licence of the Petitioner on the ground that he was satisfied that the Petitioner had recently misconducted himself. The Petitioner had not been given an opportunity of explaining his alleged misconduct.

2. We are of opinion that when a District Commissioner has before him a question as to whether he should cancel a licence under the Ordinance, he is exercising functions of a judicial nature. In the case of R. v. Dublin Corporation (2 L.R.W. 371) Chief Justice May said :—

> "In this connection the terms judical does not necessarily mean acts of a judge of legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judical act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability of affecting the rights of others."

3. If a District Commissioner desires to cancel a licence under the Ordinance, he should act properly and judicially and give the petition writer an opportunity of defending himself against the allegation of misconduct. This was not done in this case and the action of the District Commissioner cannot be supported. An order will therefore be issued to the Respondent directing him to restore to the Petitioner his licence under the Ordinance, the effect of this being that the Order of the 7th December, 1937, must be taken to be a nullity and cancelled.

4. Petitioner will have the costs of this application to include LP. 5.— Advocates fees.

Delivered this 24th day of February, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 145/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :—

Hassan Saleh Hammad. APPELLANT.

v.

The Attorney General. RESPONDENT.

Leave to appeal — Cruelty to animals — Criminal Code Ordinance, secs. 236,42(2), 251(b) *— Election — Magistrates Courts Jurisdiction Ordinance,* 1935, *secs.* 3(1),12 *— Maximum sentence — Criminal Procedure (Trial Upon Information) Ordinance, secs.* 47—70 *— Renumbering of sections in Drayton's Revised Edition — Revised Edition of the Laws Ordinance, sec.* 11 *— Jurisdiction of District Court — Sentence.*

In allowing an appeal from the judgment of the District Court of Jaffa, dated the 23rd November, 1937, whereby Appellant was convicted of :

(1) Cruelty to animals, contrary to sec. 386(1)(b)(c) of the Criminal Code Ordinance, 1936 ; and

(2) Obstructing and beating a Police Officer in the due execution of his duty, contrary to sec. 251(b) of the Criminal Code Ordinance, 1936 ;

and sentenced to a fine of LP. 5.—, and in default, to one month's imprisonment on the first count and to six months' imprisonment on the second count, both sentences to run concurrently ; and in quashing the conviction on the first count and reducing the sentence on the second count :—

HELD : 1. An accused person can not elect trial where the maximum penalty for the offence with which he is charged does not exceed a fine of five pounds or imprisonment for one week.

2. The Court should not impose a period of imprisonment in default of payment of a fine in excess of the maximum period of imprisonment for the offence.

3. Leave to appeal from judgments given by a District Court in summary cases may be given under sec. 73(1) of the Criminal Procedure (Trial Upon Information) Ordinance.

FOR APPELLANT : Cattan.

FOR RESPONDENT : Crown Counsel (Mr. Belle).

JUDGMENT:

This is an appeal from the District Court of Jaffa which comes to this Court by leave granted by me. *Inter alia* — one or two

technical points in connection with it influenced me in granting leave, and it is desirable to make them clear.

The first count, that is — cruelty to animals — comes under Section 386 of the Criminal Code Ordinance, and in the absence of a previous conviction, the penalty which can be imposed is imprisonment for one week or a fine or five pounds.

The Appellant elected to be tried by a District Court, and the Magistrates' Courts Jurisdiction Ordinance, 1935, which provides this procedure for a person to elect to go from one Court to another, lays down in Section 3(1) as follows :—

> "(1) Where any person is charged before a magistrate with any offence not triable upon information the maximum penalty for which exceeds imprisonment for fifteen days or a fine of five pounds, such magistrate, if not a British magistrate, shall inform such person that he has a right to be tried by a British Magistrate or by the District Court".

The offence in question is below the minimum laid down under the above sub-section, and I do not think that the Accused had the right to elect to be tried by the District Court, but, in fact, he was tried by the District Court and was given a penaty of five pounds fine, and in default, to suffer one month's imprisonment. As I have already said, in the absence of any previous convictions, the maximum is one week's imprisonment or five pounds fine. It may be arguable that if a fine only is imposed first the provisions of Section 42(2) of the Criminal Code Ordinance may come into operation, but I do not think this view should be upheld. The section imposes a maximum imprisonment of one week, in the absence of any previous convictions, and if a person is convicted under that section I do not think the Court should, in default of payment of a fine, impose imprisonment exceeding the maximum laid down, i. e. seven days.

An application was made to the District Court for leave to appeal, and the District Court, in dealing with this matter said :—

> "The present application must have been made under Section 73(1) of the Griminal Procedure (Trial Upon Information) Ordinance, (Cap. 36), as there is no other provision of law under which the application can be based."
> Obviously, therefore, this Section 73(1) cannot apply to the case which we have tried, and we are of opinion that leave to appeal must be declined on this ground."

I think this is a misapprehension which was brought about through a change in the numbering of the sections made by Mr. Drayton.

The Magistrates' Courts Jurisdiction Ordinances, 1935, by Section 12 thereof, provides as follows :—

> "Notwithstanding anything contained in Section 1 thereof the provisions of Sections 47 to 70 inclusive, of the Trial Upon Information Ordinance, 1924—1935, shall apply to summary trials by District Courts of persons whose trial is referred thereto under the provisions of this Ordinance as though they were trials upon information."

The old sections, 47 to 70, as shown in the Gazette, have been renumbered in Mr. Drayton's Revised Edition of the Laws of Palestine, and Section 11 of the Revised Edition of the Laws ordinance provides :—

> "Whenever in any enactment or in any document of any kind reference shall, where necessary and practicable, be deemed to extend and apply to the corresponding enactment in the revised edition."

We find, therefore, that the old Section 70 is now Section 73, and the District Court was wrong in holding that it had no power to grant leave to appeal.

An allegation was made that an increased penalty had been imposed because the accused had elected to be tried by the District Court. We have enquired into that matter, and we can find no ground for this allegation.

As regards the first count, we held that the District Court had no jurisdiction, and the conviction on that count will be quashed.

As regards the second count, it has been suggested to us that there was no evidence upon which the Accused could be convicted, but we are satisfied that there was evidence on which the Court below could convict.

It has further been suggested that the sentence under Section 251(b) is excessive. We have considered the facts and probabilities, and taking them into consideration we feel justified in reducing the sentence from one of six months' to one of three months' imprisonment, to run from today. In so doing we have taken into account that the Accused has already been in prison for some thirty days.

Delivered this 24th day of February, 1938.

Chief Justice.

CRIMINAL APPEAL No. 14/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Khayat, JJ.

IN THE APPEAL OF :

George Simaan Marina. APPELLANT.

v.

The Attorney General RESPONDENT.

Murder — Criminal Code Ordinance, sec. 214 — Early complaints — Evidence Ordinance, sec. 8 — Wrong inference drawn from facts — Negligence — Knowles v. The King — Alternatives to finding of murder — Post mortem examination — Coroner's Ordinance — Corroboration.

In allowance an appeal (Greene, J. dissenting) from the judgment of the Court of Criminal Assize sitting at Haifa, dated the 17th January, 1938, whereby the Appellant was convicted under sec. 214 of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. The meaning of the expression "shortly after" used in sec. 8 of the Evidence Ordinance is to be determined in the light of each particular case and the statement made by the deceased in the present case was admissible under sec. 8.

2. The finding of the lower Court that the Appellant had thrown inflammable liquid at his mother was not warranted by the evidence.

3. The lower Court had failed to consider findings alternative to that of wilful murder.

4. The medical officer has a discretion under the Coroner's Ordinance to draw his conclusions without dissecting the body .

5. Corroboration is not required in criminal cases.

ANNOTATIONS : As to corroboration see annotations to CR. A. 160/37 (21.ii.38) where authorities are collected.

On the admissibility and relevancy of "early complaints" see CR. A. 160/37 (C. of J. 546) and CR. A. 21/35, CR. A. 20/35, CR. A. 64/35 and CR. A. 29/37 — quoted in CR. A. 160/37 (*supra*).

FOR APPELLANT : Abcarius Bey.

FOR RESPONDENT : Hogan.

JUDGMENT:

The Appellant was charged with murder before a Court of Criminal Assise sitting at Haifa. The particulars of the offence as set out in

the information were that he, on September 20th, 1937, with premeditation, caused the death of his mother by burning. The relevant section of the Criminal Code Ordinance is Section 214 which divides murder into four categories. 214(a) says that any person who by any unlawful act or omission wilfully causes the death of his mother etc. is guilty of murder. 214(b) says that any person who with premeditation causes the death of any person is guilty of murder. The other two categories are irrelevant to the facts of the present case. The issue of premeditation was never considered in the Court below and the charge was treated as being one under section 214(a).

2. The Court below by a majority found the Appellant guilty and he was sentenced to death. The facts proved were as follows. On the 20th of September, 1937, between 5 and 6 a. m., the deceased was boiling milk before a fire. She was suddenly heard shouting for help, persons came to her assistance and her clothing was found to be on fire. The fire was extinguished and she was taken to hospital suffering from burns in the hands, the lower part of the abdomen and the lower extremities. While in the hospital at 6.30 a. m. she made a statement to the police in which she alleged that she got burnt because the Appellant had come and thrown a tin of some inflammable liquid over the fire. She said "the reason he did so to me is that we want to sell the house and they intend that I should not take my share in it so that my sons may take it." She died on the 22nd of September, 1937, and the medical evidence showed that the cause of death was heart-failure resulting from the burns on her body. The defence of the Appellant was a denial that he had thrown any liquid on the fire. It was suggested that the deceased had kindled too large a fire when boiling the milk and that her clothes had accidentally caught fire. The statement of the deceased shows that the Appellant took this attitude from the beginning. She said that he entered the room after the fire had been extinguished and said to her : "What is up with you, Mamma ? I said to you before not to make such a fire lest you get burnt." He attributed his mother's accusation to the fact that she hated him. No traces of any inflammable liquid were found in any part of the house, including the part which was occupied by the Appellant.

3. The first ground of appeal was that the statement of the deceased woman was inadmissible. Section 8 of the Evidence Ordinance makes such a statement admissible if it is made shortly after the alleged act of violence. Abcarius Bey for the Appellant urged that the statement in this case was not made shortly after the alleged act of violence.

He said the act was at 5 a. m. and the statement was not made till 6.30 a. m. Further he said the statement was made in answer to inquiries by the police and that the kind of statement contemplated by the section is one made to the persons who are the first to arrive at the scene. It is certainly a curious fact that though several persons turned up immediately after the incident there was no evidence that the deceased made any statement to any of them accusing the Appellant of having burned her. In spite of this I am of opinion that the majority of the Court below were right in deciding that the meaning of the words "shortly after" was a question to be determined in the light of the particular facts of the case. On those facts they decided that the statement was made "shortly after" and I am not prepared to say that they were wrong.

4. The Court below hesitated to convict the Appellant on this statement alone. The mother and the son were on bad terms and the defence was that the burning had been an accident, and that the deceased had falsely accused the Appellant in order to gratify her spite against him. The Court below sought for other facts in the case from which inferences might be drawn tending to show the truth of the accusation.

5. It must be made clear that in dealing with the evidence, this Court is in as equally good a position as the Court below. The evidence consisted merely of a document and of inferences drawn from facts. No questions arise as to the demeanour of witnesses or their credibility.

6. The first inference depended on the state of the clothing worn by the deceased at the time of the incident. The majority of the Court below said : "Apart from large patches of burning it is burnt in a number of places in roundish holes of various sizes which we think are consistent with the inflammable liquid having bubbled, whiffed and splashed as she described." They came to the conclusion that the state of the clothing supported the statement of the deceased woman. I am unable to see how it supported her statement that it was the appellant who throw the liquid on the fire. The same results would presumably have followed if she herself or anyone else had thrown the liquid on the fire.

7. Another inference was drawn from a kaileh, i. e. a small can which was found near the fireplace. It shows marks of burning inside and outside. Without any evidence on the point the majority of the Court said : "We are of opinion that this is the can used by accused." As I have said, there was no evidence, and I cannot see how the Court

drew this inference. Only one can was found in the house. The deceased in her statement says that she was using a "kaileh" in which to boil her milk. The presumption is that is was this "kaileh" which was found near the fireplace. The fact that no other can was found creates an inference in favour of the Appellant.

8. The majority of the Court drew an inference from the evidence that the fire was an unusually large one. This they held also supported the statement of the deceased.

9. Another inference was drawn from the fact that about 6.15 a.m.. Zaki, a brother of the Appellant, telephoned from the hospital to the police at his mother's request. The police then went to the house of the Appellant in order to arrest him. The only inference that can be drawn from this is that the deceased was anxious to have the Appellant charged and arrested. It adds nothing to her statement blaming the Appellant for the injuries she had received.

10. It will be seen that from the finding of the can no inference can be drawn one way or the other. Zaki telephoning from the hospital was simply a confirmation of the deceased's statement by the deceased herself. The state of the clothing and the largeness of the fire were said by the majority of the Court below to support the deceased's statement. If they meant that these facts supported that part of the deceased's statement which implicated the Appellant I think it was a misdirection. These facts were as equally consistent with innocence as with guilt, that is with the burning being accidental as well as with it being caused by the Appellant. I assume, however, the Court below meant that these facts supported only that part of the deceased's statement which attributed the burning to some inflammable liquid being thrown on the fire. The Court below was entitled to look at the evidence as a whole and to believe the statment of the deceased if part of it was substantiated by some of the surrounding circumstances. But in dealing with another part of the evidence the majority of the Court below fell into an error and as it obviously affected the judgment any conviction founded on it cannot stand.

11. In the course of the majority judgment it was said : "It is clear that the woman and her two sons, within a short period all made statements to the police substantially to the same effect. We think that the fact that the sons made statements similar to the mother's although not evidence of their contents in themselves, tends to prove the truth of what she said." The two sons referred to

were Zaki and Edmund. They were called by the prosecution and the Court allowed them to be treated as adverse and to be cross-examined by Mr. Hogan, the advocate for the prosecution. They had both made statements to the Police. These statements were not proved. Mr. Hogan admits that they were not put in evidence. The only evidence of what they stated to the Police is to be found in their evidence. I shall deal with Edmund's evidence first. The revelant part of what he said was : "I said to the Magistrate I had said to the Police. I said it out of fear. I told Magistrate it correct, but out of fear I said this. The advocates said corroborate the statement you made George. I cannot remember if what I said to Police was true due to lapse of time." This is the only evidence of what he said to the Police and it need hardly be said that it does not bear out the finding in the majority judgment that his statement to the Police was substantially the same or similar to that of the deceased.

12. What Zaki said in evidence of this point was as follows : "I don't remember if what I said to the Police is true. I angry with my brother. I am still angry with my brother. I said I saw my brother throw liquid over my mother. Now I cannot remember if he did that. I said my brother George did wilfully pour. I said it. I cannot now remember if it is true."

13. There are two matters which we are agreed emerge beyond doubt from the statement of the deceased. The first is that she made it clear that she was alone at the time when she says that the Appellant threw the liquid on the fire. It is true that at the end of the statements she gives the names of six witnesses including Zaki and Edmund but it is obvious that she does not mean they were present when the incident occured. She said Zaki and Edmund came when she shouted out that she was burning. The second matter is that she says the liquid was thrown over the fire and not over her. Zaki contradicted his mother in these two important particulars. When he made his statement to the police he said he saw the incident and that the Appellant threw the liquid over the deceased. The statement in the majority judgment that Zaki's statement to the police was substantially the same or similar to that of the deceased was not correct. In general, it may be said that as neither Zaki or Edmund were present it was impossible that they could have truthfully given statements similar to that of the deceased.

14. The majority judgment concluded with a finding of fact that the Appellant threw some inflammable liquid "at his mother". This

finding was not warranted by the evidence. The only evidence on the point was the deceased's statement in which she said that the Appellant threw the liquid "over the fire", and the majority of the Court below were not justified in drawing from this an inference that he threw the liquid at his mother.

15. Manslaughter is defined in the Criminal Code Ordinance (sec. 212) as causing death by an unlawful act or omission. The offence of which the Appellant was convicted was wilfully causing death by an unlawful act or omission. I cannot find in the majority judgment any indication that the judges ever directed their attention to the point whether the death was wilfully caused. It rejected the defence of accident, but it does not follow that murder was the only alternative. The circumstances were unusual ; an allegation of causing the death of a person near a fire by throwing an inflammable liquid over the fire. It is possible that such an act might be done and that the death might not be said to have been wilfully caused. Apart from accident there were several possibilities, (a) a degree of negligence not involving any criminal responsibility, (b) a degree of negligence making the offence a misdemeanour under sec. 218 of the Criminal Code Ordinance, (c) a degree of negligence making the offence manslaughter, (d) a degree of negligence making the offence murder, (e) a deliberate intention to cause injury. Wilful does not merely mean non-accidental ; applied to acts it means acts to which the will is a party, and excludes negligent acts, except acts done by a person with reckless carelessness, not caring what the results of his carelessness may be. Possibilities (a) to (c) above were not explored by the majority of the Court below, possibly because they came to a finding of fact, unjustified by the evidence, that the Appellant had thrown the liquid at his mother. In the case of Knowles v. the King (46 T.L.R. 276) Viscount Dunedin in delivering the opinion of the Judicial Committee of the Privy Council said : "But the fatal flaw in the judgment is that having set aside Mrs. Knowles' account of the occurence as accident he at once assumed that the only alternative to the accident is murder. There is not the slightest inquiry into whether, assuming that the shot was fired by the accused, the act amounted to manslaughter and not murder. There is no attempt to face the question whether the standard of proof required to prove murder as against manslaughter has in this case been reached".

16. Lastly, I wish to refer to two points raised by Abcarius Bey. The first was that the evidence showed that the medical witness came

to his conclusion as to the cause of death without dissecting the body. The Coroner's Ordinance shows that it is in the discretion of the medical Officer as to whether he is to make a dissection or not. It is of course preferable that he should in a case of this kind make a dissection so that there should be no doubt as to the cause of death, but I do not think that the fact that he did not do so can be made a ground for challenging the verdict. The matter was one for adequate cross-examination in the Court below. The second point was that the Ottoman Law of Evidence must be regarded as the law in force at present and that it requires the evidence of two witnesses before an accused person can be convicted. It has been decided in a recent case by this Court that the relevant provision of the Ottoman Law must be taken to be repealed as regards Criminal cases and this ground of appeal must therefore be rejected.

17. The majority of the Court below, in convicting the Appellant, overlooked important points and overstressed others. Inferences prejudicial to the Appellant were drawn which were not justified by the evidence. In particular an erroneous view was taken of the effect of the statements which Zaki and Edmund made to the Police. For these reasons, I think that this appeal should be allowed and that the conviction should be quashed.

Senior Puisne Judge.

The Appellant was convicted on the 17th January, 1938, on a charge of murdering his mother by throwing some inflammable liquid at her whilst she was boiling milk over the fire in her house in the early morning.

He has appealed against this conviction and the first ground of appeal is that the elements necessary for a conviction under 214 of the Criminal Code Ordinance were absent in the present case. Although this was one of the grounds of appeal, Abcarius Bey for accused did not argue it before us and I need only say that the Court found that the evidence, if believed, is sufficient in law.

The second ground of appeal is that from the evidence there was nothing more than a probability that Appellant had committed the offence charged. The Court found as a fact that deceased woman's clothing caught fire as a result of inflammable liquid being thrown by accused on a fire where deceased was boiling some milk. Shortly after the burning, deceased made a statement to the police that the accused threw the liquid on the fire and that it bubbled, whiffed and

splashed on her and she caught fire. She said that she and Appellant were on bad terms.

The Court found that the statement of deceased was supported by an examination of her clothing which was produced. There were large patches of burning and also the clothing covering the upper part of her body was burnt in a number of places in roundish holes of various sizes which the Court thought were consistent with the inflammable liquid having bubbled and splashed as she described.

One witness said she saw the fire and that there was a lot of smoke but refused to say if it was a big fire. Another witness said he saw flames from his house 150 metres away. From this evidence the Court drew the inference that it was an unusually large fire and I think they were entitled to draw such inference.

Another inference was drawn from a can which was found near the fireplace in deceased's room, but there is no evidence to connect this can with accused. It might have been the can used by deceased herself when boiling milk and I think the Court were wrong in drawing the inference that this is the can used by accused. Only one can was found in the house and deceased in her statement says she was using a can in which to boil milk. It is more than probable that the can found was the one used by deceased. The can found has not been connected with accused in any way. Be that as it may this would not affect the finding that accused threw inflammable liquid on the fire. Abcarius Bey submits that the Court misdirected itself as regards the allegation by the defence that the case is a "frame up" on account of the bad feeling between deceased and her son, the accused.

The majority of the Court found as a fact that deceased woman and her two sons within a short period after the incident all made statements to the police substantially to the same effect and were satisfied that deceased's story of the incident was true and could not have been concocted.

Abcarius Bey submitted that no post mortem examination had been held because there had been no dissection of the body. He submitted that in order for a post mortem examination to be complete there must be dissection. In this contention I think he is wrong. I think it is most desirable when making a post mortem that dissection should be done, yet the Coroner's Ordinance shows that it is in the discretion of the Medical Officer as to whether he does a dissection or not. Dr. Dajani gave evidence that he held a post mortem examination and

that deceased died from heart failure resulting from second degree burns of lower part of abdomen and legs.

The Court also found that on the morning in question accused was in his rooms alone, and the rooms were close to the room of deceased and that he had ample opportunity to commit the crime alleged. He gave evidence on oath and denied the charge. He says he stayed in bed for ten minutes after he heard deceased's screams. The Court did not accept the evidence of the accused. The defence is a bare denial.

There appears to have been ample evidence that the accused threw inflammable liquid on the fire at which deceased was sitting and as a result of throwing this liquid deceased's clothing caught fire inflicting injuries from which she died.

There was undoubtedly evidence upon which the Court could reasonably affirm that the accused was guilty of the offence charged.

For these reasons, I am of opinion this appeal should be dismissed and the conviction affirmed.

Delivered this 26th day of February, 1938.

British Puisne Judge.

CIVIL APPEAL No. 233/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Malka Reisel Elkunin. APPELLANT.

v.

1. Daniel Elkunin,
2. Yusef Elkunin,
3. Levy Elkunin,
4. Arie Elkunin,
5. Kaste Karsinti,
6. Mariam Elkunin,
7. Hadassah Yurshi,
8. Fania Elkunin,
9. Kanilla Elkunin,
10. Nakhama Elkunin,

11. Lina Elkunin,
12. Kina Elkunin,
13. Braina Kastel,
14. Sima Dovinoff Elkunin. RESPONDENTS.

Claim of title to land — Prescription — Inception of cause of action — Land Courts Ordinance — Admission in lower Court — Judgment based on admission.

In allowing an appeal from the judgment of the Land Court, sitting at Tel-Aviv, dated the 17th November, 1937, entering judgment in favour of Appellant against Respondents 1—7 and remitting the case for hearing as against Respondents 8—14 :—

HELD : 1. (Against Respondents 1—7). Appellant had no remedy until the enactment of Land Courts Ordinance and her cause of action arose from the time that the Land Courts were given the power to have regard to equitable rights to land in virtue of the above Ordinance. The action having been filed within fifteen years from the creation of this cause of action, the plea of prescription could not be raised against the Appellant.

2. (Against Respondents 8—14.) Judgment must be given in favour of Appellant on the ground that the Respondents had admitted the claim both in the Land Court and on appeal.

ANNOTATIONS :

1. See C. A. 149/33 (P. P. 10.vii.34, C. of J. 1510) ; L. A. 45/29 (C. of J. 1499) ; L. A. 49/32 (P. P. 10.v.33, C. of J. 1221) ; C. A. 184/37 (3 Ct. L. R. 129).

2. Earlier proceedings in this case (L. C., Tel-Aviv, 80/34) were reported in P. P. 4.1.38.

FOR APPELLANT : Eliash.

FOR RESPONDENTS :

Nos. 8, 9, 10 — Gorodisky.
No. 14 — Smoira—Barshira.
Nos. 11, 12, 13 — served by advertisement.
Nos. 1—7 — served — absent.

JUDGMENT:

This is an appeal from the Land Court, Tel-Aviv, in which the Appellant's claim to be registered as the owner of certain landed property was dismissed. The Land Court came to this decision on the ground that more than 15 years had elapsed from the time when the Appellant, the then Plaintiff, had the right to bring an action in respect of the claim. Now it is quite clear that in Turkish times the Appellant had no cause of action at all because her husband was

the owner of the Kushan and no unregistered documents were of any value as against the Kushan, and it was not until 1921 when Land Courts Ordinance came into force that the courts of this country had the power to have regard to equitable rights in land as well as legal rights. Previous to 1921 the Appellant had no remedy and therefore had no cause of action. Since 1921, until the date when she brought the claim, less than 15 years had elapsed and therefore we hold that the Land Court was wrong in dismissing the claim. The appeal must be allowed.

As regards Respondents No. 1—7 judgment is given in favour of the Appellant in ground that, both in the Court below and here they have admitted the claim and asked that judgment be given in favour of the Appellant.

With regard to Respondents Nos. 8—14 the case must be remitted to the Land Court in order that they may hear it on its merits.

No costs as against Respondents Nos. 1—7.

As regard Respondents 8—14 the Appellant will have the costs of this appeal and LP.5.— advocate's fees.

The provisional attachment granted against Respondents Nos. 1—7 is confirmed.

Delivered this 28th day of February, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 16/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Abdul Hadi, JJ.

IN THE APPEAL OF :

Abdul Rahman Abdul Khaliq. APPELLANT.

v.

The Attorney General. RESPONDENT.

Irregularity of Procedure — Witness called by the Court — Attendance of advocate — Examination by the Court — CR. A. 6/36 — Cross examination — Criminal Procedure (Trial Upon Information) Ordinance, sec. 72.

In allowing an appeal from the judgment of the District Court of Nablus, sitting at Nazareth, dated the 19th January, 1937, whereby Appellant was convicted

of being in possession of a serviceable firearm of military value and ammunition, contrary to sec. 8A of the Emergency (Amendment) Regulations (No. 4) of 1936, as amended by Paragraph (b) of sec. 3 of the Emergency (Amendment) Regulations (No. 5) of 1936, and sec. 4 of the Emergency (Amendment) Regplations (No. 8) of 1936, and sentenced to five years' imprisonment ; and in remitting the case to the lower Court with directions :

HELD : The Court has the right to recall a witness or ask for a witness to be called. After the case for the prosecution is closed it is a right which should be exercised sparingly. When a new witness is called, the prosecution and the defence should be given an opportunity to examine him. The Accused had been prejudiced by the absence of his advocate.

Considered : CR. A. 6/36 (*unreported*).

FOR APPELLANT : El Madi.
FOR RESPONDENT : Ghussein.

JUDGMENT:

This is an appeal from the District Court sitting at Nablus. The main ground of appeal is that there was an irregularity of procedure at the trial. It seems that at the end of the case for the defence, the Court indicated that they desired to hear the evidence of a particular witness. It also seems that the advocate for the defence was led to understand that it would not be necessary for him to attend when that witness was called.

I think it is quite clear that a Court has a right to recall a witness or to ask for a witness to be called, but I certainly think that after the case for the prosecution is closed it is a right which should be exercised sparingly, and in no case should the Accused be prejudiced by what is done.

When a witness is questioned by the Court, as frequently happens, at the end of his evidence it is the usual practice for the prosecution or the defence to put any further questions which may be necessary through the Court, which is a convenient practice. If a witness is recalled or a new witness is called, it is clear that the prosecution and the defence should generally be given an opportunity to cross-examine or to put questions through the Court. In Criminal Appeal 5/36 the Court of Trial indicated that it would deliver judgment on the following day, and the advocate for the Accused asked leave of the Court not to attend, which the Court granted. The next day, however, the Court heard the evidence of a witness and on appeal the conviction was quashed.

This case before us is not so strong as the one to which I have referred, as the Court made its request that a further witness should be called at a same time when the advocate for Accused was present, but it is clear that the advocate for the Accused was not present when the witness was heard. There is nothing in the English record to show that the position was explained to the Accused or that he was invited to cross-examine the witness. In the Arabic record it is stated that the Accused did not cross-examine, but this is ambiguous.

We feel therefore that on this ground the trial was not satisfactory and as has been suggested to us by the counsel for the Accused we remit the case to the Court below to give an opportunity to cross-examine the witness in question.

By virtue, therefore, of the powers vested in us by Section 72(1)(c) of the Criminal Procedure (Trial upon Information) Ordinance, we quash the conviction and remit the case for a new trial with a direction that the witness, Badawi Eff., Police Inspector, should be cross-examined by the Accused or his advocate, if they so desire. The notes of the former trial may be read as the section provides, and in the light of the cross-examination of that witness the Court will further consider the matter.

Delivered this 28th day of February, 1938.

Chief Justice.

HIGH COURT No. 69/37.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Yacoub el Herbawy. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Rafaat Abu el Filat. RESPONDENTS.

Execution Proceedings — Whether stopped for over one year — Execution Law, Art. 114.

In making absolute an order *nisi* dated the 13th December, 1937, directing the first Respondent to show cause why his orders dated the 26th June, 1937,

and the 7th July, 1937, made in Execution File No. 5679/32 should not be set aside and execution proceedings to proceed :—

HELD : It was clear from the dates in the file that execution proceedings had not been stopped more than a year and the Petitioner was, therefore entitled to his order.

FOR PETITIONER : Eisenberg.

FOR RESPONDENTS : No. 1. No appearance,
No. 2. Asal.

JUDGMENT:

In this High Court case the point arises whether one year has elapsed since the execution proceedings have been stopped until their renewal.

It appears from the record of execution that on the 10th August, 1936 and again on 19th October, 1936 the Chief Execution Officers at that time gave orders for execution and for sale.

On 26th June 1937 the then new Chief Execution Officer gave the following order :

> "In accordance with section 114 of the Execution Law the proceedings should be taken afresh".

and again on 7th July, 1937, the same officer gave the following order :

> "Action proceedings having been stopped for more than one year application is refused".

From these dates it is perfectly clear that the proceedings have not been stopped "more than a year".

The Chief Execution Officer, therefore, misdirected himself, and the Order *nisi* of 13th December, 1937, is made absolute. Petitioner will have his costs to include LP. 5.— Advocate's fees from 2nd Respondent.

Delivered this 28th day of February, 1938.

British Puisne Judge.

HIGH COURT No. 5/38.

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

BEFORE : The Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

1. Muhammad Ahmed Issa,
2. Ibrahim Yousef Awad. PETITIONERS.

v.

Inspector General of Police. RESPONDENT.

Withdrawal of criminal charge — Jurisdiction of High Court.

Application for an order to issue to the Respondent calling upon him to show cause why he should not abstain from withdrawing certain criminal proceedings which had been commenced before the Civil Courts against the Petitioners, dismissed.

The Petitioners were charged with having fired at and killed a certain person on the 22nd December, 1937, contrary to secs. 214, 215 and 23 of the Criminal Code Ordinance, 1936, and were brought before the Magistrates' Court, Jerusalem, for remand.

After remand but before any proceedings had been taken in the case, Respondent applied for the withdrawal of the charge on the ground that the case was being filed before the Military Courts.

On behalf of the Petitioners, it was contended before the Magistrate that the Respondent could not withdraw the charge without a written order from the Attorney General, pursuant to sec. 59 of the Criminal Procedure (Trial Upon Information) Ordinance. The Respondent submitted that the section did not apply in view of the fact that the proceedings could not be said to have commenced.

The Petitioners then applied to the High Court.

HELD : The High Court has no jurisdiction to prevent the Respondent from withdrawing a criminal charge.

FOR PETITIONERS : Rashid.

FOR RESPONDENT : No appearance.

ORDER.

We have no power to prevent the Inspector General of Police withdrawing a criminal proceeding, and the Order prayed for is therefore refused.

Delivered this 7th day of February, 1938.

Chief Justice.

CIVIL APPEAL No. 3/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Shukri Ibn Daoud Zayed Kattan on behalf of the Estate of his father Daoud Zayed el-Kattan,
2. Nimeh Bint Zayed Kattan. — APPELLANTS.

v.

Bishara Elias Anton Kattan. — RESPONDENT.

Appeal from Land Court — Points of Law — Provisional Law of Disposition, Art. 17 — Claim of ownership after sale — Delay.

In dismissing an appeal from a judgment of the Land Court Jerusalem, dated the 9th December, 1937 :—

HELD : 1. The appeal could not be entertained as no point of law had been urged against the judgment of the Land Court.

2. In view of the provisions of Art. 17 of the Provisional Law of Disposition, and having regard to the fact that no reason had been adduced to justify the Appellants' failure to file action before the completion of the sale in execution, the action should not have been heared.

ANNOTATIONS :

1. L. A. 113/24 (P. L. R. 36, C. of J. 15) and L. A. 40/28 (P. L. R. 293, C. of J. 1394) afford confirmation of this requirement which, in the case of appeals from the Land Court, is statutory. See also C. A. 30/38 (17.iii.38).

2. Apart from the provisions of Art. 17, the sale is defeasible : See, *e. g.* L. A. 60/22 (C. of J. 1775) and annotations to H. C. 73/37 (1938, 1 S. C. J. 5).

FOR APPELLANTS : Kamar.

FOR RESPONDENT : Amon.

JUDGMENT:

In this case the Respondent obtained possession of certain house property at Beit-Jalla, as a result of an execution sale. The Appellants took action before the Land Court of Jerusalem claiming that the whole of this house property had not belonged to the judgment debtor and that they were entitled to certain shares therein. The Land Court, having heard evidence and perused the relevant documents, dismissed the claim of the Appellants on the ground that there had been a sale of this property to two persons named Ibrahim and Habib by their father during his life-time, that consequently the Appellants were not entitled to any share in the property. The Appellants have appealed to this Court and the first remark I have to make is that no point of law has been urged against the judgment of the Land Court.

2. Appeals from the Land Court to this Court are only allowed on questions of law and for that reason alone this appeal would have to be dismissed. There is, however, a further reason why this appeal must be dismissed, *i. e.* Article 17 of the Provisional Law Regulating the Right to Dispose of Immovable Property. That article reads as follows:

> "Actions claiming the ownership of immovable property, sold through the Tabou office by public auction in accordance with special laws, must be brought before the sale is completed. In that case if the court suspends the proceedings of the auction and if the claimant in the end loses his claim he will be responsible for the damages and loss of profit caused by the suspension of the auction or from any other cause.
>
> The Courts are forbidden to hear cases where the claim is brought after the sale has been completed unless the delay was due to a lawful cause."

3. The present case comes under the circumstances contemplated by the second part of the article. The sale has been completed and no facts have been adduced to justify the delay. If this point had been taken before the Land Court, that Court must have decided that the case could not be heard. There are other defects in the claim put forward by the Appellants but in view of what I have said I do not think it is necessary to consider them.

In my opinion the appeal should be dismissed with costs to include £P. 5 Advocate's fees.

Senior Puisne Judge.

Frumkin, J : I concur with my learned brother presiding, in both the conclusions he arrived at as to the dismissal of the appeal namely : that there was no point of law and that in view of Article 17 of the Provisional

Law Regulating the Right to Dispose of Immovable Property, 1331, the Appellants were too late in bringing their action.

2. Having, however, listened to counsel on both sides as to the facts of the case, I might as well point out that even on the facts as stated on behalf of the Appellant, they made out no case.

3. The case of the Appellants rests entirely on the alleged fact that the claimed property was held by and registered in the name of their two elder brothers Ibrahim and Habib as nominees on behalf of all the brothers including themselves.

4. It is clear, however, that the property in question was as early as 1309 transferred partly in the name of Ibrahim and partly in the name of Habib. The transfer was effected by their father during his lifetime by way of sale and no evidence to the satisfaction of the Court of trial was produced to prove that the registration in their names was as nominees.

Delivered this 16th day of February, 1938.

Puisne Judge.

CIVIL APPEAL No. 227/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Abdul Hadi, JJ.

IN THE APPEAL OF :

Official Receiver and Liquidator of the Palestine Shipping Co., Ltd. APPELLANT.

v.

1. Marin Ferie,
2. H. F. Kaniel & Co. RESPONDENTS.

Winding up — Preferential claims — Ottoman Maritime Code, Arts. 5—8, 147—315, Bankruptcy Ordinance,, secs. 2, 3, 10(3), 142 — French Commercial Code, Art. 191, Goiraud's French Commercial Law — Goods supplied "before the departure of the vessel".

In allowing an appeal, as to part thereof, from a judgment of the District Court of Haifa, dated the 5th November, 1937 :—

HELD : 1. The Ottoman Maritime Code is still in force in Palestine and the lower Court was correct in determining the preferences in winding up in accordance with the provisions thereof.

2. A preferential claim under Art. 5(8) of the Code for coals supplied to the ship must be limited to that supplied for the last preceding voyage.

ANNOTATIONS : The following citation is from C. A. 120/30 (P. L. R. 550, C. of J. 208) :—

> "... The Ottoman Commercial Code requires to be interpreted with the French Code, the majority of its articles being merely a translation of the corresponding provisions of the French Code. It was... interpreted in accordance with the principles of French Jurisprudence rather than with those of the Ottoman Common Law..."

See also C. A. 12/33 (P. P. 18,20.iii.35, C. of J. 449).

The same may be said to apply to the Ottoman Maritime Code Art. 5 whereof is based upon Art. 191 of the French Commercial Code (although the latter part of Art. 5 is borrowed from Art. 206 of the Sardinian Commercial Code).

FOR APPELLANT : Eliash.

FOR RESPONDENTS : Horowitz, Solomon.

JUDGMENT:

This is an appeal from a judgment of the District Court, Haifa, on an application for directions by the Official Receiver and Liquidator of the Palestine Shipping Co., Ltd. in liquidation.

Two points were raised — first, whether the officers and seamen of the s/s Tel-Aviv were entitled to the preference laid down in the Ottoman Maritime Code in respect of their wages, or to the preference conferred by the Bankruptcy Ordinance 1936, or otherwise, and secondly, whether a claim for the price of coal supplied to the ship by a German company was a preferential claim under the Ottoman Maritime Code or not.

The District Court decided against the Official Receiver holding that the crew and the Company supplying the coal were entitled to the respective preferences set out in the Ottoman Maritime Code, and further that the crew also had a privileged claim in respect of the balance of their wages, if any, against the general assets of the Company, as provided in Section 33 of the Bankruptcy Ordinance. Hence this appeal.

It has been argued before us that the Ottoman Maritime Code is no longer in force in Palestine. With this contention we do not agree. We think that the District Court was right in holding that since the Maritime Code does not deal with bankruptcy, it is not affected by the provisions of Sec. 142 of the Bankruptcy Ordinance,

which lays down that Art. 147 to 315 of the Ottoman Commercial Code, and any other Ottoman laws and regulations dealing with bankruptcy shall no longer have effect in Palestine. It is quite true that it is very seldom, if ever, that the Maritime Code is applied, but the Code is still in force, except insofar as it may have been affected by certain parts of the Merchant Shipping Act, with which however we are not concerned in this case.

We agree with the District Court that the claims in Art. 5 of the Maritime Code are claims *in rem* against the ship, and we do not think that these claims are affected by the fact that the Company owning the ship has gone into liquidation. Sec. 2 of the Bankruptcy Ordinance defines a secured creditor as "a person holding a mortgage charge or lien on the property of the debtor, or any part thereof..." and by Sec. 10(3) of the same ordinance secured creditors are not restrained in the exercise of their legal remedies in respect of their security. The crew are in the position of secured creditors and we cannot see why a charge or lien given by legislation should be any less effective than one created by private agreement. It follows therefore that the crew have a good claim against the ship in respect of the wages due to them for the last voyage in accordance with para 6 of Art. 5 of the Maritime Code.

We also think that the District Court was right in holding that the crew also have a privileged claim against the general assets of the Company in respect of any balance of wages due to them under Sec. 33 of the Bankruptcy Ordinance.

To turn now to the claim for coal supplied to the ship. This depends on the true construction of para 8 of Art. 5 of the Ottoman Maritime Code. This para is identical in terms with Art. 191 of the French Commercial Code and is as follows :—

I quote from Geiraud's French Commercial Law :—

> Art. 191. (8) The sums due to the Vendors, outfitters, tradesmen and workmen employed, if the ship has not yet made a voyage ; and the sums due to the creditors for goods supplied, work, manual labour, refitting, victualling, fitting out and equipment, before the departure of the vessel, if it has already made a voyage.

The only question for us to determine, since we hold that the Ottoman Maritime Code is still law in this country, is whether the claim for coal supplied must be limited to that supplied for the last preceding voyage, or whether it can be made for all voyages within the last three years immediately preceding the claim, there being a general prescriptive period for claims of three years laid down in

the Code. Paras. 5, 6 and 7 limit claims to those incurred in respect of the last voyage. Para 8 however, allows claim in respect of goods supplied "before the departure of the vessel". We think that the correct interpretation of the words "before the departure of the vessel" must be that one voyage only is meant — that they refer to the voyage immediately preceding the claim. If more than one voyage were meant, then the word "departure" should have been "departures" in the plural, and in any case if all departures within the last three years were meant to be included, then the phrase "before the departure of the vessel" would be unnecessary.

The appeal must therefore be allowed in part and the judgment of the District Court varied by ordering that the preferential claim under Art. 5(8) for coal supplied must be limited to that supplied for the last preceding voyage.

With regard to costs, in the circumstances we think that the fairest course will be to order that the costs of all parties both here and below should be paid out of the general assets of the winding up, to include LP. 5.— advocate's fees to each side.

Delivered this 1st day of March, 1938.

Chief Justice.

CRIMINAL APPEAL No. 22/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :—

Julius Silberman. RESPONDENT.

v.

The Attorney General. APPELLANT.

Smuggling ammunition — Evidence.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 17th January, 1938, whereby Appellant was convicted of importing firearms of military value and ammunition secretly from outside Palestine, contrary to sec. 36(1)(h) and (2)(a) and (f) of the Firearms Ordinance, and sentenced to fifteen months' imprisonment ; and in quashing the conviction :—

HELD : The conviction could not stand since the evidence did not connect Appellant with the suit case alleged to have contained the ammunition.

ANNOTATIONS : See the English and Empire Digest, Vol. XIV, p. 358, cases Nos. 3790—3792 (*evidence consistent with innocence*).

FOR APPELLANT : Eliash.

FOR RESPONDENT : Fawzi Ghussein.

JUDGMENT:

The Appellant in this case was convicted by the District Court of Haifa, composed of the Relieving President, sitting alone, on a charge under the Firearms Ordinance of having smuggled and endeavoured to import to Palestine ten automatic pistols and about 1200 rounds of ammunition. The Relieving President wrote a very long judgment clearly analysing all the evidence and expressing very freely his belief that the evidence was very doubtful. At the end of his judgment he says :—

> "Having considered the evidence I find that it has been proved beyond a reasonable doubt that accused was the man who went to the Harbour Gate carrying the suit-case with the pistols and ammunition in it",

and convicted him and sentenced him to fifteen months' imprisonment.

Now if this conviction is to stand it has got to be proved that it was this Appellant who had this particular suit-case in which these pistols were found. Two witnesses apparently gave evidence that they had seen the Appellant come to the gate with this particular suit-case, and the Court in its judgment said :—

> "In my judgment it is not possible for the witnesses to identify the suit-case with certainty. There may well have been a number of suit-cases like this one on the ship".

On that finding of fact alone by the Court this conviction cannot possibly stand, since it shows that the connecting link between the suit-case and the Appellant is missing. That being so, it is not necessary for me to say anything more about this case.

The appeal is allowed, the conviction quashed and the Appellant is discharged.

Delivered this 2nd day of March, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 24/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Yousef Hussein el Haj Taleb. APPELLANT.

v.

The Attorney General. RESPONDENT.

Attempted murder — Appeal from finding of fact — Witnesses abroad.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 1st February, 1938, whereby Appellant was convicted of attempted murder, contrary to secs. 222(a) and 23 of the Criminal Code Ordinance, 1936, and sentenced to ten years' imprisonnment :—

HELD : 1. There had been ample evidence before the lower Court to come to the conclusion to which it came.

2. The Court has no power to bring witnesses from foreign countries.

ANNOTATIONS : See note 1 to CR. A. 6/38 (1938 1 S.C.J. 64).

APPELLANT : In person.

FOR RESPONDENT : Ghussein.

JUDGMENT:

This Appellant has been sentenced by the District Court of Haifa to ten years' imprisonment for attempted murder. The charge was that he fired upon a man, hit him and smashed one of his hands. The man remained 33 days in hospital and 4 months under treatment.

There was ample evidence before the Court below to come to the conclusion to which it came and to convict you of the charge brought against you.

The fact about the witnesses not being there, these are from Syria and the Court has no power to bring witnesses from foreign countries.

There is nothing in this appeal and it is dismissed.

Delivered this 2nd day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 21/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

Elieser Bernstein. APPELLANT.

v.

Itzhaq Hayutman. RESPONDENT.

Arbitration — Court may remit or set aside award — Arbitration Ordinance, secs. 12, 13 — *Ambiguous judgment — C. A.* 5/37 — *Interpretation of judgment.*

In refusing an application for leave to appeal from the judgment of the District Court of Tel-Aviv, dated the 13th October, 1937 :—

HELD : The lower Court had used the expression "set aside" and went on to speak of "remitting" the award. The judgment was therefore ambiguous and must be interpreted as remitting the award.

Followed : C. A. 5/37 (1937, 1 S. C. J. 471 *sub num.* C. L. A. 5/37).

FOR APPELLANT : Hamburger.

FOR RESPONDENT : Eliash.

JUDGMENT.

This is an application for leave to appeal from a judgment of the District Court of Tel-Aviv arising out of an arbitration.

Unfortunately, there seems to be some confusion in the mind of some Courts as to their powers under the Arbitration Ordinance. The powers, as I understand them, are similar to the powers of the Court in England. The Courts, according to the circumstances, have power either to set aside an award or remit it with directions to the Arbitrators to do what may be right. See Sections 13 and 12 of the Arbitration Ordinance, Chapter 6.

The Court in this case used this expression — "set aside" — and went on to speak of "remitting". The actual words of the judgment are as follows :—

> "We accordingly set aside the award and remit the matter to the three persons who acted, with instructions to them to make an award either unanimously or by a majority of two to one."

The judgment, therefore, as it stands, is ambiguous.

A similar point arose in another case, No. 5 of 1937, the judgment of the District Court in that case concluding as follows :—

> "We therefore set aside the award and remit it to the umpire in order that he may give the defendant an opportunity of cross-examining the plaintiff in respect of the statements made and plans produced in his absence, and give a fresh award."

In this case there were allegations of legal misconduct by the arbitrators.

On appeal to this Court it was held —

> Unfortunately, the judgment of the District Court is not clear, but in our opinion the effect of that judgment is to set aside the award."

When a judgment is ambiguous in that it uses the expressions "set aside" and "remit", this Court must look to see what is its real effect.

In this case we are of opinion, particularly having regard to the express reference to Section 12, that the effect is not to set aside but to remit. The application for leave to appeal is therefore refused, with costs. Advocate's fees £P. 3.

Delivered this 3rd day of March, 1938.

Chief Justice.

CIVIL APPEAL No. 22/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

Iser Goldberg. APPELLANT.

v.

Lietuvos Kredito Bankas. RESPONDENT.

Claim for money in foreign currency — Action on bill or proof by bill — Foreign law.

In dismissing an appeal from a judgment of the District Court of Tel Aviv, dated the 22nd November, 1937, confirming the judgment of the Magistrates Court :—

HELD : Respondents were suing for money lent and not on the bills which had been produced as evidence of indebtedness. The foreign law regulating the bills was therefore immaterial.

ANNOTATIONS : C. A. 151/33 (P.P. 28.xi.34, C. of J. 1934—6 550) is to the same effect. See also C. A. 79/25 (C. of J. 701).

The distinction between suing on a promissory note and suing on the consideration is also drawn in C. A. 12/36 (1937, 1 S. C. J. 89, P. P. 5.vii.37, 1 Ct. L. R. 47) — earlier proceedings in C. A. 83/34 (P. P. 12.iv.35).

FOR APPELLANT : R. Rabinowitch.
FOR RESPONDENT : Silberg.

JUDGMENT:

We need not trouble you Dr. Silberg. This appeal fails. The Respondents sued the Appellant in the Magistrate's Court for a sum of money expressed in Lithuanian currency and produced in support of their claim some bills given by the Appellant to them. The Magistrate gave judgment in favour of the Respondents holding that Lithuanian Law was of no use in this case, seeing that the Respondents who were the plaintiffs in the original case were not suing on the bills themselves but for money lent.

The District Court dismissed the appeal and gave leave to appeal to this Court. We think that the Courts below were perfectly correct in the view which they took. The bills were produced here merely as evidence in support of the claim and therefore the intricacies of Lithuanian Law with regard to these bills do not concern us in this case in the least.

This is another instance of a defendant endeavouring to evade his liabilities by any artifice which he can think of. This is a state of affairs which is only too prevalent in this country. There is nothing in this appeal which is a waste of time and we therefore dismiss it with costs and £P. 5.— advocate's fees.

Delivered this 3rd day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No.23/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

1. Moses Doukhan
2. Bernard Joseph
   Joint Liquidators of the Phoénix Life Insurance Co., Vienna. APPELLANTS.

V.

1. Sally Wolf,
2. Mrs. Alice Wolf. RESPONDENTS.

Joint liquidators — Delegation — Signing notice of appeal — Insufficient cause for extension of time.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 7th January, 1937 :—

HELD : 1. A liquidator appointed by the Court cannot delegate his powers and the notice of appeal having been signed on behalf of one of the liquidators, there was no appeal before the Court.

2. A mistake of this nature is not a sufficient cause for granting an extension of time to lodge the appeal, there being no appeal before the Court.

ANNOTATIONS :

1. In C. A. 38/32 (P. L. R. 769, C. of J. 213) it was held that an advocate could not appear under a power of attorney signed by one only of two syndics. This decision, however, is based upon Art. 173 of the Ottoman Commercial Code.

See English and Empire Digest, Vol. X, p. 990, cases Nos. 6852 *sqq.* (*acts done by one of a number of joint liquidators*).

2. In C. A. 21/25 (P.L.R. 55, C. of J. 144) the Court held that it bad no power to accept an appeal out of time, under the Civil Appeal Rules, 1921 (The application for extension of time had been made after the expiration of 30 days from the delivery of judgment).

FOR APPELLANTS : Doukhan.

FOR RESPONDENTS : Hopp.

JUDGMENT:

In this appeal which is stated to be by the joint liquidators of the Phénix Life Insurance Company, Vienna, a preliminary point has been taken that there is no appeal before this Court inasmuch as the notice of appeal is not signed by both liquidators. This is a fact, and it appears that Dr. B. Joseph, the second liquidator, is not at the moment in this country and that the notice of appeal was signed by one of his partners who holds a general Power of Attorney from Dr. B. Joseph. We are of opinion that this is not sufficient. We do not think that a liquidator appointed by the Court can delegate his powers to any one designated by him. The proper course would have been either for both liquidators before the departure of the one, or the remaining liquidator, to have applied to the Court for directions and such appointment as the Court should see fit to make. There is therefore no appeal before this Court.

2. An application has been made for an extension of time within which to lodge the appeal. We do not think that we should do this

because a mistake of this nature is not a sufficient ground for us to grant the facility, there being as I have said no appeal before this Court. The application must be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 3rd day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 240/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE CASE OF :

The Palestine Mercantile Bank. APPELLANTS.

v.

1. Jacob Freyman,
2. Ritan Belkind. RESPONDENTS.

Guarantee — Bank charges — Interest and commission — Obscurity of Ottoman law and Art. 46 of the Palestine Order in Council — Mejelle, Book III — Doctrine of consideration — Conradit v. Barron — Dunlop Pneumatic Tyres Co., Ltd. v. Selfridge & Co. — Applicability of English law — Hooper's Civil Law, Vol. II, p. 23.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 21st November, 1937, and in varying the judgment of the lower Court :—

HELD : 1. Reference to English law under Art. 46 of the Palestine Order in Council should be made only so far as the Ottoman law does not extend or apply, but not where it is merely obscure.

2. The Ottoman law on the subject of guarantees makes it quite clear that consideration is not a necessary element in this kind of contract.

3. (Frumkin, J., dissenting) A bank is entitled to make an agreement with a customer that he shall pay it some amount for its services in keeping the account. The Respondents in this case had agreed to 1% commission being charged and Appellant was therefore justified in charging this commission as well as 9% interest.

Followed : Conradit *v.* Barron S.A.L.R. (1919) A. C. 279 Dunlop Pneumatic Tyres Co., Ltd. *v.* Selfridge & Co. (1915) A. C. 847.

ANNOTATIONS :

Earlier proceedings in this case (C.D.C., Haifa, 105/37) were reported in P. P. 6.i.38.

3. The attention of the Court was not invited to C. A. 105/26 (*not reported*) in which it was held that a bank may not charge both interest and commision.

FOR APPELLANTS : Olshan, Kouriansky.
FOR RESPONDENTS : S. Gratch.

JUDGMENT:

The facts in this case were as follows : One Yoel Friman made an arrangement with the Appellant bank for an overdraft, and on the 19th May, 1935, he signed the usual agreement with the bank. *Inter alia* he engaged to pay 9% interest on the overdraft and a commission of 1% for the services of the bank in keeping his account. Towards the end of 1935 the overdraft amounted to LP. 384,704. The bank apparently got nervous and were pressing for a settlement. Friman assuaged their fears by producing a guarantee from the two Respondents, in which they jointly and severally undertook, in case Fryman failed to settle, to pay the LP. 384.704 within one year. The guarantee was dated the 29th December, 1935. Neither Fryman nor the Respondents paid, and in the 24th May, 1937, the bank took an action against them in the District Court of Haifa for the balance due, viz LP. 326.751. The District Court decided that the bank was not entitled to charge 1% commission for the keeping of Fryman's account, and that there was no consideration for the guarantee. Fryman had not appeared so judgment was given against him by default for the full amount claimed, but the action against the Respondents was dismissed.

2. The bank has appealed and the first question that arises is the one of consideration. The District Court came to the conclusion that the Ottoman Law on the point was not clear and that therefore the English doctrine of consideration must be applied. I think the District Court misdirected itself in taking this view. It relied on Article 46 of the Pelestine Order in Council, but the Article nowhere states that English Law is to be applied if the Ottoman Law is not clear. The words used are "so far as the same shall not extend or apply". If the Ottoman Law is not clear it is the duty of judges to expound it , however difficult it may be. A judge cannot say "I do not understand this provision of the Ottoman Law and therefore I shall apply English Law". In most systems of legislation there are obscure provisions and provisions capable of two or more interpretations, and a judge has the difficult task of laying down to the best of his ability the correct interpretation. In Palestine a large and important part of the Ottoman Law is still in force, and Article 46 of the Order-

in-Council is not intended to be a refuge when a judge finds difficulty or doubt in its interpretation. The District Court, however, doubly misdirected itself in this case, for the Ottoman Law on the subject of guarantees makes it quite clear that consideration is not a necessary element in this kind of contract. The Law is set out in Book III of the Mejelle. It consists of sixty-one articles and there is not the slightest intimation that a contract of guarantee is not binding unless it is supported by consideration.

3. It is argued that as the Ottoman Law on this point does not contain any doctrine of consideration, this doctrine of English Law should be applied. This, to my mind, is a misunderstanding of Article 46 of the Order-in-Council, as I shall explain shortly. It is also based on the misconception that a law of contract cannot be complete unless it has such a doctrine. This is not so. The Law of South Africa, Roman Dutch Law, has no doctrine corresponding to the English Law. In the case of Conradit *v.* Barron (S. A. L. R. 1919 App. Cas. 279) it was held that a gratuitous option was binding and that there was no doctrine of consideration in Roman Dutch Law. Gratuitous promises are also enforced in Scotch Law, except that a gratuitous promise to pay money requires something in writing to prove it. Consideration is not necessary. The doctrine itself has become discredited in England, and a recently appointed Committee has recommended its abolition except as regard oral promises. The Committee spoke of the inconvenience and possible injustice resulting from the doctrine. In the case of Dunlop Pneumatic Tyre Co. Ltd. (1915 A. C. 847) Lord Dunedin made a scatting comment on it, saying that owing to it a person could "snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the party seeking to enforce it has a legitimate interest to enforce".

4. It may be as well that I should state my view on what I conceive to be the effect of Article 46 of the Order-in-Council. So far as the Ottoman Law and local legislation do not extend or apply the jurisdiction of the Courts is exercised in confirmity with the common law and the doctrines of equity in force in England. The Law of Equity, as it is known in England, has no counterpart in the Ottoman Law ; that is, the doctrines are not collected as one definite part of the substantive law, though some of them may well be present to the minds of judges and others who have to expound the law. In general the Ottoman Law does not extend as to comprise the doctrines of equity in force in England. These doctrines may therefore be applied so far as the circumstances of Palestine and its inhabitants permit ;

if they already exist in Ottoman Law, well and good ; if they do not exist, they may be resorted to. Where, however, there exists an Ottoman Law on particular subjects, such as sale, hire, guarantee or agency, then that law both extends and applies to all questions that have to be determined with reference to these species of contracts. Two things have to be remembered, first, that the law in force is the Ottoman Law as it existed on November 1st, 1914, save in so far as it has been altered by legislation. The second thing is that the Mejelle is not exhaustive. I am in agreement with what Mr. Hooper says at p. 23 of Volume II of his "Civil Law of Palestine and Trans-Jordan" :—

> "As regards points where the Code is silent, it is submitted that it is the obvious duty of Courts to examine the sources in order to ascertain what the law is".

In the present case we are dealing with the law of guarantee. The Ottoman Law has its own law of guarantee. It is silent on the doctrine of consideration and it must be concluded that it never occured to the lawgiver to include such an artificial restriction on the freedom to contract. Where there is no Ottoman Law dealing with branches of jurisprudence which are necessary to the ordered life of civilised communities, such as those branches of the law of torts which are concerned with negligence and defamation, then the Courts of Palestine have to consider whether in the circumstances English common law may be resorted to.

5. Further the English doctrine of consideration stated in its simplest form is that a promise not under seal cannot be enforced unless there is consideration to support it. The Ottoman Law knows of no such distinction as that between simple contracts and contracts under seal, and it is difficult to see how the English doctrine could ever be applicable in Palestine. When the law as to a contract is covered by the Ottoman Law, then the Ottoman Law on the particular kind of contract has to be studied to see if consideraion is necessary. In the judgment of the Court below and in the argument before us local cases were cited in which agreements had been held to be unenforceable because they were not supported by consideration. These agreements were not guarantees and the authorities are therefore not applicable. It must be assumed that the Court in these cases found that consideration was necessary in the particular kinds of contract with which the cases were concerned.

6. Apart from this it seems that the Court below did find facts showing that there had been consideration for the guarantee of the Respondents. They seem to have found that the bank had agreed with

the Respondents that it would not sue Fryman if the Respondents guaranteed the overdraft. I think this would have been a sufficient consideration even according to English Law.

7. As regards the 1% commission for keeping the account the Court below come to the conclusion that this was a mere subterfuge on the part of the bank to enable it to charge 10% interest on the overdraft, that is 1% more than the maximum rate of interest allowed by law. I do not agree. A bank is entitled to make an agreement with a customer that he shall pay it some amount for its services in keeping the account. In this case the customer agreed, and the guarantors also agreed to this 1% being charged. The bank was therefore justified in charging this commission as well as the 9% on the overdraft.

8. For these reasons I think this appeal should be allowed. I do not think it is necessary to send the case back as the Respondents admitted the guarantee and that Fryman had not paid. In my opinion the judgment of the Court below should be varied by making it a judgment against Fryman and the two Respondents jointly and severally for LP. 326.751 with costs and interest from May 1st, 1937, The bank should have its costs against the Respondents in the Court below (to include LP. 4.— advocate's fees) and also the costs of this appeal to include LP. 5.— Advocate's fees.

Delivered this 4th day of March, 1938.

Senior Puisne Judge.

Frumkin J. This appeal involves two points of interest. On the first point, that of consideration, I wish to emphasize that in the Mejelleh there is a slight indication which could be taken to show that the doctrine of consideration is not altogether unfamiliar to Moslem Law.

2. Article 84 of the Mejelleh provides that "a promise is binding when made subject to the fulfilment of a condition." Taking this rule from the negative aspect, it shows that an ordinary promise is not binding. Where this rule of the Mejelleh corresponds with the English doctrine of consideration, it is in that an ordinary promise is not binding. But while English Law in certain cases requires consideration in order to make a promise, or a contract binding, the Mejelleh is satisfied if such promise is made subject to the fulfilment of a stipulated condition. It is not necessary, however, that the promisor should derive any benefit in the nature of consideration or otherwise.

3. The illustration given in the said article makes it clear :—

> "If a person says to another : sell these goods to X and should he not pay the money for it, I will pay it ; if the purchaser does not pay it the person making the promise is bound to pay the money."

4. Certain commentators of the Mejelleh derive from this rule and example the adverse rule that when the promisor simply says : "I will pay the price" without conditioning the non-payment by the purchaser there would be no binding promise, but nobody goes so far as to suggest that the promise would not be binding if no consideration is obtained.

5. Based on Art. 84 there is Art. 623 of the Mejelleh which provides that a guarantee is constituted also by a conditioned promise. So that there is a guarantee when a person says to another "If X does not pay your debt, I will pay it."

In the light of what was said before it might be assumed that had the person just said "I will pay X's debt" there would be no binding guarantee. But it is obvious that the main object is that in order to make a person liable on his promise it must be clear that he in fact intended to assume liability. It is one way of making such intention clear when he makes his promise subject to the fulfilment of an act to be completed by another person as in Art. 84 or 623. But not necessarily only by that means. There is a binding guarantee when the guarantor uses the term "I am a guarantor" or a similar term which makes it quite clear what his intention was (See Art 622). And once he becomes thus a guarantor he is liable to pay as per Art. 643.

6. It is quite clear, that on this point the Mejelleh is exhaustive, and contains no provision that consideration is required in order to make a guarantee binding, and it is therefore not necessary to resort to either Section 46 of the Palestine Order-in-Council or to the sources of the Mejelleh.

7. As regard reference to the sources of the Mejelleh I might as well take this opportunity of making my view clear on this point.

8. A distinction must be made between the interpretation of an obscure passage in the Mejelleh or the definition of a legal term and a case where the Mejelleh is silent altogether. In the first case, sources of Moslem Law might be resorted to in order to clarify such obscurity and thus to arrive at the real meaning of the passage or term. But not so in cases where the Mejelleh is silent altogether.

9. Although the Mejelleh is entirely composed of Moslem Law it became operative and applicable in the Civil Courts in Turkey and later in Palestine not as such but as having become part and parcel of the legal system of Ottoman Law by an Imperial Iradeh. The Mejelleh is a codification of certain parts of Moslem Law, but not of all the Moslem Law, and unless the Civil Legislative Power of the Ottoman Empire has elected to embody certain parts of Moslem Law other

than the Mejelleh in its legislation it cannot be applied in the Civil Courts.

10. It follows that when on a given point the Mejelleh is silent altogether in the sense that it does not extend or apply to it and there are also no other provisions in the Law of Palestine extending or applicable to such point, Art. 46 of the Palestine Order-in-Council is to be resorted to and not the sources of the Mejelleh.

11. In conclusion, I concur on this point with my learned brother Manning.

12. To come now to the second point of this appeal, namely, the commission charged by the Bank to Fryman at the rate of 1 per cent which the Court below found to be excessive interest.

13. No doubt any bank can charge commission for services rendered, and such commission can be in the form of a fixed charge per annum as well as at a percentage rate. So far as I know when commission is charged at a percentage rate it is levied one time on the performance of the transaction.

Of course, I don't want to exclude any possibility not within my knowledge that banks also charge their commission at a percentage rate per annum as in the present case. But just the fact that in this case the bank charged the maximum legal rate of interest and above it a further one per cent per annum on a monthly accumulative basis as the interest, makes one feel as if this form of commission was used to hide an additional one per cent which the bank could not otherwise charge, without coming into conflict with the law relating to usurious interest.

14. I am therefore of opinion that on this point the case must be remitted to the Court below to go into the matter of the practice of Banks in this country in charging commission for services rendered. The test must be this : If it is established that even when charging less than the legal maximum rate of interest, banks do charge a commission in the form of an accumulative percentage rate added to the rate of interest charged there will be judgment for the Appellant. Otherwise, the commission will have to be reduced to the rate normally charged.

Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 5/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

The Government of Palestine. APPELLANT.

v.

Mamour Awqaf, Nablus. RESPONDENT.

Ownership — Payment of tithes as evidence.

In dismissing an appeal from a judgment of the Land Court of Nablus, dated the 7th December, 1937 :—

HELD : The lower Court was right in holding that there must have been some legal origin for the payment of tithes to the Respondent.

FOR APPELLANT : Toukan.

FOR RFSPONDENT : Zueiter.

JUDGMENT:

We seen no reason to interfere with the second judgment given by the Land Court. It is quite clear that for years the tithes were received by the Awqaf and Government must have known that they were so received till eventually the payment was stopped in 1923. We think that the Court below was right in holding that there must have been some legal origin for this payment of tithes to the Awqaf.

The appeal will be dismissed with costs to include LP. 5 advocate's fees.

Delivered this 8th day of March, 1938.

Chief Justice.

CIVIL APPEAL No. 9/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

Khadijeh Ahmad el Arrawi. APPELLANT.

v.

Hassan Ahmad el Arrawi. RESPONDENT.

Application to hear witness — Adjournment — Record — Advocate's Fees.

Appeal from a judgment of the Land Court of Jaffa, in its appellate capacity, dated the 18th December, 1937, dismissed.

Appellant claimed from Respondent, before the Land Settlement Officer, a share in certain lands. Respondent relied on a document alleged to be a deed of sale signed by a number of attesting witnesses of whom only two were alive at the time of the action. Both witnesses were summoned but only one of them appeared and denied that he had attested the document.

On appeal to the Land Court it was held that the Settlement Officer should have adjourned to secure the attendance of the second attesting witness :—

HELD : The Land Court was right in holding that the Land Settlement Officer should have adjourned the proceedings in order to secure the attendance of the witness.

ANNOTATIONS : *cf.* C. A. 242/37 (1937, 1 S.C.J. 51 and annotation). See also C. A. 40/38 (31.iii.38), C. A. 182/37 (14.iii.38).

For the evidence of attesting witnesses, see English and Empire Digest, Vol. XXII, pp. 495 *sqq.* : Sec. 10. — *Attesting witnesses.*

FOR APPELLANT : Machles.

FOR RESPONDENT : No appearance.

JUDGMENT:

It seems to us that the judgment of the Land Court was right. It is clear from the record that the Respondent raised the point that he wanted to call a witness but was not given an opportunity of doing so, though no record of this request appears in the proceedings.

The appeal will be dismissed with costs, but no advocate's fees are granted, as the advocate for the Respondent did not appear.

Delivered this 8th day of March, 1938.

Chief Justice.

CRIMINAL APPEAL No. 18/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khaldi, JJ.

IN THE APPEAL OF :

Attorney General. APPELLANT.

v.

Saleh Yousef Suleiman. RESPONDENT.

Possession of firearms — Emergency Regulations Charge not arising out of the disturbances — Amendment of charge — Appeal by or on behalf of Attorney General — Cap. XXXVI, sec. 67, Law of Procedure (Amendment) Ordinance, 1934, secs. 2(b), 4(1) — "Prosecute" — Crown Counsel — Law wrongly applied to facts — Emergency Regulations part of substantive law — Constitution of courts during the disturbances — CR. A. 97/37.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 16th December, 1937, whereby Respondent, although charged with being in possession of a revolver and ammunition contrary to Regulation 8A (i) of the Emergency Regulations, as amended, was convicted of possession of firearms and ammunition contrary to sec. 36(2) (a) and (f) of the Firearms Ordinance and sentenced to one year's imprisonment :—

HELD : 1. By virtue of the Law of Procedure (Amendment) Ordinance the Attorney General or his representatives are empowered to prosecute any criminal proceedings. The term "prosecute" includes the filing of an appeal and a crown counsel is a person duly authorised by the Attorney General.

2. The District Court should have convicted on the original charge and had wrongly applied the law to the facts by amending the charge without the consent of the prosecution. The Attorney General was therefore entitled to appeal.

3. The Emergency Regulations are the substantive law of this country and their application does not depend upon the continuance or otherwise of the "disturbances". The latter merely affect the consitution of the Court which tries offences under the Emergency Regulations.

Followed : CR. A. 97/37, P. P. 22.ix.37, 2 Ct.L.R. 95.

ANNOTATIONS :

1. But an appeal will not lie against a striting out of the information : CR. A. 104/37 (P. P. 17.xi.37, 2 Ct. L. R. 103) see also CR. A. 31/38 (17.iii.38).

2. On the amendment of informations, see annotations to CR. A. 13/38 (1938, 1 S. C. J. 93).

FOR APPELLANT : Crown Counsel (Hogan).

FOR RESPONDENT : Asfour.

JUDGMENT:

In this case the District Court of Haifa, on trying a charge of possession of firearms under the Emergency Regulations, at the close of the prosecution held, that since the charge did not arise out of the disturbances the proper charge should have been under the Firearms Ordinance. They thereupon purported to amend the charge accordingly ; the accused pleaded guilty and was sentenced to one

year's imprisonment. The Attorney General has appealed and the ground alleged by him is that without the consent of the prosecution, which has not been given in this case, the Court cannot alter the charge. Certain preliminary points have been taken by the counsel for the Respondent and the main one is that by section 67 of Chapter 36 power is given to the Attorney General himself personally only to appeal in criminal cases. This clause, however, has been altered by the Law of Procedure (Amendment) Ordinance, 1934. By section 4(1) of that Ordinance the Attorney General or his representative may prosecute any criminal proceedings in any Court and may appear and be heard in any Court, in any appeal, application etc. By section 2(b) in the same Ordinance the Attorney General's representative is defined as including the Attorney General and certain specified officers and certain persons authorised by the Attorney General. The word "prosecute" necessarily includes the filing of a charge, since that filing is the first step in a prosecution, and it follows that the filing of an appeal, which is a step in a prosecution must equally be within the competence of the Attorney General or his representative.

This actual appeal is signed by Mr. M. J. Hogan, Crown Counsel, and we are satisfied that Mr. Hogan in his capacity as Crown Counsel is a person duly authorised by the Attorney General. The name Crown Counsel has no particular importance ; the argument as to the Crown having no legal status in Palestine, besides being incorrect, is immaterial. It has been argued that, supposing that the appeal is properly laid, the ground alleged is not a ground upon which the Attorney General can appeal. We do not agree with that contention. We are of opinion that the Law was wrongly applied to the facts of the case and that the Court has actually gone wrong as is admitted. But the essential point on which they went wrong is this ; they never gave a verdict on the charge as laid. If they thought that the charge should have been amended they should undoubtedly have given a verdict on the original charge which they did not do. The appeal must therefore be allowed and the case remitted to the District Court for a verdict to be given on the original charge as laid under the Emergency Regulations. The conviction under the Firearms Ordinance must accordingly be set aside and when this case comes back before the District Court, we would like to call their attention to this fact. The Emergency Regulations are the substantive law of this country, and their application does not depend on the continuance or otherwise of what were euphemistically called "disturbances". It cannot be too often repeated that the existence of the so called disturbances

merely affects the constitution of the Court which tries offences under the Emergency Regulations. That principle has already been laid down by this Court in Criminal Appeal No. 97/37 (Ijbara Abdel Aziz el Fakhoury *v.* The Attorney General). The appeal is allowed as I have said and the case remitted for a proper verdict to be given.

Delivered this 8th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 4/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :—

Abraham Yom-Tov. APPELLANT.

v.

Yousef Iz-Eddin Ahmad el Ghussein. RESPONDENT.

Damages — Return of Deposit — False warranty of title — Void contract — Interest as damages.

In allowing an appeal from a judgment of the District Court of Jaffa, dated the 8th December, 1937 :—

HELD : 1. There was no basis of title to the land offered by Respondent and the contract of sale was therefore void.

2. Appellant was therefore entitled to the return of his deposit and no damages could be claimed.

ANNOTATIONS :

1. To the same effect : C. A. 246/37 (1938, 1 S.C.J. 40).

2. For the return of the deposit under a void agreement, see authorities set out in note 1 to C. A. 246/37 (*supra*).

FOR APPELLANT : Gorodissky, Goitein.

FOR RESPONDENT : Cattan.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa ; that Court having held that no damages and no return of deposit could be made on the ground that neither Plaintiff nor Defendent in the original action had any cause of action.

Now in the agreement between the parties which opens with a number of recitals, it is definitely stated :—

> "Whereas the vendor is the owner of a piece of land hereinafter described, registered today in the Land Registry, Jaffa, in the name of Yousef Bek Moyal, by virtue of a judgment of the Land Court, Jaffa, in file No. 195/25".

It is quite clear that that recital is the basis of the title which the Responding was offering to the present Appellant. That judgment actually was set aside — the grounds on which it was set aside do not concern us here — but having been set aside, and set aside before the contract was entered into between the parties, that statement was an untrue statement, and the whole basis of the title offered went. We are of opinion that, in these circumstances, this contract was a void contract and therefore that the District Court was wrong in not ordering the return of the deposit paid by the Appellant to the Respondent.

Being a void contract, we hold that no damages are payable.

The appeal must therefore be allowed in part, and judgment entered for the Appellant in the sum of LP. 200.—, being the amount of deposit paid by him on two separate dates. We do not allow interest, since to allow interest will be in the nature of allowing damages. The Appellant will get the costs here and below to include LP. 5.— advocates' fees.

The provisional attachment already granted is confirmed.

Delivered this 9th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 12/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

1. Musbah Ammar,
2. Yousef el Amassi. APPELLANTS.

v.

1. Said Kayali,
2. Abdel Jawad Joudeh,
3. Abdel Rahim Kayali,
4. Izzat Kamal. RESPONDENTS.

Rent — Appeal on question of fact — Possession of leased premises — Rent payable for period of Arab strike.

In dismissing an appeal from a judgment of the District Court of Jerusalem, in its appellate capacity, dated the 11th January, 1938 :—

HELD : 1. It was proved that the Appellants had been in possession in April and in October, 1936, and the burden or proof was shifted to them to prove that they had given up possession between these two dates.

2. Rent is payable in respect of the period of the Arab strike.

Followed : C. A. 138/37 (P. P. 5—10.x.37, Ha. 4.xi.37, 2 Ct. L. R. 73).

ANNOTATIONS : 2. And see the case considered in C. A. 138/37 (*supra*).

FOR APPELLANTS : Cattan.

FOR RESPONDENTS : Kanafani.

JUDGMENT:

This is an appeal from the District Court of Jaffa in which they altered the judgment of the Chief Magistrate and gave judgment against the two Appellants for rent for a period from the 19th April, 1936, to the 27th October in the same year. The Magistrate had previously given judgment in favour of the Respondents for a period from the 27th October, 1936, to the 17th January, 1937. Against the second part of the Magistrate's judgment, there is no appeal.

2. The first ground of appeal is that the District Court, sitting as an appellate Court, had no power to interfere with the finding of fact of the Magistrate. If we examine the judgment, we find that they had not in fact interfered with this finding. The Magistrate found as a fact that the Appellants were in possession of these premises on the 19th April, 1936. He also found as a fact that the Appellants were in possession on the 27th October, 1936. In our opinion, the burden of proof is thereby shifted to the other side to prove that they have, in any way, between these two dates given up the possession of the premises. The learned Magistrate also would seem to be under the impression that for the period of the strike the lessess were not liable to pay rent. This of course is a wrong principle and the correct law has been laid down by this Court in another Jaffa case.

3. With regard to the other points raised by the Appellants, we are of opinion that there is nothing in them.

4. The appeal must be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 9th day of March, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 27/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khaldi, JJ.

IN THE APPEAL OF :

Ahmad Ibrahim Shattat. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal — Findings of fact — Grounds of appeal — Sentence.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 17th February, 1938, whereby Appellant was convicted of theft, contrary to secs. 263 and 272 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment :—

HELD : 1. There had been evidence to justify the conviction by the lower Court.

2. No grounds of appeal having been urged, the appeal must be dismissed.

ANNOTATIONS : 1. See CR. A. 6/38 (1938 1 S. C. J. 64), note 1.

APPELLANT : In person.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

In this case there was clear evidence on which the Appellant was convicted by the Court below.

As a matter of fact the District Court took a lenient view in as much as they found you not guilty for carrying a rifle, an offence with which you were originally charged.

The sentence imposed is really a light one, and as no grounds of appeal have been urged, the appeal must be dismissed.

The conviction and sentence are confirmed.

Delivered this 10th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 182/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Frumkin, JJ.

IN THE APPEAL OF :—

Yousef el Khalil. APPELLANT.

v.

Ibrahim el Khalil. RESPONDENT.

Evidence against registered title — Land Court not bound by Ottoman rules of evidence — Admissibility of document relating to illegal transaction — Duty of Land Court to hear evidence.

In allowing an appeal from a judgment of the Land Court of Haifa, dated the 22nd July, 1937, and in remitting the case to the trial Court to hear evidence :—

HELD : 1. When the Land Court has before it a dispute as to land it is its duty to hear the case and to give a judgment, and it is not bound by the rules of evidence contained in the Ottoman Code of Civil Procedure.

2. The lower Court should have admitted in evidence a document relating to a sale during the prohibited period to consider whether it contained an admission by Respondent.

ANNOTATIONS :

1. See also C. A. 9/38 (8.iii.38 and first paragraph of annotation). And see L. A. 122/23 (C. of J. 718) ; L. A. 44/30 (C. of J. 885) ; L. A. 5/27 (C. of J. 1528) — *Land Court not bound by rules of evidence.* See also C. A. 2/38 (14.iii.38).

FOR APPELLANT : Asfour.

FOR RESPONDENT : Eliash.

JUDGMENT.

This appeal arises out of a dispute with reference to land before the Land Court of Haifa.

2. In the Statement of Claim it was alleged by the plaintiff that his father had bought certain land for the plaintiff and his three brothers, and that owing to arrangements between them the land was registered in the name of the Respondent alone. He alleged that after this arrangement, and because the land happened to be registered in the name of the Respondent, the Respondent claimed to be sole owner of the property. The defence of the Respondent was based on limi-

tation. This point was never considered by the Court below and we say nothing about it in this appeal. The Court below came to the conclusion that it was precluded from hearing any evidence whatever to contradict the registered title of the Respondent. In this we think the Court below misdirected itself. The Statement of Claim disclosed a cause of action, and when the Land Court has before it a dispute as to land it is its duty to hear the case and to give a judgment, and it is not bound by the Rules of Evidence contained in the Ottoman Code of Civil Procedure.

3. We also think that the Court misdirected itself on another point. A document had been produced dated 11th September, 1919. This document effected to dispose of certain immovable properties and according to the law at that date all dispositions of immovable property were totally prohibited. It was alleged, however, by the Appellant that the document contained admissions by the Respondent in his favour, and he contended that the Court should for that purpose treat the document as admissible in evidence. The Court below came to the conclusion that as the disposition of the land was prohibited, the document itself was illegal and invalid. We do not think that the document was illegal and invalid for all purposes. We think that it was admissible in evidence, and that the Court below should have taken it into consideration to see whether it contained an admission by the Respondent and particularly if any such admission effected the land in dispute. As we have said when a Land Court has a dispute before it regarding land and the Statement of Claim discloses a cause of action, it is the duty of the Court to hear all admissible evidence which the plaintiff desires to produce. This was not done in the present case, and we therefore order that the judgment of the Land Court be set aside, that the case be remitted to it for a new trial with directions to hear all admissible evidence that the Appellant may desire to produce, and to consider also, if necessary, the defence of limitation put forward by the Respondent. Costs of this appeal to include LP. 5.— advocate's fees to abide the event.

The provisional attachment to be restored.

Delivered this 14th day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 2/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

Zvi Gaber — APPELLANT.

v.

"Migdal" Insurance Co. Ltd., Tel-Aviv . — RESPONDENT.

Admission in Land Registry — Estoppel — Specific performance of contract to lend money — Iztizhar oath — C. A. 306/20 — Mejelle, Arts. 1589, 1737, C. A. 78/28, L. A. 14/23, L. A. 20/32, C. A. 110/32, C. A. 77/33, C. A. 10/34 — Code of Civil Procedure, Art. 90, Provisional Law of Mortgage, as amended, sec. 4 — Land Transfer Ordinance, sec. 8 — Estoppel by deed compared to admission in Land Registry — South African Territories v. Wallington.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 16th December, 1937 :—

HELD : 1. An admission made in the Land Registry creates an estoppel similar to that created by the execution of a deed according to English law. Such an estoppel may be rebutted by proof of fraud or duress which had not been alleged in the present case.

2. A claim for specific performance of a contract to lend money will not be entertained.

Distinguished and considered : C.A. 306/20 (P.L.R. 1, C. of J. 1129).
C.A. 78/28 (P.L.R. 432, C. of J. 61).
L.A. 14/23 (C. of J. 1112).
L.A. 20/32 (C. of J. 66).
C.A. 110/32 (C. of J. 67).
C.A. 77/33 (P. P. 1.3.34, C. of J. 69).
C.A. 10/34.

Followed : South African Territories *v.* Wallington (1898), A. C. 309.

ANNOTATIONS :

1. This case provides another instance of the recent trend of judicial decisions, mostly based on English law, to admit evidence to a greater extent than formerly. See, *e. g.* C. A. 149/35 (1937, 1 S.C.J. 40, 1 Ct.L.R. 7) — *evidence of circumstances under which a cheque was made and negotiated* ; C. A. 87/37 (P .P. 23..viii.37, Ha. 7, 21.x; 4.xi.37, 2 Ct.L.R. 19) — *evidence to impeach the consideration of a promissory note;* C.A. 182/37 (14.iii.38) — *evidence against registered title.*

2. In addition to the case followed in the judgment, see English and Empire Digest, Vo. XXXXII, p. 532, sec. 13 — *Money, Contract relating to.*

FOR APPELLANT : Karwassarsky.
FOR RESPONDENT : Horowitz.

JUDGMENT:

On 27.12.36 the Plaintiff (Appellant before us) executed in the Land Registry, Tel-Aviv, a mortgage in favour of the Defendant (Respondent), which was in the usual form and recited that the mortgagor had received the sum of LP. 650.— as the consideration therefor.

The Plaintiff now alleges that that sum was never paid to him, and brought an action therefor in the District Court. His statement of claim recited the mortgage, and paragraphs 2 and 3 thereof were as follows :—

> "2. Plaintiff has, true, admitted in the Deed of Mortgage the receipt of LP. 650.—, assuming that the loan will be paid to him as usual, but this amount was never paid to him, neither at the time of transaction nor afterwards, in spite of the demands of the Plaintiff, and the Notarial Notice sent to Defendant through the Notary Public of Tel-Aviv.
>
> 3. Plaintiff prays that the defendant be summoned and ordered to pay LP. 650.—,legal interest from 27th December, 1936, costs and advocate's fees."

The Defendants in their defence pleaded : —

(a) That the statement of claim disclosed no cause of action ;
(b) that the Plaintiff was bound in law by the admission in the mortgage that he received the LP. 650 ;
(c) that the amount was duly paid to the Plaintiff or his order.

Upon the issues so raised argument was heard in the District Court.

The learned President, with some regret, took the view that upon the authorities the Plaintiff was in effect estopped from denying the receipt of the money, and that the Plaintiff was asking for specific performance of a contract to lend money, which the Court would not grant. His Honour Judge Korngrun took the view that the Plaintiff should be allowed to call evidence as to the facts.

As the result of this difference of opinion the action was dismissed.

The Plaintiff appealed to this Court.

The first point for our consideration is, what is the true effect of an admission made in a transaction in the Land Registry.

The first reported authority was decided in August, 1920, in that case the Plaintiff having made an admission. The question raised was whether the Defendant could be called upon to take the Istizhar oath. The judgment states —

> "Having considered this point, this Court is of opinion that admissions that take place in an Official Department do not come within the wide meaning of Article 1589 of the Mejelle. The Court of Cassation in its judgment of June 13th, 1314, and November 6th, 1315, appears to have taken this view.
>
> The admission in this case having taken place in an Official Department, *viz.*, the Tabu Department, attention would not paid therefore to the statement that it was false."

Article 1589 of the Mejelleh provides :—

> "If anyone maintains he has not spoken the truth in an admission which he has made, the person in whose favour the admission is made is made to take an oath that it is not false."

or as translated by Mr. Hooper :—

> "Should a person allege he has not been truthful in making an admission, the person in whose favour the admission is made shall swear on oath that such admission is true".

It is not clear what was the basis of this decision, but from the reference to the Tabu Department it is possible that the Court had in mind Article 1737 of the Mejelle which provides :—

> "The Sultan's berat and the registration in the Imperial land registries, by reason of their being secure from fraud, are acted upon."

I doubt if this case was authority for anything beyond the proposition that Article 1589 did not apply to a formal admission, but it has been followed, however, in a number of cases to which I will refer later.

It may be noted that in 1924 the Evidence Ordinance, now incorporated in Chapter 54, was passed, which enlarged the rights of a party to give evidence on his own behalf.

In Civil Appeal 78/28, in which the question was also the taking of an oath by the person in whose favour the admission was made, the Court followed No. 306/20 and purporting to quote that judgment stated — "That an allegation of a false admission cannot be heard before the Land Registry." If the report in the Palestine Law Reports is accurate this would seem to be a misquotation.

In Land Appeal 14/32 the Court held — "In accordance with the principle that no parol evidence is admissible to disprove an admission made before the Land Registry the appeal must be dismissed."

It will be seen that this judgment extends the principle to parol evidence.

In Land Appeal 20/32 the Court held :—

> "Following the judgment in Civil Appeal No. 78/28, Civil Appeal No. 306/20 and Land Appeal No. 137/20, wherein it was decided that a person once having made an admission before the Land Registry in a land transaction, the person making the admission cannot subsequently set up the defence that such an admission was

a false admission and request the oath to be taken by the person in whose favour the admission was made, neither can an allegation of a false admission be heard as against admissions made before the Land Registry."

In Civil Appeal 110/32 the President of the Court referred to the principle, but the case was decided upon other grounds.

In Civil Appeal 77/33, the judgment states :—

"The Appellant further argues that the Respondent's admission having been made in proceedings in the Land Registry the Respondent cannot be heard to allege that the admission is false. In support of this argument the Appellant cites the decision of the Court of Appeal established under O. E. T. A. (S) in Civil Appeal No. 306/20, Khadijeh Iemail Abu Khadra v. Ammah Khalil Abu Khadre ; and the judgments of this Court in Civil Appeal No. 78/28, Jamile bint Mohamed Sarban v. Ibrahim Mohammed Faraj El Hussein, and Land Appeal No. 20/32, Ibrahim Abu Habib, v. Said Mohammed Yasin."

and goes on to hold :—

"The rule that an admission made in a formal document in the Land Registry cannot be rebutted (by the person ?) by whom it was made, however, inconvenient that rule may be, appears to us to be established by the cases cited by the Appellant. It follows that the Respondent cannot now bring evidence to prove that plot (c) was not transferred to him by the Appellant."

In Civil Appeal 10/34 the majority of the Court held :—

"The Court has already decided in Civil Appeals 306/20, 78/28 and 110/32, that where a person makes an admission before the Land Registry, the person making such an admission is bound by it and is estopped from setting up anything to the contrary.

In accordance with these decisions we are of opinion that Appellant having agreed to the amount transferred to Respondent before the Registrar, and the same having been duly registered (in the absence of fraud) which is not alleged, he is now estopped from setting up the plea that the area conveyed was more than the amount agreed upon and registered."

Khayat J. who dissented holding :—

"In my view the fact that incorrect area and price were mentioned in the deed of transfer before the Land Registry did not prevent an action being heard for proving such incorrectness especially when there is a legal contract between the parties upon which the sale was based and the price was assessable according to the area.

I agree that no claim for the basic alteration of the contract is admissible such as to make it one of mortgage or security, but a claim that the price was not correctly stated is, in my view, admissible.

It should be remembered that the fact that incorrect price and area were mentioned was in the interest of the purchaser who paid transfer

> fees less than the legal fees. He cannot benefit by misleading and cheating the Government to abstain from paying the actual price in accordance with the contract.
>
> Apart from this the administration is not bound by the price fixed in the sale transaction and may put down a value other than the value recorded in the deed lodged.
>
> Accordingly, on the authority of Civil Appeal No. 131/26, Sheikh Tawfiq Dajani and Moses Khankin, where reference was made to the agreement for the purpose of ascertaining the value of the transferred lands, and their categories and areas and not to the Tabu deed, I am of opinion that the Court may go into the merits of the case and try the claim."

Although I can discern no reference thereto in the judgments I have quoted, it may be noted that Article 90 of the Ottoman Code of Civil Procedure provides:—

> "Official documents shall be admitted in evidence as aforesaid. Such official documents include Imperial Berats, entries in Tabu registers, and decrees issued by Civil or Religious Courts which are not subject to appeal and are free from forgery or fraud. Such documents shall be deemed sufficient proof of a claim."

It may also be noted that Section 4 of the Mortgage Law as amended (set out in the Mortgage Law (Amendment) Ordinance, Chapter 95, Section 5) is as follows :—

> "4. Any person who wishes to make immovable property security for a debt must do so in accordance with the provisions of the Land Transfer Ordinance and must execute a deed in the form and manner prescribed ; and deeds so executed will be accepted as evidence of the matters therein constained in all courts and by the administrative authorities without further proof."

and that the Land Transfer Ordinance, Chapter 81, which deals with the registration of dispositions and transactions of land, provides in Section 8:—

> "No guarantee of title or of the transaction is implied by a consent given under section 4 and the registration of the deed."

In my judgment the effect of the legislation to which I have referred and the authorities I have cited is not to lay down a rule of law that entries in the Land Registry are conclusive and unimpeachable, but to provide that admissions made therein create an estoppel similar to that created by the execution of a deed according to English law. Such an estoppel may be rebutted by proof of fraud or duress, and in certain circumstances it is open to a party to show that despite his admission he has not received the consideration stated.

Mr. Horowitz pressed upon us the undesirability in this territory of weakening in any way the sanctity of formal contract. It may be that attempts to avoid contracts are more common here than in some other

countries. As to that I express no opinion, but I agree that Courts should not be over eager to interfere with formal contracts. They can only do so having regard to the provisions of the Evidence Ordinance, Chapter 54, and the rights of third parties must be protected.

In the case before us, in his statement of claim, the Plaintiff makes no allegation of fraud, and he sets out no facts explaining why he did not receive the sum of LP. 650.— moreover, it may be noted, that the Appellant's advocate referred to a letter of 22.3.37 (i. e. before the Plaintiff filed his statement of claim) from the Respondent's then advocate, addressed to the Plaintiff, which states —

> "That sum was paid to you on that date before the signature of the mortgage by a cheque to Bank Tel-Aviv Ltd. No. 15045 signed by me to your order to Bank Tel-Aviv Ltd., and you have endorsed the cheque, and it was on your instructions that the said cheque was handed over to Bank Tel-Aviv Ltd., and on consideration for that cheque the Bank debited my account on 31.12.36".

I am satisfied that the Plaintiff has not alleged any matters which bring the case within the principles I have set out.

The Plaintiff, in his statement of claim, recited the mortgage, and having alleged that the sum of LP. 650.— was not paid to him, asked for payment of that sum. In my opinion this amounts to a claim for specific performance of a contract to lend money. It is unnecessary to discuss the extent to which the Courts of this Territory will specifically enforce contracts, but they certainly will not carry the doctrine of specific performance further than it is carried by the Courts in Englnad.

In South African Territories *v.* Wallington, 1898 Appeal Cases, 309, Lord Halsbury, referring to a claim for specific performance of a contract to lend money, said :—

> "With respect to the claim for specific performance, a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any Court or any member of any Court has entertained a doubt but that the refusal of the learned judge below to grant a decree for specific performance was perfectly right. But, of course, in this, like any other contract, one party to the contract has a right to complain that the other party has broken it, and if he establishes that proposition he is entitled to such damages as are appropriate to the nature of the contract."

For the above reasons I am of opinion that the statement of claim disclosed no cause of action, and the appeal should be dismissed with costs. Advocate's fees LP. 5.—.

Delivered this 14th day of March, 1938.

Chief Justice.

CIVIL APPEAL N. 26/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Greene and Frumkin, JJ.

IN THE APPEAL OF :

1. Abdel Haleem Sha'ban Agha Ali,
2. Abdel Rahman Sha'ban Agha Ali. APPELLANTS.

v.

Fiddieh Sha'ban Agha Ali. RESPONDENT.

Land Settlement — Limitation — Possession not adverse — No appeal on part of judgment.

In dismissing an appeal from a judgment of the Land Court of Jaffa, in its appellate capacity, dated the 18th December, 1937 :—

HELD : The lower Court had been correct in upholding the decision of the Land Settlement Officer that a plea of limitation could not be raised as possession had not been adverse.

ANNOTATIONS : See C. A. 228/37 (1938, 1 S. C. J. 99 and note 1) — *Possession by co-heirs.* See also C. A. 30/38 (17.iii.38).

FOR APPELLANTS : Muwaqi'.

FOR RESPONDENT : Rashid.

JUDGMENT.

The appeal arise out of a dispute before the Settlement Officer in the Ramleh Settlement Area. The Settlement Officer went into the dispute with great care and considered the respective titles of the parties with reference to eight different parcels of land. The evidence as regards each parcel differed from the evidence with regard to the other parcels. The Settlement Officer took the evidence in each case into consideration and gave a decision in favour of the Respondent.

The Appellants appealed to the Land Court of Jaffa. In giving its judgment the Land Court divided the issues into two. Certain of the parcels of land had been in the possession of the Appellants and they claimed before the Settlement Officer that the action of the Respondent was barred by limitation. The Land Court agreed with the Settlement Officer that the possession of the Appellants with respect to these parcels had not been adverse and confirmed the decision of the Settlement Officer with respect to them.

There were certain other parcels to which different considerations

applied, and as regards each, different evidence had been given before the Settlement Officer. Regarding these parcels the Land Court set aside the decision of the Settlement Officer and decided that the case should be remitted to him to investigate the dispute further. Against this part of the decision of the Land Court there has been no appeal.

In the light of what has been said, we think that the judgment of the Land Court was right and that the appeal must be dismissed with costs to include LP. 3.— advocate's fees.

Delivered this 16th day of March, 1938.

Senior Puisne Judge.

HIGH COURT No. 14/38.

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

BEFORE : The Senior Puisne Judge and Greene, J.

IN THE APPLICATION OF :

Nasrallah Salim Khoury. — PETITIONER.

v.

Registrar, District Court, Haifa. — RESPONDENT.

Registrar — Assessment of syndic's remuneration — Registrar's judicial functions — Registrar acting as a judicial officer — Overstepping his functions — Courts Ordinance, sec. 6.

In making absolute an order *nisi* calling upon the Respondent to show cause why he should not refrain from dealing with the assessment of the remuneration payable to the syndics, former syndics and Judge Commissaire in the bankruptcy of the firm S. M. Khoury ; and in restraining the Respondent from proceeding further in the matter :—

HELD : The assessment of a syndic's remuneration is not one of the judicial functions which a Registrar may carry out and the Respondent could not therefore be regarded as a Court. He had purported to exercise functions as a public officer and the jurisdiction of the High Court could be invoked to restrain him as he had overstepped his functions.

ANNOTATIONS : See also H. C. 92/32 (P.L.R. 860, C. of J. 1100, P. P. 24.4.33) where an order of a District Commissioner under the Land Disputes (Possession) Ordinance was set aside by the High Court, it being held that the District Commissioner was not acting as a Magistrate and did not, therefore, constitute a court.

FOR PETITIONER : Weinshall.
FOR RESPONDENT : Crown Counsel (Hogan).

DECISION:

This is a return to a rule *nisi* directed to the Registrar of the District Court of Haifa, calling upon him to show cause why he should not refrain from dealing with the assessment of remuneration payable to a syndic in the Bankruptcy of the firm of S. N. Khoury.

In the Registrars Ordinance, the Registrars of the District Courts are clothed with certain functions of a judicial nature and in exercising these functions the Registrars are judicial officers, and each Registrar so exercising any of the functions may be regarded as a Court. It is admitted, however, by Mr. Hogan, who appeared on behalf of the Registrar that the assessment of the remuneration payable to a syndic is not one of the judicial functions which a Registrar may carry out, and in view of this, we are of the opinion that the Registrar in this instance cannot be regarded as a Court, that he was simply purporting to exercise functions as a public officer and that therefore the jurisdiction of the High Court may be invoked to restrain him if he over-steps his functions. We have no doubt that in this particular case he did over-step his functions and that therefore this is a case contemplated by Section 6 of the Courts Ordinance, and that he should be restrained from proceeding further with the matter.

The rule will be made absolute. As the applicant does not ask for costs, there will be no order as to costs.

Given this 16th day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 29/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :

Moshe Kastelanitz. APPELLANT.

v.

1. Isaac & Moshe Shwisha,
2. Tewfiq Rinno. RESPONDENTS.

Haifa Harbour Estate sub-lease — Consent of Harbour Authorities — Rescinding contract of lease — Inherent defects — Condition precedent.

Appeal from a judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 23rd December, 1937, confirming the judgment of the Chief Magistrate, allowed New judgment substituted for that of the lower Courts.

Appellant leased from Respondents a store situate in the Haifa Harbour area. Respondents undertook to obtain the consent of the Harbour Authorities for the use of the premises as a vegetable wholesale store but applied for and obtained instead the consent of the Harbour Authorities for the use of the premises as an office.

Appellants entered into occupation but subsequently discovered the discrepancy in the consent and sought to rescind the lease.

Both before the Chief Magistrate and in the District Court, the law relating to inherent defects in hired premises, as set out in the Mejelle, was applied and it was held that there was no inherent defect in the premises entitling Appellant to rescind the contract.

HELD : The question of inherent defect was not involved as Appellant complained that a condition precedent to the contract had not been complied with by Respondent. This justified Appellant in rescinding the contract.

FOR APPELLANT : Levin.

FOR RESPONDENT : Ben Israel.

JUDGMENT:

The facts in this case were as follows :—

The Appellant leased from the Respondents a store situated in the Haifa Harbour area. The agreement was reduced into writing and one clause of the agreement translated into English reads as follows :—

> "The lessors undertake to write immediately to the Harbour Company to the effect that they rent the store at the corner with two doors in Kingsway for a store for vegetables wholesale and to *obtain their agreement*".

The lessors did write to the Harbour Authorities and obtained their agreement that the premises might be used as an office and that nothing but samples were to be kept therein.

2. The Appellant entered into occupation of the premises. There was no evidence before either of the Courts below to show that he was aware of the difference between what was stipulated in the agree-

ment with regard to the premises and what the Harbour Authorities actually gave permission for. Having occupied the premises for four months the Appellant discovered this discrepancy and asked that the contract of lease should be rescinded. Before the learned Chief Magistrate and also before the District Court, the question turned upon the consideration of certain passages in the Mejelle with regard to inherent defects in hired premises, and on the ground that there was no inherent defect of the hired premises in this case, both Courts decided against the Appellant. We are of opinion that both the Courts below misdirected themselves in considering the question of inherent defect. That question was not at all involved in the case for the Appellant. It was clear from the statement of claim that the Appellant complained that a condition precedent to the carrying out of the contract had not been complied with by the Respondents. Respondents had undertaken to obtain the agreement of the Harbour Authorities that the store might be used for the sale of vegetables whole-sale. It is not disputed that this agreement was not obtained. The whole object of the contract was that the Appellant should be able to use the store in the manner contemplated and the failure of the Respondents to obtain the necessary consent justified the Appelant in rescinding the agreement as soon he had discovered that the consent had not been obtained. We are, therefore, of opinion that the judgment of both Courts below were wrong, and that the Appellant was entitled to succeed in his claim.

The judgment of the District Court and the Magistrate's Court will be set aside and there will be substituted a judgment for the Appellant for LP. 12.500 mils and the return of the three promissory notes for LP. 75.— LP. 58.340 mils and LP. 75.— respectively, and if these notes are not returned to the Appellant within three months, the Respondents become liable to pay the cash value. The Appellant will have his costs in both Courts below and also the costs of this appeal to include LP. 5.— advocate's fees.

Delivered this 17th day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 30/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :

Hanneh Habib Talhami, on her own behalf and on behalf of the heir of Salim Matta Bahheus. APPELLANTS.

v.

Zarifeh Naser Jarrous, on her own behalf and on behalf of the heirs of Hanna Matta Bahhous. RESPONDENTS.

Appeal from Land Court on question of law only — Prescription — Joint possession by predecessor of both parties — Interruption of period of limitation.

In dismissing an appeal from a judgment of the Land Court of Haifa, sitting in its appellate capacity, dated the 29th November, 1937 : —

HELD : From an application signed by the predecessors in title of both parties it appeared that the lands in question were held in joint possession by the predecessors. The effect of this document was to interrupt the period of limitation.

ANNOTATIONS : See C. A. 26/38 (16.iii.38) and annotations — *possession by co-heirs.*

FOR APPELLANTS : Attallah.

FOR RESPONDENTS : Asfour.

JUDGMENT:

This appeal arises out of a land dispute between the Appellants and the Respondents. The Settlement Officer in the Haifa settlement area decided in favour of the Appellants, but on appeal his decision was reversed by the Land Court of Haifa, and there is now an appeal to this Court. Such an appeal is allowed only on a question of law.

2. I have had some difficulty in finding what is the exact point of law on which the Appellants have appealed. In the judgment of the Land Court, the respective claims of the parties are summarized and it appears that the Appellants contested the claims of the Respondents on the ground that they had been in exclusive possession for the period prescribed. The Land Court had before it a document dated the 4th of May, 1926, which was an application signed by the predecessors in

title of both parties showing that the lands in question were held in joint possession by the predecessors of both parties. The Land Court came to the conclusion that the effect of this document was to interrupt the period of limitation, and I think the Land Court was right in coming to that conclusion. That is the only point that I can find in the appeal, and I am, therefore, of opinion that the appeal should be dismissed with costs to include £P. 5.— advocate's fees.

In these circumstances it is unnecessary to say anything as regards the preliminary objection raised by Mr. Asfour.

Delivered this 17th day of March, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 31/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khaldi, JJ.

IN THE APPEAL OF :

The Attorney General. — APPELLANT.

v.

Jamil Suleiman Halhal. — RESPONDENT.

Appeal — Law wrongly applied to facts — Criminal Procedure (Trial Upon Information) Ordinance, sec. 67(1)(b) — Offences against Emergency Regulations committed before the establishment of Military Courts.

In allowing an appeal from a judgment of the District Court of Haifa, (Majority judgment, the President dissenting), dated the 6th January, 1938, whereby the information under which Respondent was charged with being in possession of firearms of military value without a licence or lawful excuse, contrary to Regulation 8A(i) of the Emergency Regulations No. 5 of 1936, was quashed ; and in setting aside the order of the District Court :—

HELD : 1. The order of the District Court quashing the information could be regarded as a judgment and, as such, could be appealed on the ground that the law had been wrongly applied to the facts.

2. Offences against the Emergency Regulations committed before the establishment of Military Courts, should be tried by the District Courts.

Followed : CR. A. 4/38 (1938, 1 S. C. J. 62) ; CR. A. 6/38 (1938, 1 S. C. J. 64).

ANNOTATIONS : See also CR. A. 18/38 (8.iii.38) — *Law wrongly applied to facts.*

FOR APPELLANT : Crown Counsel (Hogan).
FOR RESPONDENT : Atalla.

JUDGMENT:

So far as this appeal is concerned, in the first place it has been suggested that the Attorney General cannot appeal. I think that the order of the District Court could be regarded as a judgment and as such, it could be appealed under Section 67(1)(b) of the Criminal Procedure (Trial Upon Information) Ordinance, on the ground that the law was wrongly applied to the facts. Since the delivery of the judgment of the District Court in this case, this Court has taken the view, in two cases, that offences against the Emergency Regulations, committed before the establishment of the Military Courts, should be tried by the District Courts.

The appeal will therefore be allowed, the order of the District Court quashing the information will be set aside, and the information will still stand.

Delivered this 17th day of March, 1938.

Chief Justice.

HIGH COURT No. 10/38.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE :

BEFORE : The Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

The Arab Union Cigarettes and Tobacco Co., Ltd. PETITIONER.

v.

1. The British American Tobacco Company Ltd.,
2. Registrar of Trade Marks. RESPONDENTS.

Trade marks — Application for cancellation not opposed.

In allowing an application for an order to issue to the Second Respondent directing him to cancel the Trade Mark No. 409 (old No. 114 in class 45) which said trade mark was advertised in the Official Gazette No. 85 of the 15th February, 1923, and No. 86 of the 1st March, 1923, and registered in the name of the First Respondent :—

HELD : In view of the fact that the First Respondent did not oppose the application, the trade mark should be cancelled.

FOR PETITIONER : Sanders.

FOR RESPONDENTS : No appearance.

ORDER.

The Court, after hearing Mr. Sanders on behalf of the Petitioners, and in view of the fact that the First Respondents did not oppose in time and moreover filed by their advocate a letter in which he states that his clients do not propose to object to the registration, orders that the trade mark No. 409 (old No. 114 in Class 45) which trade mark was advertised in Official Gazette No. 85 of 15.2.1923 and No. 86 of 1.3.1923, and registered in the name of the First Respondents, be cancelled.

The Registrar of Trade Marks may proceed in the usual way with the registration of the trade mark applied for by the Petitioners.

Given this 21st day of March, 1938.

Chief Justice.

CIVIL APPEAL No. 31/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge, Copland and Khaldi, JJ.

IN THE APPEAL OF :

Jacob Mouchly. — LPPELLANT.

v.

Richard Juhl. — RESPONDENT.

Contract — Vague conversations not constituting agreement — Return of deposit — Claim for damages — Agreed issues dispensing with necessity for proof.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 12th December, 1937 :—

HELD : The lower Court having come to the conclusion that there had been no binding agreement between the parties, was correct in ordering the return of the deposit and disallowing the counterclaim for damages and expenses.

FOR APPELLANT : Harari.

FOR RESPONDENT : No appearance.

JUDGMENT:

The facts in this case were as follows : There were certain conversations between the Appellant and the Respondent ; as a result both parties thought at the time that some form of binding agreement had been entered into, and on the strength of that the Respondent paid to the Appellant a deposit of £P.500. The alleged agreement in the opinion of the Respondent was not carried out by the Appellant, and he consequently took action in the District Court of Haifa claiming the return of his deposit. The Respondent put in a counterclaim claiming damages, commission and expenses. When the matter came before the District Court, that Court gave judgment for the Respondent for the return of his deposit, and dismissed the counterclaim of the Appellant.

The judgment of the Court below is not quite clear on certain points, and there are some obvious misdirections in law, but it is clear that from a consideration of the pleadings it came to the conclusion that the converisations between the parties had been of so vague a nature that no binding agreement had ever been entered into. This being the case the Respondent was entitled to the refund of his deposit and the Appellant was not entitled to any damages, or commission or expenses. As the Court below came to this conclusion on the pleadings we do not think it was necessary for it to hear any witnesses on behalf of either party.

We therefore order that the appeal be dismissed and that the judgment of the Court below be confirmed. The Respondent will have the costs of the appeal to include £P. 5 advocate's fees.

Delivered this 21st day of March, 1938.

Senior Puisne Judge.

CIVIL APPEAL No. 33/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

"Ahrayuth" Beth Harosheth Lemartzefoth, Ltd. — APPELLANT.

v.

Harry Rotter. — RESPONDENT.

Evidence — Experts' report — Application for further evidence.

In dismissing an appeal from the judgment of the District Court of Haifa, in its appellate capacity, dated the 12th November, 1937 :—

HELD : In the circumstances of this case the Magistrate was justified in declining to hear further evidence after the experts had given their report.

FOR APPELLANT : Shapiro.

RESPONDENT : In person.

JUDGMENT:

We need not trouble the Respondent. This apeal comes to us on a point of law stated by the R/President of the Haifa District Court, in these terms :—

> "Whether, when the defendant applies, after the expert appointed by the Court has delivered his report and given evidence in connection therewith, that the Magistrate should hear his witnesses in order to prove his contentions, the Magistrate is, or is not bound to hear such witnesses, and the arguments of the parties before giving judgment".

The point is of course much too widely stated. There are many occasions on which the Magistrate would have been under the duty of hearing all the evidence tendered —- there are many cases where he would be under no such duty. This case falls within the second class.

Experts were apointed by consent of both parties, they made their reports and gave evidence in Court and were cross-examnied. That evidence was conclusive and on the points on which the experts gave evidence the Magistrate was under no necessity to hear further witnesses, if he accepted the experts' reports.

Two points were reserved by the experts for the decision of the Magistrate who heard certain evidence and declined to hear any further evidence on the ground that the evidence tendered would be irrelevant. In the circumstances of this case we think that the Magistrate was correct. The Appellants had claimed that certain work had not been done by the Respondent — the latter should have been called upon by the Appellants to prove his claim that he had done it. The Appellants did not see fit to take this course but adopted another one which was wrong.

The answer to the point stated is that in the circumstances of this case the Magistrate was justified in declining to hear the further evidence.

The Appellants must pay the costs of this appeal together with LP. 2.— travelling expenses for the Respondent.

Delivered this 22nd day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 10/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

Shafiq Shuqair. APPELLANT.

v.

1. Salim Cotran,
2. Na'im Cotran. RESPONDENTS.

Interest on loan — Notarial deed — Notarial notice — Payment of interest where not claimed in notice — Civil Procedure Code, Art. 112 — "Presentation of a plaint" — Law of Notary Public, Art. 69 — C. A. 75/34 — Interest from day of action — Remedy excepted from etatement of claim.

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 20th December, 1937 :—

HELD : 1. Interest could not be claimed on the loan as neither the deed nor the notarial notice provided for the payment thereof.

2. Although Appellant could have executed the agreement without suing upon it, Art. 112 of the Code of Civil Procedure applied and interest could not be claimed as there had been no action. Nor may a notarial notice be deemed to constitute a "presentation of a plaint".

3. Appellant would have been entitled to interest from the date of action but he had deliberately excepted this remedy in his statement of claim.

Distinguished : C. A. 75/34 (1 S. C. J. 6, 1, Ct. L. R. 37).

ANNOTATIONS :

1. In C. A. 133/24 (C. of J. 1038) interest from the date of a notarial notice was refused by the Court as the notice had contained no demand for repayment. Where payment of interest is not provided for in the contract, it cannot be claimed ; C. A. 73/32 (C. of J. 1047) ; C. A. 48/24 (C. of J. 1284) ; C. A. 98/31 (P. L. R. 664, C. of J. 1301).

2. In C. A. 40/30 (C. of J. 1028) a notarial notice was held not to constitute "une demande en justice".

3. A plaintiff is bound by his statement of claim — see note 2, C. A. 236/37 (1938, 1 S. C. J. 29) and add C. A. 147/26 (P. L. R. 116, C. of J. 378).

Normally, interest is awarded from the date of action, *e. g.* C. A. 98/ 25 (P. L. R. 84, C. of J. 650) ; C. A. 107/31 (P. L. R. 783, C. of J. 89) ; C. A. 215/37 (1938, 1 S. C. J. 85). The Court has no discretion with regards to awarding interest : C. A. 41/28 (P. L. R. 332, C. of J. 1039).

FOR APPELLANT : Atalla
FOR RESPONDENTS : No. 1— Katafago
No. 2— Katafago by delegation.

JUDGMENT.

Copland, J. This is the Considered Judgment of the Court.

In this case the Appellant, who was the plaintiff in the District Court, sued the Respondents for the interest on a loan due to them from the Appellant. This loan was secured by a deed drawn up and authenticated by the Notary Public, Acre, dated the 13th September, 1927, and in it the Respondents promised to pay the debt, jointly and severally on the 20th May, 1928. The deed was as follows :

> On Tuesday, 13th September, 1927, I Mohammad Hashim son of Late Shafik Abdul Latif Dajani, Notary Public, Acre, went to the house of Dr. Na'im Cotran, at Acre ; there Dr. Na'im and Salim Eff. Cotran declared before me that they have borrowed from Shafik Bek. Shouqair of Cairo — Egypt, a sum of £P. 1498.40 piastres, to be spent by them on their own benefit. They undertook to settle the said debt, jointly and severally, on 20th May, 1928.
> This deed was made by me in presence of the undersigned witnesses.
> 13th September, 1927.
>
> sgd. *Mohammad Hashim Dajani, Notary Public.*
> sgd. *Salim and Na'im Cotran Debtors.*
>
> Identifying Witnesses :
> Sgd. *Jabra Abdul Nur.*
> Sgd. *Sam'an Stabli.*

The debt was not paid on the due date, and on the 21st May, 1928 the deed was produced to the Notary Public and he was requested by the Appellant to notify the Respondents to pay the said sum. The notice was served on the Respondents on the 22nd May, 1928, and was in these terms :

Notarial Notice

> To Messrs. Salim and Na'im Cotran.
> A deed was produced to me, authenticated by the Notary Public of Acre, dated 13th September, 1927, No. 195/4092, signed by you, and containing an undertaking made by you to pay on 20th May, 1928, a sum of £P. 1428.40 piastres to Shafik Bek. Shouqair of Egypt. The fixed period expired without fulfilling your undertaking, by paying the said sum to their owner. Therefore, and by virtue of Art. 69 of the Law of the Notary Public, I hereby notify you, that you should pay the said sum to the Creditor within a period of 8 days as from the date of serving this notice upon you, otherwise legal steps will be taken against you.
> 21st May, 1928.
>
> Sgd. *Abdul Rahman Jarrah, Notary Public Acre.*

Various amounts have since been paid off and the balance of the capital is under collection by the Execution Officer. The Respondents declined to pay the interest on the amounts outstanding as from the date of service on them of the Notarial Notice. The Appellant sued them before the District Court of Haifa which dismissed the claim, holding that, since the deed contained no undertaking to pay interest, and since no interest had been claimed in the Notarial Notice, no interest was therefore payable, and the Court based its judgment on Art. 112 of the Civil Procedure Code. This article reads :—

> "If the contract be for the payment of a certain sum of money, and there be delay in making such payment, damages may be awarded at the rate of one per cent, per month (reduced to nine per cent per annum by the Law on the Rate of Interest) on the principal amount, and the creditor shall not be required to prove that he has suffered any loss. If no stipulation for the payment of interest be included in the contract, it shall be payable from the date of protest, if it was claimed in the protest, and otherwise from the date of presentation of the plaint".

A lengthy argument has been addressed to us that the presentation of a notarial notice and the application to the Chief Execution Officer are equivalent to the "presentation of a plaint". We do not agree. The terms of Art. 112 are very clear, and the words "presentation of a plaint", given their ordinary meaning, mean the entry of an action in the Court. It is true that in this case the Appellant was under no necessity to file an action, since on default of compliance with the Notarial Notice he could at once lodge the deed for execution in the Execution Office, following the procedure laid down in Art. 69 of the Law of the Notary Public. This however does not affect the situation, because if the filing of an action is not necessary, one cannot assume a fictitious action and a fictitious date for its filing, in order to bring the matter within the terms of Art. 112 with regard to the payment of interest.

The Appellant had his remedy. Since there was no undertaking in the deed to pay interest, he should have served a notarial notice claiming interest, either with the official notice claiming repayment of the capital sum of the loan, or separately. This he has not done, and we think that the District Court was right in dismissing his claim.

The Appellant in his argument has relied on the case of Said el Karmi *v.* Albert Far'oun, (Civil Appeal No. 75/34) This, however, concerned interest on a mortgage, and we do not think that it has any application in the matter now before us.

Though not entitled to interest from the date of the serving of the Notarial Notice, the Appellant would, we think have been right in saying

that the Court should have given him interest from the date of filing of his action in the District Court. This follows from Art. 112 of the Civil Procedure Code, and, indeed, the Respondents do not dispute this. We say "would have been right", because if he had claimed it, he would have been entitled to judgment for the amount. But he did not claim it in his action. In his plaint he claims interest from the 22nd May, 1928 to the 31st August 1937, only and in clause 6, he states — "the plaintiff reserves for himself the right of claiming interest on the balance of the debt as from 1st September, 1937 until complete payment". The statement of claim was filed on 9th September, 1937. He cannot now in this Court amend his statement of claim, by claiming something which he deliberately excepted in his original claim.

The appeal fails and must be dismissed with costs to include £P. 5.— Advocate's fees.

Delivered this 24 day of March, 1938.

Chief Justice.

CIVIL APPEAL No. 42/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

1. Shmuel Broza,
2. Haim Greenberg. APPELLANTS.

v.

Herzl Weinshinker. RESPONDENT.

Breach of contract — Delay in arriving at the Land Registry — Time not warranted by the contract — Notarial notice fixing new time for transfer — Finding of fact.

Appeal from the judgment of the District Court of Tel-Aviv, dated the 12th January, 1938, dismissed.

By the terms of a contract between Appellants and Respondent, Respondent undertook to transfer to the Appellants a plot of land and building within six months from the date of the contract. Appellants undertook to appear at the Land Registry, in order to accept transfer, upon the receipt of the registered letter from Respondent, sent fourteen days before the date fixed by the Respondent for transfer.

Respondent was unable to transfer the property within the six months for

causes beyond his control and in respect of which the contract provided that he should not be liable.

When the file was ready for transfer Respondent invited the Appellants to appear at the Land Registry on the 3rd March, 1937, in order to complete the transfer. Appellants did not appear on that date.

On the 8th March, 1937, Appellants sent a notarial notice to the Respondent, calling upon him to appear at the Land Registry on the 17th March, between the hours of 9 a. m. to 1 p. m. and transfer the property to their name.

On the 17th March, Appellants appeared at the Land Registry and waited for Respondent till 1 : 20 p. m. Almost immediately after they left, *i. e.* at 1 : 25 p. m. Respondent appeared at the Land Registry. The office hours of the Land Registry are between 7 : 30 a. m. to 1 : 30 p. m. The file was then ready and prepared for completion and Respondent was ready to transfer Appellant did not appear again on that day although the office was kept open till later than 1 : 30 p. m.

The Trial Court held that Appellants were not entitled, under the terms of the contract, to fix a time for transfer and that Respondent had been ready and willing to complete the sale.

HELD : Respondent had not committed a breach of the contract.

ANNOTATIONS : See the English and Empire Digest, Vol. XII, p. 313, cases under the heading "*(d) Time made of Essence of Contract by Notice*" and p. 324, case No. 3687 (*Tender*) ; and see the following Palestine cases : C. A. 35/33 (P. P. 8.iv.34, C. of J. 452) : *notarial notice not affecting liability of parties ;* C. A. 80/27 (P. L. R. 290, C. of J. 1781) : *new obligation cannot be imposed by notarial notice* and C. A. 25/28 (C. of J. 387).

FOR APPELLANTS : Eliash.

FOR RESPONDENT : S. Gratch.

JUDGMENT.

Frumkin, J. The main point in this case is whether the Respondent committed a breach by arriving at the Land Registry 25 minutes after the time fixed in the Notarial Notice of the Appellants, and 5 minutes after the Appellants left the Land Registry. The fixing of the time was not warranted by the contract. The Court below held that this delay does not constitute a breach and we are not prepared to interfere with this finding.

The appeal must therefore be dismissed with costs to include £P. 5.— advocate's fees.

Given this 24th day of March, 1938.

Puisne Judge.

HIGH COURT No. 13/38.

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

BEFORE : The Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

The Palestine Cigarette Co., Ltd. PETITIONER.

v.

1. Bejerano Bros.,
2. Registrar of Trade Marks. RESPONDENTS.

Trade Marks — "Alef", "Aloof" — Distinctive mark — Trade Marks Ordinance, sec. 6 — "Distinctiveness" defined — Registrar of Trade Marks v. W. & G. Du Gross, Ltd. — Garett's Application — Single letter or group of letters not distinctive.

Application for an order to issue to the second Respondent directing him to reject the application for the registration of a trade mark numbered 4624 in class 45, in respect of cigarettes, published in Supplement No. 3 of the Palestine Gazette No. 736 of the 11th November, 1937, at p. 123, and for further order and directions as may seem just and proper, allowed.

Respondents applied to register a trade mark which consisted of the word "Alef" in script running into a fanciful representation of the Hebrew character "Alef". The application contained a disclaimer in respect of the exclusive use of the word "Alef" or the Hebrew letter "Alef".

Applicants objected to the registration of the mark, *inter alia,* on the ground that it might infringe their registered trade mark "Aloof" and that it was not distinctive.

HELD : Reference should be made to English law for a consideration of the term "distinctive" and, in accordance with English authorities, a single letter or a group of letters are not distinctive.

Followed : Registrar of Trade Marks *v.* W. & G. Du Gross Ltd., 1913, Garett's Application, 1916, 1 Ch. A. C. 624.

ANNOTATIONS : The following Palestine decisions hear on the distinctiveness of trade marks : H. C. 104/35 (P. P. 24.iii.36) ; H. C. 110/35 (P. P. 30.iii.36).

See English and Empire Digest, Vol. 43, pp. 136 *sqq.*, Sec. 2 — *What Trade Marks Registrable* and in particular pp. 145 *sqq.*, sub-sec. 6 — *Any Other Distinctive Mark.*

FOR PETITIONER : Levin.

FOR RESPONDENTS :

No. 1. P. Joseph.

No. 2. No appearance.

JUDGMENT:

The Respondents to this application are seeking to register a trade mark which consists of the word "Alef" in script, running into a somewhat fanciful representation of the Hebrew character Alef.

The application was advertised under No. 4624, Class 45, Gazette No. 736, of the 11th November, 1937, and contained the following disclaimer :—

> "No claim is made by the Applicants to the exclusive use of the word "Alef" and the Hebrew letter "Alef"."

The Applicants before us object on the ground that the proposed mark may infringe their registered mark "Aloof" and is calculated to deceive, and also on the ground that —

> "The said mark which the First Respondent has applied to register is not adapted to distinguish goods of the First Respondent and does not consist of any characters, devices or marks or combinations thereof which have a distinctive character".

I will deal with the last objection first.

Section 6 of the Trade Marks Ordinance, Chapter 144, provides —

> "Trade marks capable of registration must consist of characters, devices or marks or combinations thereof which have a distinctive character".

The Ordinance gives no definition of "distinctive" but I think it should be given the English definition to which I am about to refer.

The use of letters as distinctive marks was considered in the House of Lords in the case of the Registrar of Trade Marks *v.* W. & G. Du Cros, Ltd., 1913 Appeal Cases, 624. Lord Parker in his speech, which constituted the leading judgment, said :—

> "My Lords, if either mark be registrable, it must be because it is a distinctive mark within the meaning of s. 9, sub-s. 5, of the Act. "Distinctive" is defined as meaning "Adapted to distinguish the goods of the applicant for registration from the goods of other persons". This definition is found for the first time in the Act of 1905, but the word "distinctive" was, I think, used in all the earlier Acts in the sense of "adapted to distinguish". The difficulty lies in finding the right criterion by which to determine whether a proposed mark is or is not so adapted. If, as is sometimes suggested, the mark is to be considered on the hypothesis that it will be admitted to registration, and in conjunction with the monopoly of user which such registration confers, I can imagine no mark which would not be adapted to distinguish the goods of the proprietor from those of other persons. Nothing could be better adapted for this purpose than some letter or combination of letters which no one else was at liberty to use. In my opinion, in order to determine whether a mark is distinctive it must be

considered quite apart from the effects of registration. The question, therefore, is whether the mark itself, if used as a trade mark, is likely to become actually distinctive of the goods of the persons so using it. The applicant for registration in effect says: "I intend to use this mark as a trade mark, *i.e.*, for the purpose of distinguishing my goods from the goods of other persons", and the Registrar or the Court has to determine before the mark be admitted to registration whether it is of such a kind that the applicant, quite apart from the effects of registration, is likely or unlikely to attain the object he has in view. The applicant's chance of success in this respect must, I think, largely depend upon whether other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark, or some mark nearly resembling it, upon or in connection with their own goods. It is apparent from the history of trade marks in this country that both the Legislature and the Courts have always shown a natural disinclination to allow any person to obtain by registration under the Trade Marks Acts monopoly in what others may legitimately desire to use. For example, names (unless represented in some special manner) and descriptive words have never been recognized as appropriate for use as trade marks. It is true that they became registrable for the first time under the Act of 1905, but only if distinctive, and they cannot be deemed distinctive without an order of the Board of Trade or the Court. This restriction does not apply to marks consisting of a letter or combination of letters, but before such a mark be accepted the Registrar or the Court has to be satisfied that it is adapted to distinguish the goods of the applicants from those of others. It need not necessarily be so adapted, and whether it is or is not so adapted appears to depend largely on whether other traders are or are not likely to desire in the ordinary course of their business to make use in connection with their goods of the particular letter or letters constituting the mark.

There seems no doubt that any individual or firm may legitimately desire in the ordinary course of trade to use a mark consisting of his or their own initials upon, or in connection with, his or their goods. The applicant company's cars are marked "W & G" because those are the initial letters of the christian names of the partners in the firm to whose business the applicant company has succeeded. The use of the initials of an individual or firm on the goods, packing cases, letter paper, and invoices of such individual or firm is common. Individuals whose names were William Green or Wallace Graham, or firms whose names were Weston and Gibbs or Wilcox and Gatherne, might desire to make use in this way of the letters WG of W and G, and it would be a strong thing to deprive them of the right to do so. It is to be observed that initials are even less adapted for trade mark purposes than names, and the latter (unless represented in a special manner) cannot be deemed distinctive without an order of the

> Board of Trade or the Court. Under these circumstances, I cannot think that the mark "W & G", whether in script or in block type, is in itself distinctive within the meaning of the Act".

In Garrett's application, 1916 1 Ch. at 451, in which it was sought to register the word "Ogee" Warrington L. J. said :—

> "But of course the discretion is a judicial discretion and must be exercised on reasonable grounds and not capriciously. The matter being now before the Court, the discretion is to be exercised by the Court. Are there, then, sufficient grounds for refusing the application ? I think there are. If the application was for the registration of the letters "O. G." it would plainly fail on the authority of the "W. and G." case referred to above. The word, though at the same time a dictionary word, represents the letters written out. Moreover, in considering questions of possibility of confusion or of deception regard must be had to sound as well as to sight, and the pronounciation of the word and of the letters is the same. If the goods of some one with the same initials were to be sold with the letters "O. G." upon them, persons asking for their goods as "O. G." might well obtain the plaintiff's goods and *vice versa*. The disclaimer of the right to use the letters themselves as a mark does not meet the case. It is from the sound that the possible confusion may arise. The application is in fact an attempt to use in another form initials which could not themselves be used, and I think it ought to fail".

It seems to me that these arguments are equally applicable to a single letter as to a group of letters and I do not think that the fact that the letters in question in the cases cited happened to be connected with the name of the Applicants seeking registration affected them.

In my opinion this principle should be applied by this Court and the registration should not be granted. It is unnecessary to deal with the other matters raised, and as I understand proceedings are pending between the parties I make no observation upon them.

The Applicants application is granted with costs. Advocate's fee LP. 5.—.

Delivered this 24th day of March, 1938.

Chief Justice.

LAND APPEAL No. 72/34.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khayat, JJ.

IN THE CASE OF :

1. Mahmoud Abu Hana,
2. Ahmed el Haj Mahmoud el Yehia,
3. Mohammad Mustafa el Omar,
4. Hassan Ayoub. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Lease of mirie in the name of Government — Village metruké — Goadby and Doukhan's Land Law — Intermediate class of of land deemed to belong to class to which it comes nearest — Registered land belongs to the category in which it is registered — Metruké need not be registered as such — Evidence of long usage — More land than is necessary for villagers' use — Land (Settlement of Title) Ordinance.

In allowing an appeal from a judgment of the Land Court of Haifa, dated the 26th June, 1934 :—

HELD : 1. If land is not registered in any category it is possible that its history and physical characteristics may be factors in determining its category, but if it is registered, *prima facie* it belongs to the category in which it is registered.

2. *Metruké* land need not be registered as such, nor is it necessary that it should be assigned by deed of grant or dedication.

3. Villagers may prove their right to land as *Metruké* by evidence of long usage as such but a village cannot, by such evidence, establish a claim to more land than is reasonably necessary for its needs.

ANNOTATIONS : *Cf.* L. A. 13/33 (P. P. 22.vi.34, C. of J. 811).

FOR APPELLANTS : Goitein.

FOR RESPONDENT : Ghussein.

JUDGMENT.

It seems that certain land in the villages of Tantoura is registered as *Miri* in the name of the Government.

On the 5th of May, 1930, the High Commissioner, on behalf of the Government, granted a lease for forty-nine years of a portion of this land to the Palestine Jewish Colonization Association. I understand that some of the land was swamp and the lessees had undertaken to drain it.

The inhabitants of the village claimed rights in the land, and with the object of settling those claims the Government brought proceedings in the Land Court, Haifa, against certain persons representing the village.

I do not understand the basis of the action, but broadly speaking the Attorney General was clearly acting properly in seeking to have the public rights ascertained.

As to certain lands there was no dispute and the Government was prepared to transfer them on payment of *bedl misl.*

The defendants (villagers) called evidence to show that land described as el Zour (or the Bass) were village pasture lands — and that rushes were also grown there. The area was not clearly defined and was claimed by them as *Metruké*.. The Government apparently said the land was *Mewat.*

The Land Court held that the land was not *Mewat,* but went on to find :—

> "It is, in fact, land of that indeterminate class which, as has been suggested in Cyprus, happens, as a result of the provisions of the Land Code, to belong strictly to none of the recognized categories of land. It has been held also in Cyprus that this kind of land should be deemed to be regulated by the law relating to that class of land to which it comes nearest. (Goadby & Dukhan on the Land Law in Palestine, p. 61).
> In the present case, this would be *Mewat* because it is admitted that the land has never been cultivated".

This seems to me to be artificial. If land is not registered in any category it is possible that its history and physical characteristics may be factors in determining its category, but if it is registered, *prima facie* it belongs to the category in which it is registered ; any other view would lead to a state of great confusion.

In my opinion the real question was, what amount, if any, of the land is *Metruké* of the village of Tantoura.

The Land Court took the view that none of the land is *Metruké* because there is no evidence of its assignment, but it went on to say :—

> "As the same time there is no doubt in our minds but that in fact both the Northern and Southern portions of the land have been used in the past by the inhabitants of Tantura for grazing their animals and for supplying reeds and rushes for their mat-making, and accordingly the inhabitants have a strong moral claim on the Government to a portion of the land sufficient for their needs in these two respects. We have not considered the question of whether the Northern portion will or will not be sufficient because in our view it is not within our competence to do so".

I do not think it is necessary that *Metruké* should be assigned by

deed of grant or dedication, or by entry in the Land Registry, and there must be many cases where land used and treated as *Metruké* is not registered as such.

I am of opinion that when the land is registered in the name of Government, and Government is the Plaintiff in the action,rights to village *Metruké* may be proved by evidence of long usage. On the other hand I do not think that by such evidence a village can establish a claim to more land than is reasonably necessary for its needs. I would add that I am not dealing with the special powers conferred upon a Settlement Officer under the Land (Settlement of Title) Ordinance, Chapter 80.

In my judgment this case should go back to the Land Court to ascertain what land has been used as villages *Metruké* by Tantoura, and what portion of that land the village reasonably requires.

The hearing of this appeal has been delayed because of attempts to reach a settlement. In my view this is essentially a case for an amicable settlement and I hope that renewed efforts will be made in the light of this judgment.

Delivered this 24th day of March, 1938.

Chief Justice.

HIGH COURT No. 15/38.

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

BEFORE : The Senior Puisne Judge and Frumkin, J.

IN THE APPEAL OF :

Dr. Mandelberg Rogalsky. — APPELLANT.

v.

Director of Medical Service, Jerusalem. — RESPONDENT.

Licence to practice medicine — Medical practioners Ordinance, sec. 4, as amended — Limitation on number of licences — Distinction between Palestinian citizens of various classes — Palestine Order in Council, sec. 17 — Palestine Citizenship Order in Council, sec. 8.

In allowing an appeal from an order of the Respondent, dated the 4th January, 1938, which was communicated to the Appellant by the Senior

Medical Officer, Department of Health, Jaffa, and in remitting the application to the Respondent with directions :—

HELD : The High Commissioner is not empowered to promulgate legislation by an ordinance which is at variance with an Order in Council ; and sec. 4 of the Medical Practioners Ordinance, as amended, which discriminate between Palestinian citizens by birth and Palestinian citizens which acquired their citizenship after the 1st December, 1935, otherwise than by birth, if the number of applicants for a licence to practice. medicine exceeds a certain maximum, is *ultra vires* sec. 8 of the Palestine Citizenship Order in Council.

FOR APPELLANT : Olshan.

FOR RESPONDENT : Crown Counsel (Bell).

JUDGMENT:

The Appellant applied to the Director of Health for a licence to practice medicine under Section 4 of the Medical Practitioners Ordinance. In the reply of the Director of Health to her application, she was told that no licence could be granted to her for the year 1938, but that she might apply to be considered for a licence during the year 1939. In order to understand the issue involved in her appeal to this Court from the decision of the Director of Health, it is necessary to consider the history of the legislation on this subject. By the Medical Practitioners Ordinance, which came into force on the 15th February, 1928, it was provided in Section 4, that the Director of Health should grant a licence to all applicants who are Palestinian citizens or had received permission to remain permanently in Palestine if they satisfied him that they were of good character and had studied medicine in a recognised school for 5 years and had obtained a recognised diploma. By an ordinance which came into force on the 30th of October, 1935, a new section 4 was substituted for the previous section Under the new section a distinction was made between persons who are Palestinian citizens by birth or who had become Palestinian citizens before the 1st of December, 1935, and persons who become Palestinian citizens after the 1st of December, 1935. The persons in the 1st category were entitled to be granted a licence by the Director of Health if they satisfied him on the matters already referred to. Persons in the second category were also entitled to a licence but by section 4A, a new section introduced by the amending Ordinance, the High Commissioner was given authority at the end of each year to prescribe the maximum number of licences which might be granted during the following year. The Appellant had not

become a Palestinian citizen until the end of the year 1937. She became a Palestinian citizen by marrying a person to whom a certificate of naturalization as a Palestinian citizen had been granted. As a consequence she fell into the second category above mentioned, and at the time when her application was refused she was informed that the refusal was based upon the fact that she was a person who had become a Palestinian citizen after the 1st of December, 1935, and that the maximum number of licences had already been allotted.

Mr. Olshan, who argued the appeal on her behalf, conceded that the amending Ordinance was an Ordinance which might be considered necessary for the peace, order and good government of Palestine and that therefore its validity could not be challenged on the ground that it was *ultra vires* of section 17 of the Palestine Order in Council, 1922. He argued, however, that the substituted section 4 and the new section 4A of the amending Ordinance were inconsistent with article 8 of the Palestine Citizenship Order, 1935, which reads as follows :—

> "A person to whom a certificate of naturalisation is granted by the High Commissioner shall, subject to the provisions of this Order, be entitled to all political and other rights, powers and privileges and be subject to all obligations, duties and liabilities to which a Palestinian citizen is entitled or subject".

He said that the effect of this article was to guarantee to all persons to whom a certificate of naturalization had been granted, the same rights and privileges as all other Palestinian citizens, but that the effect of the amending Ordinance was to discriminate between those who are Palestinian citizens by birth and those who obtained a certificate of naturalization after the 1st of December, 1935. Mr. Bell for the Director of Health, on the other hand, says that article 8 cannot be construed as an enactment to restrict the power of the High Commissioner to make such a distinction between Palestinian citizens as has been effected by the amending Ordinance.

It is clear that the effect of the Ordinance is that A, who is a Palestinian citizen by birth and who can satisfy the Director of Health on the matters above referred to, is entitled to the privilege of being granted a licence to practice medicine ; while B, who has been granted a certificate of naturalization after the 1st of December, 1935, and who similarly satisfies the Director may be refused a licence on the ground that the number of applicants in his category exceeds the maximum prescribed by the High Commissioner. This certainly seems to show that in this respect a person who has been granted a certificate of naturalization is not entitled to the same privilege as a Palestinian citizen by birth. The whole object of article 8 was to ensure that

there should be no such discrimination as this, and that there should be the same law for all Palestinian citizens no matter in what way their nationality was acquired. The amending sections are in conflict with the principle embodied in the article. In my view, the High Commissioner is not empowered to promulgate legislation by an Ordinance which is at variance with a provision of an Order in Council, and the result must be that Section 4A of the Ordinance which gives the High Commissioner authority to fix a maximum, and gives the Director of Health an unfettered discretion to refuse a licence to a person who has become a Palestinian citizen otherwise than by birth after December 1st, 1935, if the number of applicants exceeds the maximum is to be regarded as *ultra vires*. This being so, the Appellant is entitled to succeed in her appeal. The order of this Court should be, in my opinion, that the Director of Health should deal with her application as if the words "subject to the provisions of Section 4A of this ordinance" were absent from Section 4, sub Section 3 of the Ordinance. The Appellant will have the costs of her appeal, to include LP. 5.— advocate's fees.

Delivered this 25th day of March, 1938.

Senior Puisne Judge.

I concur and have nothing to add.

Puisne Judge.

CIVIL APPEAL No. 34/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Miller Neuman & Cargelli "Installator". APPELLANTS.

v.

David Haim Levy. RESPONDENT.

Workmen's compensation — Evidence to justify finding of fact by arbitrator — Sub-contractors — Payment at piece rate — "Workman".

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 13th December, 1937 :—

HELD : 1. There was evidence before the arbitrator on which he could

find that the Respondent was a workman. Whether he was so or not was a question of fact.

2. Being paid at piece rate is not, in Palestine, inconsistent with the status of a workman.

ANNOTATIONS: The definition of a workman is statutory in Palestine and it is therefore doubtful how far English authorities which have, of recent years, considerably enlarged the scope of the term, are applicable in interpreting the Ordinance in this respect. See C.. A. 135/33 (P. P. 29.v.34, C. of J. 708): *legislation in pari materia.*

FOR APPELLANTS: Feiglin, Levitzky.

FOR RESPONDENT: Avniel.

JUDGMENT:

This is an appeal from the Haifa District Court, in a Workmen's Compensation Case, on a point of law stated by the R/President in this form:—

> "Whether there was sufficient evidence before the Arbitrator to support the finding that the Appellant was a "Workman" within the meaning of the "Workmen's Compensation Ordinance".

The facts so far as relevant are as follows: The Appellants for the purpose of some work which they had undertaken to do arranged with a Mr. Braverman to construct a cess-pit and to dig a channel in connection therewith. Braverman, who thereupon became a sub-contractor, arranged with a Mr. Settner, who is the secretary of a Haifa Labour Exchange, to supply workmen for the job, and Mr. Settner detailed to this work certain men including the Respondent. In the course of the work, the Respondent was seriously injured. The Respondent and the other men with him were paid a lump sum for the construction of the cess-pit, and at piece rates for the construction of the channel and used their own tools.

The Appellants' argue that the Respondent and his fellow workmen were sub-contractors and not "workmen" within the meaning of the Workmen's Compensation Ordinance.

Every case of this nature depends very largely upon its particular facts, and one of the most important factors is the condition of work in Palestine and the methods used — the methods adopted by labour here. It is a matter of common knowledge that a vast amount of building work is done by groups of workmen paid at piece rates, and not at daily rates on particular jobs. The Appellants admit that if the Respondent had been paid a daily wage, he would undoubtedly have been a "workman" within the meaning of the Ordinance. Under the normal conditions of work in Palestine, we cannot see that being

paid at piece rates makes him any less a "workman". Neither is the position altered because, in response to Braverman's request, he was offered the work by Settner, nor the fact that he did not know Braverman.

There was evidence before the Arbitrator on which he could find that the Respondent was a "workman" ; whether he were so or not is a question of fact. If there were evidence both ways, then it was for the Arbitrator to make his decision. He has decided that the Respondent was a "workman" within the meaning of the Ordinance, and this Court cannot interfere.

We think that the Arbitrator and the learned R/President rightly directed themselves in law, and it follow that this appeal must be dismissed with costs and LP. 5.— Advocate's fees.

Delivered this 28th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 43/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :

1. Abdallah Es-Saalimi,
2. Salem Es-Saalimi,
3. Musa Ahmad Es-Saalimi,
4. Mohammad Es-Saalimi. APPELLANTS.

v.

1. Ahmad Khalil Fayyad,
2. Mohammad Khalil Fayyad. RESPONDENTS.

Execution — Execution proceedings on property other than that of judgment debtor — Questions of fact not for determination of Appellate Court.

In allowing an appeal from a judgment of the Land Court of Jaffa, dated the 31st January, 1938, and in remitting the case to the lower Court to determine the issue of fact :—

HELD : It was impossible for the Appellate Court to decide what were the Appellants' rights to the property and whether execution proceedings extended to it, it being a question which was partly one of fact.

FOR APPELLANTS : Saleh.
FOR RESPONDENTS : Khalafawi.

JUDGMENT.

We are of opinion that this appeal should be allowed.

It seems that there is a dispute as to whether or not a certain hakura (garden) as to which the Appellants allege that they have a kushan which shows the boundaries and of which I understand them to say they are in possession. (*Sic.*) On the other hand, it is alleged that it formed part of certain lands which were the subject of execution proceedings.

It is quite impossible for us to decide this question which is partly one of fact. We think that the case should go back to the Land Court to enquire fully into the facts and to acertain whether the execution proceedings extended to the Appellants' garden, and to ascertain what are the Appellants' rights under their kushan.

The judgment of the Land Court will be set aside and the case remitted for retrial.

Costs to abide the event.

Delivered this 28th day of March, 1938.

Chief Justice.

CRIMINAL APPEAL No. 19/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

1. Rabah Abdel Rahman Hassaan,
2. Mahmoud Ahmad el Hafi,
3. El Abed Mohammad Abdel Wahhab. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Attempted robbery, theft — Criminal Code Ordinance, secs. 288, 288(2), 270 *and* 23 ; *Firearms Ordinance — Extra judicial confessions — Caution — Evidence Ordinance, sec.* 9 *— Free and voluntary confessions — Evidence of co-accused — Danger of convicting on extra judicial confession alone — R. v. Sykes, R. v. Baskerville — Sentence.*

In dismissing an appeal from a judgment of the District Court of Jaffa, dated the 27th January, 1938, whereby Appellants were convicted of attempted robbery

contrary to secs. 287, 288(2) in conjunction with sec. 29 of the Criminal Code Ordinance, 1936, and sentenced to ten years' imprisonment each :—

HELD : It may be dangerous to convict on an extra judicial confession alone, and in order to enable the Court to convict upon it, it is necessary to show that a crime has been committed and then to apply common sense tests to determine whether the confession is true. Corroboration in the full sense is not required.

Followed : R. *v.* Sykes (1913), 8 Cr. A. R. 233.

ANNOTATIONS : "The confession of the party is evidence, but the worse sort of evidence". (*Per* Holt, C. J. — *anon.*, [1701], 12 Mod. Rep. 602).

"It is doubtful whether a crime can be established without other evidence than that of the prisoner's confession". (R. *v.* Edgar, quoted in English and Empire Digest, Vol. XIV, p. 438, no. 4622 : and see cases following *ad.* 4639).

On voluntary confessions generally, see English and Empire Digest, Vol. XIV, pp. 410 *sqq.*, sub-secs. 4—8.

FOR APPELLANTS. : Goitein.
FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT.

This is in itself a simple case, but it raises several important points which it is well should be made clear. All three Accused were charged with attempting to commit robbery contrary to Sections 287 and 288 (2) of the Criminal Code Ordinance on two occasions, and with theft contrary to Section 270 and 23 of the Criminal Code Ordinance on the night of 2—3/9/37 at Ramleh, and Accused No. 1 and No. 2 with possession of firearms contrary to the Firearms Ordinance on the 6th of October, 1937, but owing to the limitation of the Court's jurisdiction, they were convicted on the first two counts only, that is, of attempted robbery. The Accused all pleaded not guilty.

The main evidence against them consisted of extra judicial confessions which each had made, as to which at the trial Accused No. 1 said : "I made a statement to the Police. This is it. In that statement I told lies because they beat me". Accused No. 2 said : "I did not make a statement to the Police. I was beaten by the Police". And Accused No. 3 said : "I did not give a statement to the Police. I was told to put my thumb print. I thought it was a bail bond. I was beaten by the Police".

The Court of Trial found as to Accused No. 1 and No. 2, that "they were cautioned and both made voluntary statements to the Police, in the course of which they admitted they had been in the party who attempted to rob the houses of the above named witnesses", and as

to the other Accused they found — "On 5.9.37 Accused No. 3 was arrested, and after having been cautioned, made a statement to the Police".

Mr.Goitein argued before us that even if admissible these confessions and the other evidence are not enough to justify the conviction, and that the Court of Trial misdirected themselves concerning the confessions.

The provisions of Section 9 of the Evidence Ordinance dealing with confessions are clear, and in practice the Courts have applied the English tests in order to ascertain if a confession was free and voluntary.

In this case it seems that the Court was satisfied that the confessions were free and voluntary. The question therefore arises — how far should the Court act upon these confessions in the light of the facts of the case.

It is clear that the evidence against each Accused must be considered separately, and that the confession of each Accused is evidence against him only, and not against the others.

It is true that the Court, speaking of Accused No. 3's statement said that in it "he confirmed the statement made by No. 1 and 2 Accused", but by that I understand them to mean that he told substantially the same story and not, as I think, appears from the later part of the judgment, that they thought his admission corroborated that of the others.

It may be dangerous to convict on an extra judicial confession alone, and in order to enable the Court to convict upon it, it is, in my opinion, necessary to show that a crime has or may have been committed, and then to apply, if I may so call them, common sense tests such as are set out in R. *v.* Sykes, C. A. R., Volume VIII, at pages 236 and 237. The passage is as follows :—

> "The main point, however, is one independent of all these details, the question how far the jury could rely on these confessions. I think the Commissioner put it correctly ; he said : "A man may be convicted on his own confession alone ; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it. But seldom, if ever, the necessity arises, because confessions can always be tested and examined, first by the police, and then by you and us in Court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true ? is it corroborated ? are the statements made in it of fact so far as we can test them true ? was the

> prisoner a man who had the opportunity of committing the murder ? is his confession possible ? is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us ?"

I think it is clear from the report as a whole that the learned Judge is not using "corroborated" in the full sense of R. *v.* Baskerville. The facts are not very fully set out, but at page 235 it is stated :—

> "The main evidence against the Appellant was his own statements ; the confession to Haigh was made in language of great obscenity and is quite unreliable ; the next statement was made in the cells and was signed by him, and must cary considerable weight ; then he gave information as to where his trousers and knife were hidden ; then he made further statements retracting his confessions, and in one of them saying that a man named Gedney could prove an alibi".

In the case before us the Court found :—

> "The Accused have given evidence on their own behalf denying any connection with the offence. We do not believe their testimony. On the contrary we are abundantly satisfied from the evidence produced by the prosecution that their statements to the Police are correct and true account of what happened on the night in question and we therefore find them guilty of attempted robbery with violence contrary to Sections 287 and 288(2) of the Criminal Code".

Applying the tests which I have stated, was the Court justified in coming to that conclusion ?

There was evidence that attempts were made by some armed men to rob the houses in question. The Accused were local men. The stories in their confessions were certainly possible, and so far as Accused No. 1 and No. 2 were concerned they were borne out by the production of a rifle and revolver, and on the whole the stories are consistent with the ascertained facts.

I see no reason, therefore, why the Court should not have acted upon them, and the appeal will be dismissed.

The sentences imposed are the maximum for the offence, and on the whole we do not think that the facts warrant the maximum. We therefore reduce them in each case to one of seven years' imprisonment.

Delivered this 28th day of March, 1938.

Chief Justice.

HIGH COURT No. 18/38.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Morgan Inshatow. PETITIONER.

v.

Registrar of Patents and Designs. RESPONDENT.

Patents — Refusal of Registrar to accept specifications without amendments — Trade Marks Ordinance, secs. 8(1), 51(*a*) *and* (*f*) *— Appeal from Registrar's decision — Jurisdiction of High Court.*

In refusing an application for an order to issue to the Respondent, directing him to show cause why a patent should not be granted in respect of Patent Application No. 930, upon the terms prayed by Petitioner :—

HELD : 1. Respondent's decision not to accept the specification without amendment was an order which he was entitled to make. Petitioner could have appealed to the District Court against the said order. 2. The High Court never assumes jurisdiction where there is another court having it.

ANNOTATIONS : 2. See annotations and judgment in H. C. 12/38 (1938, 1 S. C. J. 111).

PETITIONER : In person.

FOR RESPONDENT : *Ex parte.*

ORDER.

This application must fail. The petitioner asks us as the High Court to order the Registrar of Patents not to do or to do certain things. It is obvious from the documents of 22nd November, 1937, and 24th December, 1937 that the Registrar refused to accept the Petitioner's specification without amendment — in fact the document of the 22nd November is headed "Decision of Registrar" and it is certainly an order. That the Registrar had the power to require amendments is clear from Section 8(1) of the Ordinance. If the Petitioner objected to the Registrar's order he had a right of appeal to a Court under Section 51(2)(a) or (f). But the Court referred to is the District Court and not the High Court, which never assumes a jurisdiction where there is another Court having jurisdiction.

The application is refused.

Delivered this 28th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 14/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khaldi and Khayat, JJ.

IN THE APPEAL OF :

1. Nimr Jum'a el Barsan,
2. Salem Oudeh Issa. APPELLANTS.

v.

1. Mohammad Abu Jreiban,
2. Salem el Nweiri. RESPONDENTS.

Grounds of appeal — Statement of advocate.

In dismissing an appeal from the judgment of the Land Court of Jerusalem, dated the 23rd December, 1937 :—

HELD : The fact that the advocate had made a statement which he should not have made is not a ground of appeal.

FOR APPELLANTS : Haddad.

FOR RESPONDENTS : Shawwa.

JUDGMENT:

The one only ground in this case urged by advocate for the Appellants is that the advocate at the previous hearing said something that he should not have said, but as has been pointed out, if an argument of that sort should be allowed, there will be no end to litigation.

No other point having been raised, the appeal is dismissed with costs and LP. 5.— advocate's fees.

Delivered this 29th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 15/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Khaldi, JJ.

IN THE APPEAL OF :—

1. Mohammad Said el Kassam,
2. Mahmoud Mohammad Barakat,
3. Mustafa Mohammad Barakat,
4. Yousef Mohammad Barakat. APPELLANTS.

v.

Younes Daoud el Younes. RESPONDENT.

Contradictory claims — False claim intentionally made — Equitable sale, L. A. 1/36 — Equitable title — Long possession not exceeding ten years — Specific Performance — P. C. 47/32, P. C. 1/35.

In dismissing an appeal from a judgment of the Land Court of Nablus, sitting in its appellate capacity, dated the 8th December, 1937, confirming the judgment of the Land Settlement Officer, Tulkarm Settlement Area, dated the 20th January, 1937 :—

HELD : (Khaldi, J. dissenting).

1. Appellants had made contradictory claims and their statement of claim was deliberately false in order to embarass their oponent. The lower Courts had rightly dismissed the claim on this ground.

2. Respondent, having paid in full the price agreed upon and having remained in possession for a long period, had acquired an equitable title which entitled him to registration.

Followed : L. A. 1/36 (P. P. 30.x; 1—5, 8.xi.36, C. of J. 1934—6 340, Ha. 12, 26.xi; 10.xii.36).

P. C. 47/32 (P. L. R. 831, C. of J. 406).

P. C. 1/35 (P. P. 22.i.36, C. of J. 1934—6 331, Ha. 20.ii.36).

ANNOTATIONS : "Barrani" sale — *i. e.*, a sale outside the Land Registry.

The authority of L. A. 58/25 (C. of J. 1777 *sub. num.* 88/25), to the effect that there is no specific performance in Palestine, was first challenged in L. A. 1/36(*supra*) where, however, the Court was equally divided. In the present case, again, the Court was divided and the question of specific performance arose only indirectly out of the appeal. The question is therefore unsettled.

FOR APPELLANTS : Moghannam.
FOR RESPONDENT : Zueiter.

JUDGMENT:

This is an appeal from a judgment of the Land Court of Nablus dismissing an appeal from a judgment of the Tulkarm Settlement Officer.

The case is rather confused and even in this Court the Appellants did not seem to be very clear in their arguments. Before the Settlement Officer they counter-claimed for the land in dispute, alleging that the land had been sold by bei' bilwafa nearly ten years ago. In their pleadings before the Settlement Officer they altered this claim stating that the sale was a *"barrani"* one. Various other contradictory statements regarding the nature of the transaction were made at intervals, but finally they seem to have agreed that the transaction was an agreement to sell, and could therefore be avoided. They admitted that the original claim was wrongly made out, and that this was

intentionally done, so as to force the Respondent to produce the deed. The Settlement Officer dismissed their counterclaim on the ground that they had made a claim which they knew to be false, and since the Respondent had been in possession for a number of years, ordered registration of the land in his name.

The Appellants appealed to the Land Court which dismissed the appeal on substantially the same grounds. The Appellants have now come to this Court. Here they have agreed that the statement in the original counterclaim was only technically wrong, but much of whatever force this argument might have had is destroyed when they go on again to say that they had no other alternative to force the Respondent to produce the deed of sale or agreement for sale. But no one is entitled knowingly to make a false statement in order to embarass an opponent. Alternatively, and somewhat contradictorily they advance the plea that they are illiterate fellaheen and are unacquainted with the niceties of legal forms and procedure. This argument, I confess, fails to impress me. One does not need a knowledge of legal matters to be honest and tell the truth.

Even here in this Court they are again not too clear as to what the nature of the transaction was. First of all they say that it was a mortgage, and then almost in the same breath, that it really was a contract to sell. But when the Respondent brought forward the argument that the transaction was an equitable sale, and asked this Court to hold that the principles enumerated by one of the Judges in the case of Haj Hassan Hammad *v.* Latin Patriarch (L. A. 1/36) should be applied, they sought to distinguish this latter case, on the ground that there was an agreement for sale, whereas in the present case there was a void sale.

In view of these facts and circumstances, I frankly cannot see what other course the Courts below could have taken. It is all very well to say that Settlement Officers exist to administer justice and they must not be too technical in matters of procedure. The basis of justice is frankness and honesty on the part of those who seek it, and I cannot regard a deliberate false statement as a mere technicality. Neither can parties expect much sympathy from a Court when they continually change the nature of their claims and arguments according to what they consider will best be to their advantage, however contradictory their arguments may be, I think that the Courts below were right in dismissing the Appellants' case, and in my view this appeal should equally be dismissed.

This, as I see it, disposes of this appeal but since, however the

question of an equitable title has been raised, it must be dealt with, so that if this case should be taken further, all the arguments advanced will have been considered and a ruling given on them.

The Respondent's case on this particular point is that, having paid in full the price agreed upon, and having been in possession of the land in dispute, for a period which, though not exceeding ten years, somewhat nearly approaches it, he has acquired a good equitable title to the land, and that since Settlement Officers as well as Land Courts are instructed to pay regard to equitable as well as legal claims, he is entitled to be registered as the owner, and he quotes in support of his claim the judgment of the Senior Puisne Judge in Hammad's case (*supra*). The Appellants' answer is that there are numerous judgment of the Supreme Court to the contrary, and that the doctrine of specific performance is not recognised in Palestine.

In Haj Hassan Hammad *v.* The Latin Patriarch (*supra*) Manning J. reviewed in detail the Palestine Law on the subject of land transfer in Palestine, considered the effect of Article 46 of the Palestine Order-in-Council 1922, and two cases from the Palestine Courts which came before the Privy Council namely Abdullah Bey Chedid and others *v.* Tennenbaum (P. L. R. 831) and Sheikh Suleiman Taji *v.* Michel Ayoub and others (Privy Council Appeal No. 1 of 1935). He also dealt with certain other cases decided by this Court which had been referred to in the course of the arguments. I do not propose to cover the same ground again — it would be unnecessary and superfluous — but the conclusions at which he arrived were that equitable rights to land do exist in this country on the same principles as in England. In para 38 of his judgment he said this :—

> "To sum up, there was a valid agreement for the sale of land by the appellant to the respondent. The respondent paid the purchase money, he was let into possession, and at the time of action brought had been in possession for five years. Owing to the default of the Appellant's agent, certain provisions of the law were not complied with with the result that in law the appellant still remains the owner of the land. If the respondent is to be dispossessed now it is clear that damages will not afford an adequate remedy. There has been no default on the part of the respondent. He has thus an equitable right to the land and is entitled to sue for specific performance, and this is not affected by any of the penalty clauses in the agreement. Against any claim for the land by the appellant, the respondent has a good defence in equity".

In this present case now before us, the facts are almost exactly similar — there was an agreement to sell, the whole of the purchase price was paid by the Respondent — the Appellants let the Respondent

into possession and he has been in possession for nearly ten years. In such circumstances, and following the judgment of Manning J. in Hammad's case, and I respectfully agree with his conclusion and statement of the law *in toto,* it seems to me that as against the Appellants the Respondent has a good equitable title to the land in dispute.

There is only one further point to which I must refer. The Land Court said in the course of the judgment now under appeal "Upon these facts and in other circumstances if Plaintiff tenders the purchase price and damages, he might be allowed to go back on his contract and claim the land back". But in fact, as the Land Court found, no money was tendered and, therefore, holding as I do on the main issue in this case, it is unnecessary in my opinion to say anything further about this point.

For these reasons, in addition to those given by the Land Court, I think that this appeal should be dismissed. As my brother Mustapha Bey holds a different opinion the Court is equally divided. The result is that the appeal must be dismissed with costs LP. 5.— advocate's fees.

Delivered this 29th day of March, 1938.

British Puisne Judge.

CIVIL APPEAL No. 17/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

Anish bint Hassan Hamideh. APPELLANT.

v.

1. Chief Execution Officer, Haifa,
2. Mohammad Baradeh Abbasi,
3. Mohammad el Kalla,
4. Shehadeh Assad Khoury. RESPONDENTS.

Sale in execution Allegation of collusion and fraud not properly investigated — Execution Officer dealing with matter in dispute prematurely.

In allowing an appeal from a judgment of the Land Court of Nablus, sitting at Safad, dated the 13th October, 1937, in an action to set aside the registration on land sold in execution :—

HELD : Appellant had alleged collusion and fraud. It also appeared that the Execution Officer dealt with the matter before the delay fixed by the Chief Execution Officer. The judgment of the trial Court was not clear and the matters raised would have to be investigated.

APPELLANT : In person.
FOR RESPONDENTS : Cattan.

JUDGMENT:

It is clear that in the Statement of Claim the Plaintiff made allegations of collusion and fraud, and it also appears that she alleges that the Execution Officer dealt with the matter before the three days provided for in the Chief Execution Officer's order of 15.9.32 had expired. We do not understand the judgment of the trial Court in respect of these matters.

Mr. Cattan, on behalf of the Respondents, states that they desire the fullest investigation. We agree that in the interests of all concerned the facts of this case should be throughly investigated.

We therefore set aside the judgment and remit the case to the Land Court in order that it may go fully into the facts and make findings thereon and give a judgment accordingly.

Costs to abide the event.

Delivered this 30th day of March, 1938.

Chief Justice.

CIVIL APPEAL No. 18/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

Nicola Schmidt, APPELLANT.

v.

Sheik Mustafa el Khairy. RESPONDENT.

Land Court Rules, 1921 — Judges disagreeing — Third judge to be called in.

In allowing an appeal from the judgment of the Land Court of Jaffa, dated the 23rd December, 1937, and remitting the case to the lower Court with directions :—

HELD : The Land Court Rules are still applicable to Land Courts and in the event of a disagreement between two judges, a third judge should be called in to decide the issue.

Followed : L. A. 33/36 (1937, 1 S. C. J. 351, 1 Ct. L. R. 27, P. P. 22.x.37).

ANNOTATIONS : *Cf.* the judgment of the Jaffa District Court in the case of L. 35/35 (P. P. 30.xi.37), turning on the same question.

FOR APPELLANT : Atalla.
FOR RESPONDENT : Moghannam.

JUDGMENT:

This Court, constituted as it happens to be today, decided in April, 1937, that the provisions of the Land Courts Rules, 1921, are still applicable to Land Courts, and this is the law until this view is overruled by a higher authority.

The judgment dismissing the action is set aside, the case remitted, and the Land Court is directed to call in a third judge and to decide the issue, with costs and LP. 5.— advocate's fee.

Delivered this 30th day of March, 1938.

Chief Justice.

CIVIL APPEAL No. 19/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :

Ahmad Mahmoud Esh-Sharif. APPELLANT.

v.

Widad Shukri El-Husseini. RESPONDENT.

Appeals from decisions of Registrar — Or opposition — Registrars Ordinance, sec. 6(b).

In dismissing an appeal from a judgment of the Registrar of the District Court of Jaffa, dated the 11th November, 1937 :—

HELD : No appeal lies under the provisions of the Registrars Ordinance from a decision of the Registrar under sec. 6(b). The Appellant's proper remedy was by way of opposition.

FOR APPELLANT : Aweida.
FOR RESPONDENT : Cattan.

JUDGMENT.

This is an appeal from an order made by the Registrar of the District Court, Jaffa, under Section 6(b) of the Registrars Ordinance, 1936.

The Respondent objects to the appeal on the ground that no appeal lies under the provisions of section 8 of that Ordinance and that the Appellant's remedy was by way of opposition.

We think that that objection is well founded.

The appeal will therefore be dismissed with costs, Advocate's fees LP. 5.—.

Delivered this 31st day of March, 1938.

Chief Justice.

CIVIL APPEAL No. 40/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :

Government of Palestine. APPELLANT.

v.

The Greek Catholic Church of Haifa, represented by His Grade Bishop C. Hajjar. RESPONDENT.

Action for ownership — Evidence of one party only heard — Other party entitled to call evidence.

In allowing an appeal from a judgment of the Land Court of Jaffa, dated the 25th January, 1938, and in remitting the case to the lower Court to hear evidence and give a fresh judgment :—

HELD : In a case such as this, if a party is allowed to bring evidence to prove certain allegations, the other party is entitled to call evidence to disprove them.

ANNOTATIONS : See also C. A. 9/38 (8.iii.38).

FOR APPELLANT : Salant.

FOR RESPONDENT : Asfour.

JUDGMENT:

This is a case which has unfortunately been dragging on for some time and in which Government did not make its position clear.

It seems from the judgment that the Land Court has found that the Plaintiff has established his ownership of the land and that Court made a declaration of ownership to the land. Before they did so, they heard the evidence of the Plaintiff. Despite an application by the advocate for the Defendant, the Court refused to hear the evidence he was prepared to produce.

We think that in a case such as this, if one party is allowed to bring evidence to prove certain allegations, the other party is entitled to call evidence to disprove them.

The judgment of the Land Court will therefore be set aside and the case remitted to it to hear the evidence of the witnesses named by the Defendant, and any other evidence of the Plaintiff that it may consider necessary, and in the light of such evidence to give a fresh judgment.

Costs to abide the event.

Delivered this 31st day of March, 1938.

Chief Justice.

P. C. L. A. 2/35.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Senior Puisne Judge and Frumkin, J.

IN THE APPLICATION OF :

1. Nathan H. Gordon,
2. Dr. Bernard Joseph,
   Administrator of the estate of the late
   Asher Pierce. PETITIONERS.

v.

1. Nissan Aronowitch,
2. The heirs of the late Jacob Valero, other
   than Mrs. Menucha Valero. RESPONDENTS.

Final leave to appeal to Privy Council — Palestine (Appeal to Privy Council) Order in Council, Art. 24 — Defective state of record — Failure to prosecute appeal — Certificate of non- prosecution.

In granting a certificate of non-prosecution under Art. 24 of the Palestine (Appeal to Privy Council) Order in Council, 1924, on Petitioners' motion :—

HELD : A certificate of non-prosecution would be granted in view of the fact that the appeal had not been diligently prosecuted.

ANNOTATIONS : Earlier proceedings in this case : C. A. 12/33 (P. P. 18, 20.iii.35, C. of J. 449), C. D. C., Ja., 231/32 (P.P. 29.xii.32). To the same effect: P. C. L. A. 4/32 (2 P.L.R. 196, P.P. 22.xi.34, C. of J. 1546).

FOR PETITIONERS : B. Joseph.
FOR RESPONDENTS : No. 1. — Smoira.
No. 2 — No appearance.

O R D E R :

This is an application under Art. 24 of the Palestine (Appeal to Privy Council) Order in Council. The relevant dates are that final leave to appeal was granted in November, 1935. In May of the following year one of the two Appellants died, and in September the same year, Dr. Bernard Joseph, who was the advocate of the surviving Appellant, was appointed administrator of the Estate of the deceased Appellant.

No steps appear to have been taken with regard to the despatch of the record. In July, 1937, one of the Respondents made an application under Art. 24. It was discovered then that the record was defective. No person had been substituted for the deceased Appellant. The application was accordingly dismissed. The fact that the application was made must have made it clear to the surviving Appellant, that the record was defective, and that had the record not been defective, the application had every chance of succeeding. However, they took no steps to have the defect put right.

One of the Respondents then asked for the amendment of the record in order to enable him to be in position to apply to the Court for a certificate of non-prosecution. This application was made in December, 1937, and was granted in February, 1938. As soon as this Respondent had secured the amendment of the record he made a further application under Art. 24.

From what has been said we think that there is no necessity to dwell on the fact that this is the kind of delay which is contemplated by Art. 24. For ten months after the appointment of the administrator of the deceased Appellant no steps were taken either by him or by the surviving Appellant and when their attention was called to the defective state of the record they took no steps to put it in order. We think that this is a case in which a certificate should be issued under Art. 24 and we direct that a certificate be issued.

We allow costs of the Appeal to the Respondent, as well as the costs of the application to include LP. 5.— advocate's fees.

The security submitted by the Appellants may be returned to them when the costs have been paid.

Delivered this 17th day of March, 1938.

Senior Puisne Judge.

CRIMINAL APPEAL No. 17/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Mordechai Ben Yacob Schwartz. APPELLANT.

v.

The Attorney General. RESPONDENT.

Murder — Circumstancial evidence — Inferences drawn therefrom — Expert witnesses — Criminal Code Ordinance, sec. 216 — Onus of proof — Premeditation, preparation — Resolution, cold blood and preparation — Scheinzwit's case.

In dismissing an appeal (Frumkin, J., dissenting) from a judgment of the Court of Criminal Assize sitting at Haifa, dated the 28th January, 1938, whereby Appellant was convicted of murder, contrary to sec. 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : 1. Circumstancial evidence is as good as direct evidence but the inferences drawn from the facts must point to the guilt of the accused only and without any reasonable doubt.

2. The onus of proving premeditation is on the Prosecution. If a man shoots at the head of another who is asleep, with a rifle, at close range, the Court is entitled to draw the inference that he had resolved to kill him.

3. Of the three elements of the offence, *viz.* : resolution, cold blood and preparation, the first two are rarely present without the third and the evidence required to prove the first two will normally prove the third.

4. Preparation need not consist of physical acts only and may be proved by acts subsequent to the actual killing.

Distinguished : A. G. v. Scheinzwit.

ANNOTATIONS : This decision is followed, on the question of premeditation, in CR. A. 41/38 (12.iv.38).

1. *Circumstantial evidence* : Thus, circumstantial evidence may be used in corroboration (CR. A. 96/37, P. P. 12.vii.37, 2 Ct. L. R. 108, Ha. 18.xi.37). As regards its admissibility in criminal cases, and its cogency, see The English and Empire Digest, Vol. XIV, p. 358, cases Nos. 3791–3792. See also Vol. XXII, p. 53, case No. 297. CR. A. 73/33 (P. P. 31.x.33, C. of J. 818) — *Insufficiency of circumstantial evidence.* ...

2. *Premeditation* : See English and Empire Digest, Vo. XV, p. 770 (*passim*) — *Malice aforethought,* and see also Vol. XIV, pp. 366 *sqq*. Sec. 4. Palestine authorities : A. A. 2/30 (P. L. R. 441, C. of J. 767) — *No premeditation in the absence of cold blood ;* A. A. 2/26 (P. L. R. 92, C. of J. 540) — *Presumption of intention ;* A. A. 6/33 (P. P. 22.vi.33, C. of J. 575) — *Proof.*

3. *Cold blood* : A. A. 2/30 (*supra*).

FOR APPELLANT : Eliash, Abcarius Bey, Kaiserman.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT.

Copland, J. The Appellant in this case was convicted by the Assize Court, sitting at Haifa, of the premeditated murder of a fellow-constable, Mustafa Houri.

The evidence in this case has been said to be entirely circumstancial, but it is for that reason none the less effective. Circumstancial evidence is as good as — possibly in many cases better, particularly in this country — than direct evidence, but circumstancial evidence of course gives rise to inferences to be drawn from the facts that are proved, and, as it has been rightly said, these inferences must point in one direction only, namely, to the guilt of the accused person, without any reasonable doubt, or without any other supposition being reasonably possible.

The judgment of the learned Chief Justice has been subjected to a minute and microscopical examination and it has been argued with considerable ability that the inferences which he drew from the evidence before him were not justified, but no fault whatever can be found with the judgment, which is a most careful one, reviewing and analysing the evidence in detail, and giving the benefit of every doubt to the Appellant. We are of opinion that, on the evidence which there was before the trial Court, that Court was fully justified in coming to the conclusion that the Appellant did wilfully kill the deceased constable.

I do not propose to deal with all the facts, but will merely mention the most fundamental of them which stand out as being the most important. Much has been made of apparent differences in the sequence of shots that were heard by the three witnesses. Two of these witnesses, at any rate, agreed that there was one shot first of all, followed after an interval by four or five other shots. There were then one or two shots afterwards and some whistling. No witness, however, heard more than eight shots, whilst the Appellant said that he heard three shots, and that he himself fired eight shots afterwards, and whistled for help. It has been argued that all these witnesses did not hear all the same shots, but it has been pointed out by the Prosecution that, at any rate, the end of the firing was fixed by the whistling in each case. None of the witnesses heard the three shots which the Appellant, in his statement to the Court, alleged had been fired first by outside attackers. The trial Court was justified, therefore, in coming to the conclusion that there were no such things as three or indeed any shots fired from outside by other persons. Other pieces of evidence pointing to the guilt of the accused, to the exclusion of any other reasonable theory, are the faking, after the shooting of the deceased, of an attack on the tent. There is also the fact that the deceased was asleep at the time he was shot. The trial Court again was justified in coming to the conclusion that he

had been shot when lying on his bed. The Court came to that conclusion on evidence which we think it was justified in believeing, when it has found that it was impossible for the deceased to fall off the bed, or for the body to get on to the ground, unless the body had been pulled onto the ground. And who could have so pulled it but the Appellant ?Again there were further facts — that of the writing in the diary by the Appellant, and his own statement that after the firing he went out and sat down, in the glare of the electric lights in the camp, to summon help as he said. It is difficult to believe that a man, who had recently been attacked, would rush out into the glare of the electric lights, at such a time as this. The first instinct in such a case, particularly if he were frightened, would be to take cover in the dark.

There is the further evidence that two bullets were found in the tent, which goes to show that at least two shots, probably more, were fired inside the tent, bearing in mind the number of entrance and exit holes in the tent walls.

The only person other than the deceased who was inside the tent was this Appellant. There are further inferences to be drawn from the blood on the towel, blood on the pillow, and the position of the towel. A certain point has been made that the body could not have been long enough on the bed for all this blood to come out, but it must be remembered that the exit wound in the head was very large, and the effusion of blood must have been correspondingly large and quick. The trial Court was fully justified in holding, after hearing the Appellant, that in view of the other evidence and the contradiction in his various statements, it did not believe his evidence.

There is only one further matter in this connection in dealing with the evidence to which I have to refer, that is, the position of the tent and its contents relative to its position. It must be remembered that Mr. Lucie Smith gave evidence that when he made his examination and conducted his experiments, the tent and its contents were in their original position and condition in which they were found after the murder was committed, and that nothing had been disturbed. The defence did not have that advantage, and much of the evidence of their experts, therefore, must be theoretical, and the trial Court was entitled to reject it. I do not attach much or, indeed, any importance to the question whether the brailing was closed or not ; the most that could have happened would have been a very slight alteration in the relative position of the bullet holes. In fact, if the brailing were closed, then the position of the holes would have been brought

nearer to the ground thus supporting still further the theory of the prosecution. I am therefore of opinion that the trial Court was right in holding that the Appellant did kill Mustafa Houry.

We now come to the last phase of this case, whether the conditions of Section 216 of the Criminal Code Ordinance have been complied with. Section 216 is as follows :—

> "216. For the purpose of section 214 of this Code a person is deemed to have killed another person with premeditation when —
>
> (a) he has resolved to kill such person or to kill any member of the family or of the race to which such person belongs, provided that it shall not be necessary to show that he resolved to kill any particular member of such family or race, and
>
> (b) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his actions, and
>
> (c) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if any, with which such person was killed.
>
> In order to prove premediation it shall not be necessary to show that an accused person was in any state of mind for any particular period or within any particular period before the actual commission of the crime, or that the instrument, if any with which the crime was communitted was prepared at any particular time before the actual commission of the crime".

I agree fully with the statement that it is for the Prosecution to prove their case — the onus is always upon them to do so. With regard to resolution, that I think is clear from the evidence. The Chief Justice, in his judgment, says :—

> "In my opinion, if a man shoots at the head of another, while that other asleep, with a rifle, at close range, the Court is entitled to draw the inference that he had resolved to kill him".

That is entirely a correct inference to be drawn. With regard to the question whether the shooting was in cold blood without immediate provocation and in circumstances in which the person shooting was able to think, I think that the learned Chief Justice was also correct in his inference that the shooting here was in cold blood. The fact that there was no quarrel, no one else present — no provocation has been alleged by the defence — in the statement of the Appellant himself no indication is given of any quarrel — the fact that the man was asleep, the fact that accident has been ruled out as a defence by reason of the number of shots fired and the holes in the tent, from all these I think that the killing was in cold blood. Each case of

course must be judged on its own facts. In this case there was overwhelming evidence, in my opinion, from all the attendant circumstances that the killing was in cold blood. It is not for us to invent theories which have never been suggested or put to us as to what might have happened. We have the Appellant's own tale that there was no quarrel.

The last point is the question of Section 216(c), that is, did the Appellant prepare himself to kill or did he prepare the weapon with which the killing was effected ? Now, if the requirements of paragraphs (a) and (b) of Section 216 are complied with, it must nearly always follow that the requirements of paragraph (c) are also present — not invariably, I agree. On the evidence called to prove the requirements of paragraph (a) and (b), in the vast majority of cases there will be proved the requirements of paragraph (c). With all due respect to the judgment of the learned Chief Justice in the Sheinzwit case, I think that in that case he drew the requirements of the Section too rigidly. Resolution combined with cold blood in themselves connote a certain amount of preparation, in most cases. If the other ingredients of paragraphs (a) and (b) are present, then usually very little evidence indeed, or inference from evidence, is necessary to prove preparation. The paragraph, to my mind, cannot on this view be said to be unnecessary or meaningless. There are cases, few in number possibly, where there may be resolution and cold blood and where there cannot be said to be preparation. I give one example which comes to my mind. A. has resolved to kill "B" at the first opportunity that presents itself to him. By accident "A" and "B" find themselves walking along the edge of a cliff, and the opportunity of pushing "B" over the cliff presents itself to "A", and he proceeds to do so, and "B" is killed. That would be murder committed which had been resolved upon, and murder committed in cold blood. I do not think it could be said that it was also committed after preparation. In this case I think that the trial Court was right in holding that there was preparation ; that preparaion consisted in the taking of the weapon from underneath the mattress, loading it, standing up and pointing it at the deceased, and firing, and else in the deliberate acts of the Appellant to stage the appearance of an alleged attack by persons outside. Preparation need not necessarily consist, to my way of thinking, of physical acts only — it may be composed partly of physical acts, partly of intention, and further, preparation, to my way of thinking, could also be proved by acts subsequent to the actual killing.

In these circumstances, I am of opinion that the appeal should be dismissed.

The result will be that by a majority the appeal is dismissed and the conviction and sentence of death are confirmed.

Delivered this 1st day of April, 1938.

British Puisne Judge.

Greene, J. I entirely agree with the judgment of my learned brother the Presiding Judge.

On the evidence which was before the trial Court that Court was fully justified in coming to the conclusion that Appellant did wilfully kill the deceased.

As regards paragraph (c) of Section 216 of the Criminal Code Ordinance, I am satisfied that the trial Court having come to the conclusion that paragraphs (a) and (b) of Section 216 had been proved, and that Accused by taking the rifle from under his mattress, loading it and firing at deceased while he was lying on his bed, prepared himself to kill the deceased, and that the three ingredients necessary under Section 216 of the Criminal Code Ordinance have all been proved.

Delivered this 1st day of April, 1938.

British Puisne Judge.

Frumkin, J. I am satisfied that from the evidence before it the Court below was justified in finding as it did that the accused fired at the deceased while the latter was asleep, causing his death.

2. The question now to be considered is whether or not the accused has killed his victim with premeditation.

3. In the words of the learned Chief Justice in his considered judgment in another case known as the Sheinzwit case :—

> "The crime of murder with which the accused is charged is statutory and is defined in Section 214(b) and Section 216 of the Criminal Code Ordinance, 1936. The latter section deals with premeditation and requires three ingredients (a), (b) and (c) all of which must be present. I do not think that because two are present, the third may be assumed ; but facts which are evidence of one may also be evidence of another".

In dealing with one of the ingredients in this case the learned Chief Justice refused to draw an inference without the existence of any evidence.

4. In the present case the learned Chief Justice further held that the onus was upon the prosecution to prove the requirements of Section 216, and he does not think that merely because A killed B, any of

the requirements of Section 216 can be presumed. Each case must be considered on its own merits.

5. Of the three ingredients (a) deals with resolution (b) with cold blood and (c) with preparation. As said before all of the three must be present, neither of them can be assumed or presumed, each of them must be proved separately and the onus is on the prosecution.

6. I will deal first with the last ingredient as provided for in clause (c) which could be met in two ways, *i. e.* that the killing took place after the person having (a) prepared himself to kill or (b) prepared the instruments, if any, with which the victim was killed.

7. Strictly speaking I can hardly conceive a case where a person has resolved to kill and has actually killed in cold blood, and yet was the crime committed without the person having prepared himself. Even in a murder of a most primitive nature effected by say the use of one's fist or fingers, once the murderer has resolved to commit the murder and has done so in cold blood it could be said that he has prepared himself by approaching the victim or using his fist or fingers.

8. If I am right in this view clause (c) would appear to be entirely superfluous and of no meaning whatsoever. If we have, however, as we are bound to, to attach any meaning to this clause which in addition to the requirements of clauses (a) and (b) also requires preparation one must come to the only possible conclusion that while (a) and (b) deal with mental requirements, clause (c) deals with purely material or physical requirements which must be proved independently of the mental requirements of the previous clauses.

9. In the present case the Court below seems to have taken the view, that in the case of a constable or other person who in the course of his duty is lawfully in possession of a rifle, while the mere act of taking the rifle is in itself not sufficient to establish preparation there is preparation by coupling that act of taking the rifle with the intention to use the rifle for an unlawful purpose.

10. With all due respect I am unable to share this view. The intentions of the accused are matters to be dealt with and decided in considering the requirements of clauses (a) and (b). If apart of any intention of the accused, there was nothing which if taken alone could in itself form a material of physical act of preparation — the requirements of this clause were not met.

11. It has been suggested that if this were the case a constable or other person who in the course of his duty is in lawful possession of

arms could never be charged under Section 216. I don't think so. There might be many cases where such a person prepares himself for the act of killing other than by taking his arms with an intention to use it unlawfully. But even if it were so, it is a matter to be remedied by the legislature. We have to apply the law as it stands.

12. It follows that in my opinion the requirements of clause (c) of section 216 have not been proved and there could therefore be no conviction under that section.

13. This is conclusive in the matter of premeditation which requires the presence of all the three ingredients. But I would also like to say a few words on the requirements of clause (b) which reads as follows :—

> "(b) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his action".

The following is the relevant passage of the judgment of the Court below on this point.

> "It is clear that if a man shoots at another, while that other is asleep, particularly if no other person is present the shooting can be in cold blood, without provocation, and in circumstances in which he is able to think".

14. It is noteworthy that the word used is "can" and not "must". I am fully in agreement with the learned Chief Justice that if a person shoots at another while that other is asleep, the shooting *can* be in cold blood and in many cases, perhaps in most cases it is so, but not necessarily so. There can also be cases where a person shoots at another while that other is asleep and yet the shooting was not in cold blood in circumstances in which he is able to think.

15. Take the instance of A and B sharing one bed or one room. A awakens from a bad dream or an imaginary fright of being attacked. He instinctively grasps at a weapon easy at hand, uses it while still half asleep and kills B who shares his bed or room. I don't say that that is what happened in this case although something similar might have happened. I am only bringing this illustration to show that there can be a case of a person shooting at another while that other was asleep and the shooting was not in cold blood and in circumstances in which he is able to think.

16. There can be no immediate provocation when the victim is asleep but immediate provocation is not an indispensable element of clause (b). I mean to say that clause (b) cannot be invoked just because there is no provocation. The other elements, cold blood, ability to think, must be proved.

17. When the law requires the presence of all three ingredients, when each ingredient is to be proved and not presumed, when the onus of proof lies on the prosecution, the Court could not, in the existence of double probabilities and in the absence of direct evidence as to one or the other come to the conclusion that there was cold blood on the presumption only that when one person attacks another while that other was asleep this attack *can* be in cold blood.

18. On the law as it stands I am of opinion that the requirements of both clause (b) and (c) have not been duly proved and the conviction under 216 must therefore be substituted for a conviction of manslaughter under section 212.

Delivered this 1st day of April, 1938.

Puisne Judge.

CIVIL APPEAL No. 8/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

1. Ibrahim Ahmad Abdallah,
2. Isa Ahmad Abdallah. — APPELLANTS.

v.

Saleh Salim el Ibrahim. — RESPONDENT.

Inspection — Jurisdiction of Magistrates' Court — Question of jurisdiction raised by Court.

In dismissing an appeal from a judgment of the Land Court of Haifa, in its appellate capacity, dated the 21st of December, 1937 :—

HELD : 1. The lower Court had been correct in remitting the case to the Land Settlement Officer in order to determine, by means of an inspection, whether the land in dispute was identical with that referred to in the compromise entered into by the parties.

2. The statement of the lower Court that a Magistrate's Court has no jurisdiction to confirm a compromise which affects the ownership of immovable property was correct.

ANNOTATIONS :

1. For decisions on inspection, see annotations to C. A. 247/37 (1938, 1 S. C. J. 95).

2. See also L. A. 180/22 (C. of J. 177) wherein it was held that arbitrators have no power to give an award relating to rights to immovable property. This decision is now overruled by C. A. 62/27 (P. L. R. 177, C. of J. 496) holding that the District Court has jurisdiction to confirm an award relating to immovable property.

FOR APPELLANTS : Moghannam.
FOR RESPONDENT : Sahyoun.

JUDGMENT.

In its judgment of the 21st December, 1937, the Court below held that a local inspection was desirable and remitted the case to the Settlement Officer with that end in mind. The inspection was to be carried out for the purpose of ascertaining whether the land in dispute was identical with the land referred to in the compromise concluded before the Magistrate. With this holding of the Land Court we are in full agreement.

The Attorney for Appellants contends that the Court below erred in stating in its judgment that it was beyond the jurisdiction of the Magistrate to confirm a compromise which affected the ownership of immovable property, as this question was not raised by either of the parties. The statement of the Court below as it stands is correct, and we refrain from interfering with it as such. Whether it applies in this case is not a matter which we need determine now.

We find, therefore, that the Land Court was right in setting aside the judgment of the Settlement Officer and remitting the case to him to hear the Respondent's (Appellant therein) plea of prescriptive possession, and to hold an inspection, and the appeal is dismissed with costs and LP. 5.— Advocate's fee.

Delivered this 4th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No. 51/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Shlomo Mintz. APPELLANT.

v.

Sara Mintz. RESPONDENT.

Jurisdiction — Consent to jurisdiction of Rabbinical Court — Practice of going from one Court to another — Choice of Court.

In allowing an appeal from a judgment of the District Court of Tel-Aviv, dated the 17th February, 1938, and in dismissing Respondent's claim and cross appeal :—

HELD : Respondent had chosen to sue in the Rabbinical Court and the Appellant had consented to the jurisdiction. The Rabbinical Court was, therefore, the competent Court and the claim before the District Court should have been dismissed.

Followed : C. A. 112/36 (1 Ct. L. R. 12).

FOR APPELLANT : Rottenstreich, B. Joseph.
FOR RESPONDENT : Shneur-Aharonov.

JUDGMENT:

In this case Appellant raised the question of jurisdiction. It is clear from the record of the Court below that the parties had consented to the Jurisdiction of the Rabbinical Court. After obtaining a decree of divorce and an order for the payment unto her of LP. 300 from the Rabbinical Court, the wife tried to obtain, and did in fact obtain, a judgment for maintenance from the District Court. In Dienfield's case this Court held that the practice of going from one Court to another should not be allowed.

In this case the Respondent elected to go to the Rabbinical Court and the Appellant willingly consented to the jurisdiction of that Court. We see, therefore, that the Rabbinical Court is the competent Court to hear the case.

The appeal is therefore allowed, the judgment of the District Court set aside, and the claim dismissed. The cross-appeal is also dismissed. As the Appellant does not ask for the costs no order is made therefor.

Delivered this 5th day of April, 1938.

British Puisne Judge.

HIGH COURT No. 20/38.

IN THE SUPREME COURT SITTING AS A HIGH COURT OF JUSTICE :

IN THE APPLICATION OF :

Yonis Hallak. PETITIONER.

v.

1. Chief Execution Officer, Nazareth,
2. Malek Hallak. RESPONDENTS.

Execution — Judgment of ecclesiastical court — Genuineness of document — Proper remedy.

In refusing an order to issue to the First Respondent, directing him to show cause why his order dated the 26th March, 1938, for the attachment of money in Execution File No. 118/37, Nazareth, should not be set aside and why execution of the late judgment of the Ecclesiastical Court of the Greek Orthodox Community dated the 7th April, 1937, should not be set aside :—

HELD : This was not a matter for the High Court and the Petitioner had his remedy by applying to the Ecclesiastical Court for stay of execution of judgment.

ANNOTATIONS : See H. C. 12/38 (1938, 1 S. C. J. 111) ; H. C. 18/38 (1938, 1 S. C. J. 203), and annotation ; H. C. 27/38 (27.iv.38).

FOR PETITIONER : Asal.

FOR RESPONDENTS : Ex parte.

JUDGMENT:

In this case there are two documents issuing from and under the seal of the Ecclesiastical Court of the Greek Orthodox Patriarchate. It is not for us to say whether the said documents are right or not, for as they purport to be genuine we have to regard them as such. The Petitioner may have his remedy by applying to the Ecclesiastical Court for stay of execution of judgment, and it is for the said Court to determine whether the additional sum of 900 piastres introduced by it in its second judgment does actually represent the costs.

The application for the order *nisi* is therefore dismissed with costs.

Delivered this 5th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No. 46/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Shlomo Fried. APPELLANT.

v.

Aaron Zelig Volansky. RESPONDENT.

Disagreement of judges — Consideration — Agreement not complied with — Remedy.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 15th November, 1937 :—

HELD : 1. The judges of the trial Court having disagreed as to whether the Plaintiff had a right to sue or not, the action was properly dismissed.

2. The promissory note given by Respondent to Appellant in consideration for the latter not suing Respondent's mother could not be sued upon, nor the agreement under which the note was given, as Appellant had chosen to sue Respondent's mother.

ANNOTATIONS : To the same effect : C. A. 74/28 (P. L. R. 350, C. of J. 499) and C. A. 37/31 (C. of J. 430) (*Same case*) ; C. A. 86/30 (C. of J. 507) ; *Cf.* C. A. 79/25 (C. of J. 701) and C. A. 18/38 (1938, 1 S. C. J. 209 and annotation) — *Land Courts.*

FOR APPELLANT : Frank.

FOR RESPONDENT : Amdour.

JUDGMENT:

This appeal fails. Two points have been raised before us. The first is that since the two Judges in the District Court disagreed, by some obscure process of reasoning judgment should therefore be given for the Plaintiff. The point on which they disagreed was this : whether the Plaintiff had the right to sue or not. That being so, I should have thought it followed that if they disagreed the action must be dismissed.

The second point is about the agreement that in consideration for giving by the Respondent of a promissory note for a certain sum to the Appellant, the Appellant was to withdraw the action against Respondent's mother. The promissory note was given, Respondent undertook not to sell a particular house, but if he sold the house he should pay from the proceeds the amount due to the Appellant. He sold his

house and did not pay the Appellant. The Appellant then sued the mother. I should mention that the promissory note was due on a date considerably after the date on which these happenings occurred. The Appellant said he had never waived any right against the mother. It is clear from his admission in Court that he waived his rights against the mother. The remedy of the Appellant was to sue the Respondent either on the promissory note or under the agreement, having chosen to sue the mother again he is estopped from suing the Respondent on the amount due.

For these reasons and for the reasons mentioned in the judgment of the Relieving President of the District Court dismissing the action, this appeal is also dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 6th day of April, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 28/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Abdul Hadi, JJ.

IN THE APPEAL OF :

Nayef Habib Awwad. APPELLANT.

v.

The Attorney General. RESPONDENT.

Sentence — Accused assisting in the recovery of stolen property.

In dismissing an appeal from a judgment of the District Court of Nablus, dated the 24th February, 1938, whereby Appellant was convicted of housebreaking, contrary to sec. 295(a) of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment :—

HELD : Having regard to the observations of the Crown Counsel and to the fact that the accused had assisted in the recovery of the stolen property, the sentence would be reduced by six months.

FOR APPELLANT : In person, assisted by his cousin.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

We feel that the sentence of three years was not excessive, but having regard to the observations of the Crown Counsel and to the fact that

the accused assisted in the recovery of the stolen property, we propose to reduce it by six months ; it will therefore be one of two and a half years' imprisonment, to run from the date of arrest.

Delivered this 6th day of April, 1938.

Chief Justice.

HIGH COURT No. 23/38.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Haim Eidenberg. PETITIONER.

v.

1. The Superintendent of the Central Prison, Acre,
2. Chief Execution Officer, Haifa,
3. Victor Liber, Haifa. RESPONDENTS.

Imprisonment for debt — Debt (Imprisonment) Ordinance, sec. 11 — *Large number of orders against same debtor.*

In refusing an application for a writ of *Habeas Corpus* to issue against the First Respondent to produce the body of the Petitioner and for an order to issue to the Second Respondent to show cause why his order for the arrest of the Petitioner for debt dated the 23rd February, 1938, in File No. 3518../37 of the Execution Office, Haifa, should not be set aside : —

HELD : 1. The only onus upon the Chief Execution Officer is to apply sec. 11 of the Debt (Imprisonment) Ordinance and there was nothing in the petition to show that that section had not been applied.

2. Where there are a large number of orders against the same debtor, the Chief Execution Officer, should take the whole of these cases into consideration in assessing the amount to be paid or in determining the ability of the debtor to pay.

FOR PETITIONER : Yehuda.

FOR RESPONDENT : *Ex parte.*

ORDER.

In this case we think that the order should be refused, because the only onus upon the Chief Execution Officer is to apply Section 11 of the Debt (Imprisonment) Ordinance. From the petition which is before

us, there is nothing to show that Section 11 was not applied. The debtor was heard before the order was made.

We would further make this observation that where there are a large number of orders against the same debtor, the Chief Execution Officer should take the whole of these orders into consideration when assessing the amount to be paid, either in a lump sum or separately, or in determining the ability of the debtor to pay.

In this case, we think that a further application should be made to the Chief Execution Officer on these lines.

Gives this 6th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No. 47/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

1. Said Awad,
2. Bahiyeh Tawfiq Nakki El Abdallah. APPELLANTS.

v.

Joseph P. Albina. RESPONDENT.

Striking out case provisionally — Application to strike out refused — Civil Procedure Code, Art. 142, *Judgment by Default* (*District and Land Courts*) *Rules, rule* 2(1).

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 27th January, 1938 :—

HELD : There is no authority whereby a Court is bound to strike out a case provisionally at the request of a plaintiff.

ANNOTATIONS : The case referred to in the judgment whereby the proceedings were remitted to the District Court to cross-examine a witness is C. A. 35/37 (1937, 1 S. C. J. 261, 1 Ct. L. R. 54).

FOR APPELLANTS : Salah.

FOR RESPONDENTS : Moghannam.

JUDGMENT.

Frumkin J. This case comes before this Court for the second time. On the first occassion it was remitted to the District Court to allow

the Respondent to cross-examine a witness heard at the trial of the case.

2. The facts of this case are not relevant to the present appeal, the main ground of appeal being the following : On the date fixed for the resumed hearing before the District Court in accordance with the directions of the Court of Appeal, there was an application on behalf of the Appellants to have the case struck out provisionally. The District Court, in the submission of the Appellants, by refusing to grant this application was wrong in law.

3. The Appellants were originally represented before the District Court by three advocates one of whom was Mr. George Salah who now appears before this Court on behalf of the Appellants.

4. From the judgment of the Court below it appears that Mr. Salah submitted the application to strike the case out. Mr. Salah states that he did not sumit the application, but he does not deny the fact that such an application, was submitted an behalf of the Appellants who were represented in the Court below when this application was submitted. In fact it is his argument, and as I said, his main ground of appeal, that upon the receipt of such an application the Court should have had the case struck out provisionally.

5. I know of no authority under the law applicable whereby a Court is bound to strike out a case provisionally upon the request of a plaintiff.

6. The Appellants rely on Art. 142 of the Ottoman Code of Civil Procedure and Rule 2(1) of the Judgment by Default (District and Land Courts) Rules. Vol.. III p. 2339.

7. Art. 142 of the Ottoman Code of Civil Procedure reads as follows:

> "If the party refusing to appear be the plaintiff, the defendant may apply for and obtain an order by default dismissing the suit provisionally, and shall not be required to reply to the plaintiff's claim".

From this Article it is clear that only upon the Plaintiff failing to appear and upon the application of the Defendant a case can be struck out provisionally, but this Art. does not entitle a Plaintiff to appear and apply for his case to be struck out.

8. Rule 2(1) of the (District and Land Courts) Rules, 1926, reads as follows :

> "If at any stage of any civil proceedings in first instance before a District Court or Land Court the plaintiff does not appear in person or by a representative, the action shall be forthwith struck out, without prejudice to the plaintiff's right to institute a fresh action upon payment of the prescribed fees".

There is nothing in this rule about an application by the Defendant but it is clear that the case can be struck out provisionally only upon the failure of the Plaintiff to appear in person or by a representative. In the present case the Appellants were represented and in fact one of their advocates, no matter which he was, actually appeared and applied for the striking out of the case.

9. Both Articles 142 and other articles of the Civil Procedure Code and the Rules of 1926 are intended to protect one party against delays caused by the other party. Rule 3 for instance deals with failure of the Defendant to appear when Plaintiff can ask for and obtain judgment by default. Rule 2 on the other hand intends to protect a Defendent upon failure of the Plaintiff to appear.

10. These authorities cannot, to my mind, be so construed so as to allow a plaintiff who for one reason or another does not wish his case to be determined, simply to go to Court and ask for his case to be struck out provisionally with a right to renew it at pleasure.

11. The Court was therefore right in refusing to grant the application to have this case struck out provisionally and as the only matter before it was to cross-examine a witness it was right in coming to a conclusion that the Appellants refused to avail themselves of their right of cross-examination.

12. The judgment of the District Court is therefore confirmed and the appeal dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 7th day of April, 1938.

Puisne Judge.

CRIMINAL APPEAL No. 32/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khaldi, JJ.

IN THE APPEAL OF :

1. Abed Rabbo Abdallah el Hudhud,
2. Mahmoud Hassan el Husarieh,
3. Sa'do Khalifeh el Baik. APPELLANTS.

V.

The Attorney General. RESPONDENT.

Evidence of accomplices — Extra judicial confessions — Value of evidence to be determined by trial Court.

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 2nd March, 1938, whereby Appellants were convicted of breaking into a shop and committing theft therein, contrary to sec. 297 (a) of the Criminal Code Ordinance, 1936, and sentenced to :

1st : — 2 years' imprisonment ;

2nd : — 1½ years' imprisonment ;

3rd : — 2 years' imprisonment ;

sentences to run from the date of arrest ; *i. e.* the 27th November, 1937 :—

HELD : The evidence against the accused consisted of that of an accomplice and certain statements made by ther elves to the police. The value of that evidence was a matter for the trial Court.

ANNOTATIONS : As to evidence of accomplices, see annotation to CR. A. 160/37 (1938, 1 S. C. J. 103) and for the value of extra judical confessions, see annotation to CR. A. 19/38 (1938, 1 S. C. J. 199).

APPELLANTS : In person.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

In this case the three Appellants were charged with breaking and entering a shop and stealing therefrom a quantity of tubes.

The evidence against them consists of that of an accomplice and certain statements made by themselves to the Police. The value of that evidence is a matter for the trial Court and that Cour was satisfied as to the guilt of the three Appellants.

Appellan No. 1 Abed Rabbo has withdrawn his appeal and his sentence will run from date of arrest *i. e.* 27.11.37.

The appeals of No. 2 Mahmud and No. 3 Sa'do are dismissed. The Conviction and sentence in each case are affirmed.

Delivered this 7th day of April, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 36/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khaldi, JJ.

IN THE APPEAL OF :

Zvi Jacob Silberstein. APPELLANT.

v.

The Attorney General. RESPONDENT.

Forgery — Criminal Code Ordinance, secs. 303, 351.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 14th March, whereby Appellant was convicted of "cheating by means of a fraudulent trick", contrary to sec. 303 of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment :—

HELD : In addition to the charge under sec. 303 of the Criminal Code Ordinance, under which Appellant was convicted, there had been evidence to support a convicition under the original charge (sec. 351).

FOR APPELLANT : In person.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

The Appellant was charged with being in possession of paper resembling the special paper provided and used for making bank notes and with being in possession of certain device for the making of bank notes.

The evidence is quite clear ; he went to a certain person and told him that he is in a position to make him rich. He obtained from him LP. 3.— and actually started to do his work in imitating a note of LP. 1.—. Unfortunately for him, that person happened to be a Police Constable and arrested him with his tools.

The Appellant was originally charged under Section 351 of the Criminal Code Ordinance, and we fail to see why the District Court only convicted him under Section 303. There was in our opinion ample evidence to convict him on the original charge as well.

The appeal is dismissed and the conviction and sentence are affirmed.

Delivered this 7th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No. 50/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE CASE OF :

David A. Bechar. APPLICANT.

v.

1. Bechor A. Bechar,
2. Itzhak Bechar. RESPONDENTS.

Arbitration — Leave to appeal — Compromise.

In refusing an application under sec. 15(3) of the Arbitration Ordinance for leave to appeal from a judgment of the District Court of Tel-Aviv, dated the 19th July, 1937 :—

HELD : The minute points raised by Applicant did not suffice for leave to appeal to be granted. Applicant was sufficiently protected by the terms of a compromise made with first Respondent after the issue of the award, which the latter did not desire to enforce.

ANNOTATIONS : "We wish to say that there are too many cases of this description coming before this Court, where the parties definitely agreed to submit their dispute to arbitration and then the unsuccessful party exercises every known ingenuity to pick holes in the award". *Per* Manning, J. in C. A. 243/37 (1938, 1 S. C. J. 101).

FOR APPLICANT : Goldberg and L. Rabinovitch.

FOR RESPONDENTS : N. 1. In person.
No. 2. Ben Ami.

O R D E R.

We are of the opinion that this application must be refused. Very many grounds were urged by the attorney for the Applicants, most of them being, shall I say extremely minute points, criticising the award and the judgment of the District Court. But we do not think that leave to appeal may be granted on these points.

As the first Respondent has entered into a compromise with the Applicant after the award was made and said before us that he does not want to enforce it, we think that the Applicant is sufficiently protected.

The application for leave to appeal is refused with costs and LP. 5.— advocate's fees for the second Respondent.

Given this 11th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No. 52/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE CASE OF :

Heinrich Wittstock. APPELLANT.

v.

Boris Shoenberg. RESPONDENT.

Remuneration for services — Mejelle, arts. 563, 564.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, in its appellate capacity, dated the 2nd January, 1938 :—

HELD : According to arts. 563 and 564 of the Mejelle remuneration for services done may be allowed only when there is a request for such services to be done. There had been no request in the present case according to the finding of the trial Court.

FOR APPELLANT : Fellman & Felman.

FOR RESPONDENT : Ruda.

JUDGMENT.

This appeal fails for a very simple reason. According to Articles 563 and 564 of the Mejelle remuneration for services done may be allotted when there is a request for such service to be done. There must be such a request. The whole point is that the District Court found that there was no such request. Therefore, we find that the judgment of the District Court was right in setting aside the judgment of the Chief Magistrate as on the facts before him the requirements of Articles 563 and 564 were not complied with.

The appeal must be dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 11th day of April, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 40/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

Mohammad el Sheikh Mahmoud el Ahmad. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal — Finding of fact — Wilfull killing — Criminal Code Ordinance, sec. 214(a).

In dismissing an appeal from a judgment of the Court of Criminal Assize, sitting at Nablus, dated the 21st March, 1938, whereby Appellant was convicted of murder, contrary to sec. 214 of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : There was ample evidence to justify the findings of the trial Court.

FOR APPELLANT : Khoury.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT.

We think that there was evidence from which the Court below could conclude that the accused killed his father. The accused himself admits having used the axe, and the Court below was justified in drawing the conclusion that the death was caused wilfully within the meaning of Section 214(a) of the Criminal Code Ordinance.

The appeal is dismissed and the conviction and sentence affirmed.

Delivered this 12th day of April, 1938.

Chief Justice.

CRIMINAL APPEAL No. 41/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khayat, JJ.

IN THE APPEAL OF :

Hilal Mustafa el Yousef. APPELLANT.

v.

The Attorney General RESPONDENT.

Confession — Whether free and voluntary — Premeditation — A. G. v. Schwarz.

In dismissing an appeal from a judgment of the Court of Criminal Assize, sitting at Nablus, dated the 30th March, 1938, whereby Appellant was convicted of murder, contrary to Section 214(b) of the Criminal Code Ordinance, 1936, and sentenced to death.

HELD : 1. There had been evidence to support the finding that the confession was free and voluntary.
2. If a person takes a rifle, loads it, and aims at short range at another who is asleep, such acts may amount to premeditation.

Followed : Schwarz v. A. G. — CR. A. 17/38 (i.iv.38).

ANNOTATIONS :

1. On extra judicial confessions, see CR. A. 19/38 (1938 IS. C. J. 199) and annotations.

2. See Schwarz v. A. G. (*Supra*) and annotations.

FOR APPELLANT : Abdel Hadi.
FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT.

The only point which arises in this appeal is whether or not the admission or confession made by the Accused was properly admissible in evidence in the Court below. The Court in its judgment found quite clearly that it was free and voluntary. They said :—

> "We are satisfied beyond all doubt that this confession was free and voluntary and that no inducement was held out to accused to make this statement".

and from the evidence before them the Court were justified in coming to that conclusion. If that confession is taken into consideration, then there can be no doubt that the Accused was guilty of the offence with which he is charged.

The facts of this case are not dissimilar to the facts in the Attorney General *v.* Schwartz in which it was decided that if a person takes a rifle, loads it, and aims at short range at another who is asleep, such act may amount to premeditation.

A suggestion was made that the Accused may have been incited by a woman and therefore the element of cold blood was not present. The Court below found out that the killing was in cold blood and we think they were justified in so finding.

The Accused was properly convicted, not only on his own confession,

but also on the evidence of the witnesses which bears out what he said as to the happenings on the night in question.

The appeal is dismissed and the conviction and sentence affirmed.

Delivered this 12th day of April, 1938.

Chief Justice.

HIGH COURT No. 19/38.

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

BEFORE : Green and Frumkin, JJ.

IN THE APPLICATION OF :

Khalil Iskandar Salman. PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Mrs. Mary, widow of Ishak Sahhar. RESPONDENTS.

Interest — Does not run from date of agreement in absence of express stipulation to that effect.

In discharging an order *nisi* addressed to the First Respondent directing him to show cause, if any, why his order dated the 6th February, 1938, in Execution Proceedings file No. 5566/34, should not be set aside and an order substituted therefore, decreeing the payment of legal interest on the mortgage deed, the subject matter of the said execution proceedings, as from the said deed of mortgage :—

HELD : The settlement reached at between the parties, fixing the amount of the mortgage and replacing the mortgage deed made no mention of interest and interest could therefore not be paid as from the date of the mortgage.

ANNOTATIONS : See note 1. So C. A. 10/38 (1938 1 S. C. J. 182).

FOR PETITIONER : Elia.

FOR RESPONDENTS : No. 1 — served — absent.
No. 2 — Haddad.

JUDGMENT.

The settlement reached at between the parties fixed the amount payable under the mortgage, and so far as the amount due is concerned, took the place of the mortgage deed.

No mention was made in the settlement that interest will be payable as from the date of the mortgage.

The order *nisi* is therefore discharged with costs to include LP. 5.— advocate's fees.

Delivered this 12th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No. 62/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

Aboudeh ibn el Haj Ileiwa el Jiyousi. ..APPELLANT.

v.

Fatmah bint el Haj Mohammad Filfel in her capacity as guardian of her minor children Atallah and Ibrahim. RESPONDENT.

Application for leave to appeal.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, sitting in its appellate capacity, dated the 29th January, 1938 :—

HELD : The appeal must be dismissed in view of the fact that Appellant had not obtained leave to appeal from the presiding Judge of the lower Court.

APPELLANT : In person.

FOR RESPONDENT : Sarraj.

JUDGMENT:

The Appellast lodged this appeal without complying with the requirements of obtaining leave to appeal to this Court from the Presiding Judge of the Court below.

The appeal is therefore dismissed with costs and LP. 1.— advocate's fees.

Delivered this 13th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No. 64/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

Ribhi Dajani. APPELLANT.

v.

Daoud Omar Dajani. RESPONDENT.

Evidence — Expert's report — Verification of signature — Finding of fact — Magistrates Law, art. 37.

In allowing an appeal from a judgment of the District Court of Jerusalem, sitting as a Court of Appeal, dated the 27th of January, 1938, and in restoring the judgment of the Chief Magistrate :—

HELD : In cases of disputed signatures it is for the Magistrate to decide the dispute. The Magistrate had heard evidence and had satisfied himself on that question of fact.

ANNOTATIONS : On the verification of signatures, see C. A. 42/31 (P. L. R. 577, C. of J. 1005) ; CR. A. 92/32 (C. of J. 723).

FOR APPELLANT : Abcarius Bey.

FOR RESPONDENT : Dajani.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jerusalem sitting as a Court of Appeal dated the 27th day of January, 1938. The matter involved is simple. The District Court held that the Chief Magistrate was wrong in refusing to accept the report of the experts on the question of verification of the signature, and remitted the case to him for a fresh judgment to be given. In cases of disputed signature it is for the Magistrate to decide the dispute, and the District Court was wrong on both occasions in remitting the case to the Chief Magistrate on a pure question of fact. Article 37 of the Magistrates' Law is clear on this point. The Chief Magistrate heard and believed the witnesses who testified that they had seen the Respondent sign the promissory note, and having satisfied himself on this question of fact the District Court was wrong in interfering with his judgment.

The appeal is therefore allowed, the judgment of the District Court is set aside and the judgment of the Chief Magistrate dated the 4th November, 1938, is restored.

Delivered this 13th day of April, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 1/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khaldi, JJ.

IN THE APPEAL OF :

Abdallah Hassan Abu Zind. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal — Evidence.

In allowing an appeal from a judgment of the District Court of Nablus, dated the 20th December, 1937, whereby Appellant was convicted of robbery, contrary to secs. 287 and 288 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, and in quashing the conviction :—

HELD : If the evidence that the accused had been seen by the Mayor of Beisan on the morning following the commission of the offence, together with the complainant had been before the trial Court, they might have come to a different conclusion.

ANNOTATIONS : See 1938 1 S. C. J. 54 ,where earlier proceedings in this case were reported.

FOR APPELLANT : Moghannam.

FOR RESPONDENT : Crown Counsel. (Hogan).

JUDGMENT:

It is perfectly clear that there was certain evidence which was not before the Court below and this Court ruled that the case should go back to the District Court to hear that evidence and to determine the issue whether or not the Mayor of Beisan saw the Accused in company with the complainant the morning following the commission of the offence. The District Court heard the evidence of the Mayor and found that he did see the Accused person in company with complainant on the morning following the commission of the offence.

That being so, we are of opinion that if this evidence had been before the Court of trial they might have come to a different conclusion and the conviction is therefore quashed.

Delivered this 13th day of April, 1938.

Chief Justice.

CRIMINAL APPEAL No. 38/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khaldi, JJ.

IN THE APPEAL OF :

Ali Mohammad Ali. APPELLANT.

v.

The Attorney General. RESPONDENT.

Criminal law — Custom — Age of accused — Sentence.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 12th March, 1938, whereby Appellant was convicted of attempted murder, contrary to sec. 222(a) of the Criminal Code Ordinance, 1936, and sentenced to seven years' imprisonment :—

HELD : 1. The Court cannot take into consideration customs which do not form part of the law of the country.

2. The sentence should be reduced in view of the age of the accused.

ANNOTATIONS : On the effect of custom, see CR. A. 40/34 (2 P. L. R. 176, P.P. 3.x.34). Custom having the force of law : C. A. 34/24 (P. L. R. 81, C. of J. 1243).

FOR APPELLANT : Sanders.

FOR RESPONDENT : Fawzi Bey.

JUDGMENT:

This Court, must administer the Criminal Law of the country as laid down in the Criminal Code Ordinance. We cannot take into consideration customs of the sort raised by Counsel for the Appellant in so far as they may not form part of the law. We are, however, in this particular case, prepared to consider a reduction of the sentence owing to the age of the accused. It is admitted that his age is in the neighbourhood of twenty, and for that reason and for that reason alone, we reduce the sentence from one of seven years to one of five years imprisonment.

Delivered 13th day of April 1938.

Chief Justice.

CRIMINAL APPEAL No. 39/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Khaldi, JJ.

IN THE APPEAL OF :

Taher Said Kassab. APPELLANT.

v.

The Attorney General. RESPONDENT.

Evidence — Statement by deceased — Finding of fact.

In dismissing an appeal from a judgment of the Court of Criminal Assize, sitting at Nablus, dated the 25th March, 1938, whereby Appellant was convicted of murder, contrary to sec. 214(d) of the Criminal Code Ordinance, and sentenced to death :—

HELD : The objection to the statement of the deceased had been considered by the trial Court before whom there had been evidence to justify their finding.

FOR APPELLANT : Salah.

FOR RESPONDENT : Crown Counsel.

JUDGMENT.

We are satisfied that there was evidence before the Court below which justified it in coming to the conclusion to which it came.

As that Court pointed out, the chief difficulty in the case was the statement made by the deceased man. That has been the subject of considerable criticism and discussion here and, as George Eff. Salah who appeared for the Appellant here also appeared before the Court below, we are satisfied that the criticism of that statement was brought to the mind if the Court before it stated, as it did in its judgment, that it preferred the evidence of the witnesses to the statement of the deceased.

The appeal will therefore be dismissed and the conviction and sentence affirmed.

Delivered this 13th day of April, 1938.

Chief Justice.

CIVIL APPEAL No. 24/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

1. Shukri Barsakhian, in his capacity as administrator of the estate of the late Yousef Stephan Barsakhian, and as guardian of his minor children,
2. Lucia Barsakhian, in her personal capacity as one of the heirs of the late Yousef Stephan Barsakhian and on behalf of his estate. APPELLANTS.

V.

1. Stawri Slihit,
2. Rafleh Abdul-Nur Kar'ah. RESPONDENTS.

Appeal — Rent for staircase and use of roof.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 23rd December, 1937 :—

HELD : The only substantial point in the appeal was the question of rent to be paid for the use of the staircase and the roof. That point had not been raised in the lower Court and would doubtless be dealt with in the accounts to be settled by order of the lower Court.

FOR APPELLANTS : Levitsky, Amon.
FOR RESPONDENTS : Olshan.

JUDGMENT.

The facts of this case are very clearly and elaborately set out in the judgment of the District Court, which is a long and careful one. I agree with that judgment and with the reasons and conclusions given in it, and it would therefore be useless to state again in other language that which has already been ably expressed.

There is only one point to which I need refer, and that is the question of the rent to be paid by the Respondents for the use of the staircase through the two lower stories, and for the use of the roof of the second storey on which the Respondents have erected the 3rd and 4th stories. That point was never mentioned, however, before the lower Court. Counsel for the Respondents has stated before us that his clients would account for such rent in the accounts which

the District Court, first in an interlocutory order, and afterwards confirmed in its judgment, ordered to be rendered by the Respondents.

This will no doubt be done. It would be an advantage if the parties could agree such rent, but failing this the amount will have to be assessed by the appropriate Court.

I think that this appeal fails and should be dismissed with costs LP. 10.— advocate's fees.

Delivered this 14th day of April, 1938.

British Puisne Judge.

I concur.

British Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 36/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

1. Mohammad Amin Salah,
2. Hamdan Mustafa Ibrahim Abu Zmiro,
3. Abdul Rahim Mustafa Ibrahim Abu Zmiro,
4. Ali Mustafa Ibrahim Abu Zmiro,
5. Su'aad Mustafa Ibrahim Abu Zmiro,
6. Kamleh Mustafa Ibrahim Abu Zmiro,
7. Khdra Mustafa Ibrahim Abu Zmiro,
8. Khdra Ibrahim Abu Shah,
9. Khadijeh Mohammad Mustafa Ibrahim Abu Zmiro,
10. 'Aisheh Mohammad Mustafa Ibrahim Abu Zmiro,
11. Zahiyeh Mohammad Mustafa Ibrahim Abu Zmiro,
12. Halimeh Said Mustafa Abu Zmiro,
13. Abdul Rahman Kaid el Ahmad. APPELLANTS.

v.

Yehoshua Hankin. RESPONDENT.

Appeal — Fees paid to clerk other than cashier — Clerk not authorised to receive fees — C. A. 15/30.

In allowing an appeal from the judgment of the Land Court of Nablus, in its

appellate capacity, dated the 25th November, 1937, and in remitting the case to the lower Court with directions :—

HELD : If the clerk who received the money for the appeal was not authorised to do so, the appeal would be out of time.

Followed : C. A. 15/30 (P. L. R. 625, C. of J. 910).

ANNOTATIONS : To the same effect : C. A. 254/23 (*not reported*). *Cf.* C. A. 60/29 (*not reported*) where the appeal was allowed, the fees having been paid to the authorised clerk but not to the court cash.

FOR APPELLANTS : Abcarius Bey, Bushnac.
FOR RESPONDENT : Eliash.

JUDGMENT:

It is very unfortunate, but I am afraid that this case will again have to go back to the Land Court.

The Magistrate's Court gave judgment on the 9th September, 1937. On the 17th September the present Respondent endeavoured to file this appeal at the offices of the Land Court, Nablus, but being a Friday the cash books were closed and the money for the fees was accepted by a clerk, other than the regular cashier and an endorsement was made on the papers to the effect that the money was so received on that day. The money was entered in the cash books and an official receipt issued on the 18th September.

It has been argued that the clerk who received the money was not authorised to do so. If he were not so authorised, then following the decision of this Court in Sheikh Abdel Kader Musaffar *v.* Abdel Hamid Dirhalli, C. A. 15/30 (P. L. R. 625) ; it would appear that this appeal would be out of time. The point was taken before the Land Court, but unfortunately that Court did not deal with it in their judgment.

In my opinion the appeal should be allowed, and the judgment of the Land Court quashed, and the case remitted to the Land Court for that Court to determine whether the clerk who accepted the fees was in fact duly authorised to do so.

Delivered this 14th day of April, 1938.

British Puisne Judge.

I concur.

British Puisne Judge.

I concur.

Puisne Judge.

———

CIVIL APPEAL No. 45/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

1. Hanna Habeed,
2. Issa Butros Saba,
3. Izhaq Mitri Akel,
4. Nasarallah Farah el Ghazalleh,
5. Ghuneim Salem Ghannam. APPELLANTS.

v.

The Municipal Council of Ramallah. RESPONDENT.

Farming out taxes — Municipal Corporations — Municipal Corporations Ordinance, secs. 99(1), 94(*b*) — *Ultra vires — Void contract.*

In allowing an appeal from a judgment of the District Court of Jerusalem, in its appellate capacity, dated the 31st January, 1938, setting aside the judgment of the Magistrate of Ramallah, and in setting aside the judgment of the lower Court and dismissing Respondent's action :—

HELD : The powers of a municipal corporation are limited to those contained in the Ordinance and there is nothing in the Ordinance authorising a municipal corporation to auction the right to collect taxes in their area.

FOR APPELLANTS : Goitein.

FOR RESPONDENT : Salah.

JUDGMENT:

In this case the Respondent sued the Appellants before the Magistrate's Court for the sum of LP. 100.— due on two promissory notes given in consideration of the farming of taxes in the Ramallah Public Vegetable Market. The Magistrate dismissed the action holding that though the agreement between the parties was a legal one, yet the bidding should have been published in the Gazette in accordance with the 11th Schedule of the Municipal Corporations Ordinance 1934 and also that the agreement was in the nature of a concession and therefore required the approval of the District Commissioner under Section 94(b) of the Ordinance.

The District Court on appeal reversed the Magistrate on these points and remitted the case for retrial. The Appellants have now come to this Court.

Many points have been argued before us, but, in the view that I take of the case, I need only deal with one.

The powers of a Municipal Corporation are limited to those contained in the Ordinance and I can find nothing in Section 99(1) or any part of the Ordinance to authorise the Municipal Corporation to auction the right to collect taxes in their area. They are authorised to levy and collect certain taxes themselves — they cannot delegate the collection to others in return for a lump sum payment.

I think therefore that the contract was a void one and thus the Respondents cannot sue on it. The appeal must be allowed and the judgment of the District Court set aside and the action brought by the Respondents dismissed.

The Appellants will have all their costs both here and below to include LP. 5.— advocate's fees.

Delivered this 14th day of April, 1938.

British Puisne Judge.

I concur.

Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 60/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Copland and Frumkin, JJ.

IN THE APPEAL OF :

Shimon Baer (Dov) Lande. APPELLANT.

v.

Abraham Rundsunski. RESPONDENT.

Advocates — Representative suing as a friend — When will not be heard.

Appeal from a judgment of the District Court of Tel-Aviv, dated the 4th February, 1938.

The trial Court had made a finding that Appellant's son was appearing too often in a representative capacity.

HELD : Appellant's son should not appear on behalf of his father.

ANNOTATIONS : See C. A. 235/37 (1938, IS. C. J. 49) — earlier proceedings in the case.

FOR APPELLANT : His son.

FOR RESPONDENT : P. Joseph.

ORDER.

The Court feel unable to allow the Appellant's son, in the circumstances, to appear on behalf of his father, and upon his application, an adjournment is granted in order to enable the Appellant to appear in the ordinary way.

The Appellant will pay the costs of to-day to include LP. 5 advocate's fees. The case will not be reinstated on the list before compliance with this order.

Given this 14th day of April, 1938.

Chief Justice.

CIVIL APPEAL No. 55/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khaldi and Frumkin, JJ.

IN THE APPEAL OF :

Abdul Asim Ghoussein. APPELLANT.

v.

Abdul Kader Ghoussein. RESPONDENT.

Bond or application for amount of deposit to be fixed — Application cannot be made after appeal is filed — Right of parties to avail themselves of technical objections — Civil Procedure Rules, 1935 93(1)(b), 94, 96 — *No good cause shown for delay.*

In dismissing an appeal from a judgment of the Land Court of Jaffa, dated the 1st February, 1938 :—

HELD : When an appellant files a notice of appeal he must either file a proper bond or an application to the Court to fix a deposit to be paid in lieu of a bond. Appellant had done neither of these two things and had shown no good cause for the exercise of the discretion of the Court in allowing the deposit paid at a later date to count.

ANNOTATIONS : For dismissal of appeals on the ground of irregularity in the bond under the 1935 rules, see C.A. 223/37 (1937, 1 S.C.J. 23) and cases cited in note 1 thereto ; C. A. 16/38 (1938, IS. C. J. 114).

FOR APPELLANT : Zein El Din.

FOR RESPONDENT : Husseini.

JUDGMENT.

In this appeal a preliminary objection has been taken by the Respondent to the effect that the bond filed was defective, and that the Appellant had no right to file later an application to make a deposit in lieu thereof.

When an Appellant files a notice of appeal he must at the same time do one of two things : he must either file a proper bond in the form set out in Form 19 to the Shedule to the Rules under Rule 93(1)(b), or he must file an application to the Court to fix a deposit to be paid in lieu of a bond under Rule 94.

The Appellant in this case has done neither of these two things, — the bond is not in the form set out in Form 19 to the Schedule, and the application to the Court to fix a deposit was not filed at the time of filing the notice of appeal. The Respondent is entitled to take such advantage as he can of any mistakes made by his opponent and cannot lawfully be deprived of that right.

An application has been made to us under Rule 96 to allow the deposit which has already been paid at a later time by the Appellant to count. Under the said rule a good cause should be shown in order that such an application may be allowed. With the best will in the world we are unable to find any good cause.

The appeal must therefore be dissmissed with costs and LP. 5 advocate's fees.

Delivered this 25th day of April, 1938.

British Puisne Judge.

HIGH COURT No. 21/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Erich Planter. PETITIONER.

V.

1. The Director, Department of Customs, Excise and Trade, Haifa,
2. The Surveyor of Customs, Jerusalem. RESPONDENTS.

Retention of documents — Customs duty paid under protest.

In making absolute a rule *nisi* for an application for an order to be issued directing the Respondents, or either of them, to deliver up to the Petitioner the

documents etc. of the Petitioner detained by the Respondents, and for alternative relief :—

HELD : In view of the terms of the order *nisi* and no criminal proceedings having been instituted in the meantime against the Petitioner and the Petitioner having expressed his readiness to pay the duty under protest, he was entitled to the return of his documents.

FOR PETITIONER : Smoira.

FOR RESPONDENTS : No. 1 — No appearance.
No. 2 — In person.

JUDGMENT.

This is a return to a rule *nisi* issuing from this Court on the 11th day of April, 1938, wherein it is provided that if criminal proceedings are instituted in the meantime against the Petitioner the rule would be suspended. No criminal proceedings have been instituted and the Petitioner has further expressed his readiness to pay the required duty under protest. It is clear that the Petitioner is entitled to recover the documents which have been retained by the customs authorities for more than two months.

The rule *nisi* is therefore made absolute on the undertaking of Petitioner to pay the duty under protest, with costs and LP. 5.— Advocate's fees.

Delivered this 25th day of April, 1938.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 191/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPLICATION OF :

1. Michael Habib Raji Ayoub,
2. Yousef Habib Raji Ayoub,
3. Shibly Habib Raji Ayoub,
4. Rosa Habib Raji Ayoub. — APPELLANT.

v.

Sheich Suleiman Taji el Farouki of Ramleh. — RESPONDENT.

Application for leave to appeal to Privy Council.

Application for leave to appeal to His Majesty in Council from the judgment of the Supreme Court, sitting as a Court of Appeal, dated the 25th November, 1937, in Civil Appeal No. 191/37, granted subject to the usual terms, all formalieties having been complied with.

ANNOTATIONS: Earlier proceedings in this case: C. A. 176/32 (C. of J. 444) ; P. C. 1/35 (C. of J. 1934—6 331, P. P. 22.1.36, Ha. 20.ii.36, P. L. R. Vol. 2, 390) ; C. A. 191/37 (2 Ct. L. R. 169, P. P. 6—9, xii.37, Ha. 23.xii.37) — *where the distinction between a penalty and liquidated damages was introduced.* See also annotations to P. C. L. A. 2/35 (17.ii.38).

FOR APPLICANTS : Olshan.

FOR RESPONDENT : In person.

ORDER:

Whereas by Article 5 of the Palestine (Appeal to Privy Council) Order-in-Council, application to this Court for leave to appeal has to be made by motion or petition within thirty days from the date of judgment to be applied from — the applicant giving the opposite party notice of his intended application ; and

Whereas application to this Court has been made in time by petition, with notice to the other side, on the twenty-fourth day of December, 1938 ; and

Whereas under Article 3(a) of the said Order, an appeal shall lie as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of £ 500.— sterling or upwards, or where the appeal involves directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the said value or upwards ; and

Whereas the matter in dispute on the appeal is more than £ 500.— sterling ;

The Court therefore orders and it is hereby ordered that leave to appeal be granted subject to the following conditions :—

(i) That the Appellants do enter, within two months, of the date of this Order into a bank guarantee in a sum of LP. 300.— for the due prosecution of the appeal and the payment of all such costs, as may become payable to the Respondent in the event of the Appellants not obtaining an Order granting them final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellants to pay the Respondent's costs of the appeal (as the case may be); and

(ii) That the Appellants do take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England within two months of the date of this Order.

After fulfilling the above conditions, the Applicants may apply to this Court, after having given due notice to the Respondent, for the final leave to appeal.

Gives and delivered this 26th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No.67/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE CASE OF :

Nathan Levy. APPELLANT.

v.

1. Itshaq Levy,
2. Haim Levy,
3. Saul Levy. RESPONDENTS.

Dissolution of partnership — Application to call witnesses — Addressing the Court — Evidence of existence of partnership — Property devised to a number of legatees does not constitute partnership among them — C. A. 118/37.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 11th February, 1938 :—

HELD : 1. Appellant had been given sufficient opportunity to address the Court of trial. As the Court had decided, after hearing his own evidence, that Appellant was not a partner, there was no necessity to call other witnesses.

2. A property might pass to more than one person by will and that property becomes the joint property of the legatees but it does not necessarily constitute a partnership between the joint owners.

Considered : C. A. 118/27 (P. L. R. 259, C. of J. 1061).

FOR APPELLANT : S. Gratch.

FOR RESPONDENTS : King.

JUDGMENT.

Fumkin J. : This case is not so complicated as it looked at the beginning. The dispute is between three brothers arising out of differences in respect of the estate of their deceased father. This estate included among other properties, a business in Jaffa and the Appellant

claimed to be a partner in this business and applied for the dissolution of the partnership. Evidence was heard in the Court below which found that the Appellant did not prove his case and dismissed his application for the dissolution of the partnership.

2. On appeal two points of preliminary character were raised by the Appellant. One, that the Appellant was not given the opportunity to bring all his witnesses to the Court. With this point I will deal later.

3. The second point was that after all the evidence was heard, no opportunity was given to the Appellant to address the Court. It is of course very essential that after the conclusion of the evidence full opportunity should be given to the parties to address the Court both on matters of fact and of law as arising out of the evidence heard. In this case, however, the parties had an opportunity of addressing the Court at different stages and we are not prepared to remit the case on this ground alone.

4. On the main point whether or not the Appellant was a partner in that business, it is clear of course that only if he were a partner he could claim the dissolution of partnership, the Appellant's claim is twofold.

5. One, that he was a partner already during the lifetime of the deceased. This claim he failed to establish to the satisfaction of the Court below, which after hearing the Appellant's own evidence decided that from his own evidence they are satisfied that he was not a partner. It is worth noting that what the Court below decided was not that they were not satisfied of his being a partner, in which event further evidence might be useful, but that they were satisfied that he is *not*. No useful purpose, therefore, could be served by hearing further evidence and the Court below was therefore right in refusing his application on this point.

6. Again the Appellant relied in his claim as to the partnership on the will of his deceased father. Clause 6 of the will deals with this particular business and the Appellant's allegation is that the business was intended by the will to become after the death of the deceased the common property of the three brothers, including the Appellant, so that even if he was not a partner during the lifetime of his father, he automatically became a partner upon his death.

7. But this is not the case. A property might pass to more than one person by a will and that property becomes the property of the legatees in joint ownership but it does not necessarily constitute a partnership between the joint owners.

8. In other litigation between the same parties the President of

the District Court sitting under the Succession Ordinance directed that under clause 6 of the will it was not the intention of the deceased to transfer the business to all three brothers, but that the interest of the Appellant under this clause could be justified by the payment to him of a lump sum of LP. 1000.—.

9. No steps have been taken to set aside these directions and it is argued that as under Civil Appeal No. 118/1927 such directions are not appealable any other Court dealing with any matter under a will can go behind such directions.

10. It is not necessary, however, to deal with that point. Even if the Court below was not bound by the directions of the President, and could hold, if they so thought fit, that under clause 6 of the will the Appellant is entitled to more than LP. 1000.— this clause did certainly not create a partnership. In our opinion no partnership has been constituted automatically nor could it be so constituted by the will of the testator. There being no partnership, there was nothing which could be dissolved.

11. We express no opinion as to whether, notwithstanding the directions of the President, the Appellant is, under clause 6 of the will, justified to claim his share in the value of the business. His case was for the dissolution of the partnership, and there being no partnership, the Court below was justified in dismissing his application.

12. The Judgment of the District Court is therefore affirmed and the appeal dismissed with coste to include LP. 5.— advocate's fees.

Delivered this 27th day of April, 1938.

British Puisne Judge.

HIGH COURT No. 27/38.

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

BEFORE : Copland and Khaldi, JJ.

IN THE APPLICATION OF :

1. Mrs. Efrosine Gaitanopoulus,
2. Mrs. Sultaneh Alessantopoulus. PETITIONERS.

v.

1. Odeh Salem Mustafa,
2. Registrar of Lands, Jerusalem,
3. Director of Land Registration. RESPONDENTS.

Jurisdiction of High Court — Other remedy open to applicant.

In dismissing an application for an order to issue to Respondents to restrain them from proceeding with and effecting Land Registry transaction No. 507/38 in the Land Registry of Jerusalem and/or otherwise dealing with the house which is the subject matter of the said transaction unless and until first Respondent's ownership, if any, is declared to the said house by the competent Court :—

HELD : The Petitioner had a remedy in another court, and that being so the application cannot be entertained.

ANNOTATIONS : See also H. C. 12/38 (1938, 1 S. C. J. 111) ; H. C. 18/38 (1938, 1 S. C. J. 203), and annotations ; H. C. 20/38 (5.iv.38).

FOR PETITIONERS : Cattan.

FOR RESPONDENTS : Ex parte.

ORDER.

This is an application for an order *nisi* to issue to the Land Registrar to restrain him from registering a mortgage transaction.

The Petitioner have a remedy in another Court, and that being so we decline to entertain the application.

The application is therefore refused.

Given this 27th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No. 116/36.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

Saadiah Paz. APPELLANT.

v.

Heirs of Zamil Hajir. RESPONDENT.

Sale of land — Anticipatory breach — Notarial notice need not be sent when vendor has disposed of the land.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 30th July, 1936, and in remitting the case to the lower Court to go into the merits :—

HELD : In view of the fact that the Respondent had put it out of his power to transfer the land by selling it before the action was brought, thereby committing an anticipatory breach, there was no need to send him a notarial notice.

ANNOTATIONS : The purpose of a notarial notice is to give the other side a further opportunity to perform the contract (C. A. 12/33, C. of J. 449, P. P. 18, 20.iii.35) if he is under no duty to perform any act (C. A. 36/37, 1937, 1 S. C. J. 262, 1 Ct. L. R. 53) or if he has put it out of his power to perform it (C. A. 18/35, P. P. 28.v ; 1.vi.36, C. of J. 1934—6 164, Ha. 11.vi.36 ; C. A. 119/35, P. P. 4.ix.36, Ha. 15.x.36) it is not necessary to send any notice.

FOR APPELLANT : Feiglin.

RESPONDENT : duly served — absent.

JUDGMENT.

This appeal is allowed. A notarial notice might have been necessary, but inasmuch as the Respondent had sold the land in question after the conclusion of the contract and before action was brought, and as there has been an anticipatory branch of the contract by the Respondent inasmuch as the Respondent has put it out of his power to carry out the contract, there was no need for such notarial notice.

The case should be remitted to the District Court to hear it on its merits. Costs to await the result of the second trial.

Delivered this 28th day of April, 1938.

British Puisne Judge.

CIVIL APPEAL No.66/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

Noah Havkin. APPELLANT.

v.

1. H. Lachman,
2. P. Moses. RESPONDENTS.

Appeal — Findings of fact.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 11th February, 1938 :—

HELD : There was evidence to justify the findings of the lower Court.

ANNOTATIONS : The earlier proceedings referred to are C. A. 125/37 (2 Ct. L. R. 151).

FOR APPELLANT : S. Gratch.

FOR RESPONDENTS : Eliash.

JUDGMENT:

When this case was first on appeal before this Court it was sent back to the District Court in order to make findings of fact on two points and give a fresh judgment. The District Court heard evidence on those two points, and made their findings thereon and there is ample evidence to support the findings arrived at by that Court. That being so the judgment of the District Court is correct, and the arguments raised by Appellant entirely fail to impress us.

The appeal is therefore dismissed with costs and LP. 10.— advocate's fees for the two appeals.

Delivered this 28th day of April, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 42/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: The Chief Justice, Greene and Abdul-Hadi, JJ.

IN THE APPEAL OF:

Zaki Mohammad Deeb. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal from Conviction in criminal case — Witnesses — Sufficiency of evidence.

In dismissing an appeal from the judgment of the District Court of Haifa, dated the 25th March, 1938, whereby Appellant was convicted of entering a dwelling house with intent to commit theft therein, contrary to sec. 296 of the Criminal Code Ordinance, 1936, and sentenced to three years' imprisonment, to run from the date of termination of sentence which he is now serving:—

HELD: Appellant had had an opportunity to call witnesses in the trial Court and there had been sufficient evidence to support the conviction.

APPELLANT: In person.

FOR RESPONDENT: Crown Counsel.

JUDGMENT.

We do not think that there are any grounds for your appeal. It is quite clear that you had an opportunity of calling the evidence you wished to tender and it is quite clear from the evidence before the Court below that you could be properly convicted.

The appeal will be dismissed and the conviction and sentence affirmed.

Sentence to run from the termination of the term of imprisonment you are now serving.

Delivered this 28th day of April, 1938.

Chief Justice.

CRIMINAL APPEAL No. 43/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Mohammad Mahmoud Tallawi,
2. Ahmad Khalil Moussa. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Appeal from the judgment of the District Court of Haifa, dated the 26th March, 1938, whereby Appellants were convicted of :—

(1) Robbery, contrary to Section 287 read with Section 23 of the Criminal Code Ordinance, 1936, — the first Appellant unanimously and the second Appellant by a majority ; and

(2) Possession of servicable firearms of military value, and ammunition, without authority or reasonable excuse, contrary to Regulation 8A of the Emergency Regulations No. 4 of 1936, as ammended by paragraph (b) of Regulation 3 of the Emergency (Amendment) Regulations No. 5 of 1936, and Regulation 4 of the Emergency (Amendment) Regulations No. 8 of 1936 ; and sentenced to six years' imprisonment each, to run from the 16th September, 1937, dismissed.

APPELLANTS : In person.

FOR RESPONDENT : Crown Counsel.

JUDGMENT.

The first Appellant, Mohammad Mahmoud Tallawi, having applied for the withdrawal of his appeal, his appeal is dismissed. The sentence in his case will run from the 16th September, 1937.

The second Appellant, Ahmad Khalil Moussa, wished us to hear his appeal. There does not appear to be anything wrong in the proceedings before the trial Court and we see no grounds to interfere. The appeal will therefore be dismissed and the conviction and sentence passed are affirmed. The sentence to run from the date of the determination of this appeal, that is, the 28th April, 1938.

Delivered this 28th day of April, 1938.

Chief Justice.

CIVIL APPEAL No. 68/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Raji el Issa. APPELLANT.

v.

Joshua Blumenfeld. RESPONDENT.

Advocates — Signing notice signifies consent to appear — Power of attorney.

In dismissing an appeal from a judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 23rd November, 1937 :—

HELD : The advocate having signed the notice to attend he could not allege that he was not authorised to appear on behalf of Appellant.

ANNOTATIONS : See L. A. 28/34 (2 P. L. R. 329) but *cf.* C. A. 235/37 (1938, 1 S. C. J. 49) and annotations and C. A. 28/38 (1938, 1 S. C. J. 109).

FOR APPELLANT : Dajani.

FOR RESPONDENT : Baker.

JUDGMENT.

In this case a notice was sent to an advocate, who was stated in the statement of appeal to be the representative of the Appellant, to attend in this Court today and at this very hour in connection with this appeal. The advocate signed the notice, and this means that he accepted to appear in this case on behalf of the Appellant. We are told by the Advocate today that he is not the attorney of Appellant and that he has no power of attorney which auhorizes him to appear on his behalf. We are not prepared to deal with this argument for if this was the case he should not have signed the notice, the signing of which means that he accepts to appear on behalf of the party named therein.

We have read the notice and grounds of appeal and found this appeal to be entirely frivolous.

The appeal is therefore dismissed with costs and LP. 5.— Advocate's fees.

Delivered this 2nd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 69/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Fuad Abdul Ghani Khaldi. APPELLANT.

v.

Ra'iseh Muhyiddin Khaldi. RESPONDENT.

Disagreement of judges — Land Court Rules, rule 2(2) — Hearing the evidence — Record.

In allowing an appeal from a judgment of the Land Court of Jerusalem, dated the 28th February, 1938, and in remitting the case to the trial Court for rehearing the evidence :—

HELD : Where a new judge is called in under rule 2(2) of the Land Court Rules evidence must be heard *de novo,* it being insufficient to read the record.

ANNOTATIONS : The remitting case referred to in the judgment is L. A. 33/36 (1937, 1 S. C. J. 351, P. P. 22.x.37, 1 Ct. L. R. 27) which was followed in C. A. 18/38 (1938, 1 S. C. J. 209) — See annotation thereto. Other proceedings in the same case : L. A. 25/36 (1937, 1 S. C. J. 347) ; L. A. 2/35 (2 P. L. R. 417, P. P. 10.xii.35).

The principle in the above case has already been laid down (both for Land Courts and District Courts) in the following cases : C. A. 159/33 (2 P. L. R. 43, P. P. 6.iii.35) ; C. A. 21/31 (P. L. R. 709, C. of J. 511) ; C. A. 61/32 (C. of J. 515) ; C A. 28/32 (Hooper's Civil Law of Palestine and Trans-Jordan, Vol. II, p. 53) ; L. A. 16/35 (P. P. 24.ii.36, C. of J. 1934-6 206) ; C. A. 74/35 (P. P. 26.viii.36, C. of J. 1934-6, 207) ; C. A. 131/37 (2 Ct. L. R. 105).

See and compare the following cases on the same point : C. A. 91/31 (2 P. L. R. 2, P. P. 19.iii.35, C. of J. 1512) — *rehearing held unnecessary ;* L. A. 81/32 (P. P. 24.x.33, C. of J. 516) ; L. C., Jm., 78/28 (C. of J. 500) confirmed on appeal in L. A. 58/28 (not reported) ; H. C. 28/36 (P. P. 29.vii.36).

FOR APPELLANT : Abcarius Bey.

FOR RESPONDENT : Moghannam.

JUDGMENT:

It is most unfortunate, but this appeal must be allowed. When this case was for the last time remitted to the Land Court it was so remitted for the purpose of calling in a third Judge to join and give his opinion on the case in accordance with Sub-Rule 2, of Rule 2, of the Land Courts Rules. The Land Court held that it was not necessary to rehear the evidence and found it sufficient to have the third judge read the evidence adduced in the previous hearings. In thus holding we think that the Land Court was wrong. Where a question of evidence is involved all judges of the Court should hear the evidence.

The appeal is therefore allowed and the case is remitted to the Land Court to hear the evidence before the three judges.

Costs to await the result of the retrial.

Delivered this 2nd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 73/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF:

Shafic Ka'war. APPELLANT.

v.

M. Steinberg and Co. RESPONDENTS.

Appeal — Order not in the nature of a judgment not subject to appeal.

In dismissing an appeal from an order of the District Court of Haifa, dated the 7th January, 1938:—

HELD: An order which is not a judgment of the Court is not subject to appeal.

ANNOTATIONS: Compare L. A. 88/22 (C. of J. 1054) — *interlocutory judgment not subject to appeal.* So also, no appeal will lie from a refusal by the President, District Court, to grant leave to appeal — C. L. A. 7/34 (2 P. L. R. 230) and cases therein quoted.

FOR APPELLANT: Atalla.

FOR RESPONDENTS: Gavison — by delegation.

JUDGMENT:

This is an appeal from an Order of the District Court of Haifa, dated the 7th January, 1938.

After hearing Advocate for Appellant we find there is no judgment before us. Although there is an order by the Presiding Judge granting leave to appeal to this Court against the order of the Court below referred to above, we are of opinion that this order is not a judgment of the Court and is not subject to appeal.

Appeal must be dismissed with costs to include LP. 2.— advocate's fees.

Delivered this 3rd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No.75/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF:

1. David Illgovsky,
2. Gedalia Illgovsky. APPELLANTS.

v.

Jacob Calderon. RESPONDENT.

Application for leave to appeal — Appeal out of time — Appellant to show due diligence in prosecuting appeal — Service of award in workmen's compensation cases.

In dismissing an appeal from a judgment of the Relieving President of the District Court, Tel Aviv, dated the 10th September, 1937:—

HELD: 1. Where leave to appeal is required the period of thirty days for filing the appeal is computed from the date of the judgment appealed against until the time the grounds of appeal are filed, but deducting the period between the day the application for leave to appeal is submitted and the date of the notification of the order granting leave to appeal. Appellant must show due diligence in prosecuting the appeal.

2. Service of an award (in workmen's compensation cases) is properly made by the Superintendent of Courts through registered mail.

Followed : C. A. 2/36 (1937, 1 S. C. J. 82, P. P. 19.iii.37, 2 Ct. L. R. 64, Ha. 23.iii.37, C. of J. 1934-6, 711).

C. A. 33/36 (P. P. 5-7.ii, 8.iv.37, 1937, 1 S. C. J. 97).

ANNOTATIONS : 1. In addition to C. A. 2/36 (*supra*) — *appeal out of time,* and C. A. 33/36 (*supra*) — *appeal within legal period,* see also C. A. 126/34 (not reported).

FOR APPELLANTS : Pevsner.
FOR RESPONDENT : Krongold.

JUDGMENT:

In this appeal a preliminary objection was raised by the Respondent to the effect that the appeal is out of time. In fact the application for leave to appeal was out of time. The important dates in this case are that, on the 17th November, 1937, a copy of the award was sent by the Superintendent of Courts by registered mail to each of the parties ; on the 29th November, 1937, Appellants sent an opposition intimating their intention to apply for leave to appeal ; on the 27th December, 1937, the application for leave to appeal was actually lodged by Appelants in the District Court. Thus there was a delay of 40 days between the receipt of the copy of the award and the date when the application for leave to appeal was actually filed. Leave to appeal was granted on the 31st day of January, 1938, and notification to that effect was made on the 7th day of March, 1938. The appeal was lodged on the 11th March, 1938.

There are two cases before this Court on the question at issue. The first case is Civil Appeal No. 33/1936 wherein it was held that it would be unfair to apply Art. 181 of the Code of Civil Procedure in such cases where leave to appeal is required and that the only question to be considered is whether the Appellant showed due diligence in prosecuting his appeal, once leave to appeal was granted. In another case, Civil Appeal 2/1936, the Court, in which two of the Judges now present were sitting, adopted the same principle and held that the period from the date of the judgment appealed against until the time the grounds of appeal are filed, but deducting the period between the date the application for leave to appeal is submitted and the date of the notification of the order granting such leave, must not exceed thirty days.

In this case we come to the same conclusion and say, even supposing that Appellant had only received the copy of the award on the 28th November, 1937, which is most unlikely, that due diligence has not

been displayed by the Appellant in prosecuting his appeal. We further say that when the law prescribes a manner of service whereby a copy of an award is required to be sent by the Superintendant of Courts by registered post that constitutes sufficient service.

That being so the appeal should be dismissed with costs and LP. 5.— Advocate's fees.

Delivered this 4th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 76/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Mousa Khalil Hanna. APPELLANT.

v.

Messrs. "Palwoodma" Palestine Wood Work Machinery Trading and Manufacturing Co. RESPONDENTS.

Remittal by appellate Court — Definite instructions must be adhered to — Oath — Appeal from remitting judgment.

In dismissing an appeal from a judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 31st January, 1938 :—

HELD : 1. The Magistrate could not go beyond the instructions of the judgment of remittal and do more than tender the oath to Respondent.

2. The proper course for Appellant to have followed was by way of appeal from the remitting judgment.

ANNOTATIONS : C. A. 173/32 (P. P. 17.2.33, C. of J. 970) is to the same effect. See also C. A. 109/38 (18.v.38) and *cf.* C. A. 69/38 (2.v.38).

FOR APPELLANT : Atalla.

FOR RESPONDENTS : Levin.

JUDGMENT.

This appeal must fail. When this case was first on appeal before the District Court that Court remitted the case to the Magistrate

in order to give the Appellant the opportunity to tender the oath to the Respondents. Thus, the Magistrate was under definite instructions from the District Court which in law he could not go beyond. The Appellant refused to tender the oath to the Respondents, but rather asked the Magistrate to do something which the latter had no power to do, and the Magistrate accordingly dismissed his case. On appeal to the District Court he failed, and now he is trying his last chance by appealing to the Supreme Court.

The proper course for the Appellant to follow was to appeal to the Supreme Court from the first judgment of the District Court. The point of law stated is one that does not arise in this case.

The appeal is dismissed with costs to include LP. 5.— advocate's fees.

Delivered this 4th of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 77/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

British & Levant Agencies Ltd. APPELLANT.

v.

1. Munir Farah,
2. Adel Farah. RESPONDENTS.

Rent — Mejelle, Arts. 472, 596, 900 — *"Prepared for hire" — Absence of written contract.*

In allowing an appeal from a judgment of the District Court of Jaffa, dated the 9th February, 1938, and in remitting the case to the lower Court to hear evidence as to the preparation for hire of the tractor, the subject matter of the action :—

HELD : No contract having been signed, Art. 472 and not 900 of the Mejelle applied and estimated rent was payable.

ANNOTATIONS : See also C. A. 115/29 (P. L. R. 606, C. of J. 1161) and C. A. 6/30 (C. of J. 1162).

FOR APPELLANT : P. Joseph.

FOR RESPONDENTS : Shehadeh.

JUDGMENT.

This is an appeal from the judgment of the District Court of Jaffa dismissing a claim for estimated rent of a tractor misappropriated by the Respondents.

The Appellant based his claim on Articles 472 and 596 of the Mejelle and claimed an estimated rent of LP. 5.— per day for the hire of this machine. The District Court dismissed his claim on the ground that the Appellant should have proceeded under Article 900 of the Mejelle and sued the Respondents for compensation based on diminution in value of the machine by reason of the wrongful act.

It is clear in this case that no contract was signed. Article 472 of the Mejelle applies, namely, where a person, without a contract or permission, uses the property of another, he is liable to pay the equivalent rent. We are therefore of opinion that the District Court was wrong in saying that the action should be based on Article 900 of the Mejelle.

The appeal is allowed, the judgment of the District Court is set aside, and the case remitted to them to hear evidence as to the preparation for hire of the machine, and as to the estimated rent of the machine in question and to give a fresh judgment.

Delivered this 4th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 54/1938.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Abdul Hadi, JJ.

IN THE APPEAL OF :

Itzhak Trachtengut. — APPELLANT.

v.

1. Hamad Ismail Koulek,
2. Said Mousa Sawafiri. — RESPONDENTS.

Rent — Abandonment of premises — Breach of contract — Readiness and willingness to complete — Failure to pay promissory notes — Damages — Direct and indirect loss — Civil Procedure Code, 109, 110.

In allowing an appeal from a judgment of the Land Court of Jaffa, in its appellate capacity, dated the 30th September, 1937, confirming a judgment

of the Magistrate's Court, Jaffa, dated the 27th July, 1937 ; and in remitting the case to the Magistrate's Court with directions to determine the direct loss, if any, and give judgment accordingly :—

HELD : 1. Respondent had not committed a breach of the contract by failing to pay promissory notes for rent which had not been presented to him for payment.

2. Appellant had committed a breach of the contract, but as he had not done so in bad faith, he was only liable for direct loss and not for unearned profits.

ANNOTATIONS :

1. Note, however, that it is for the person claiming damages to show that he had been ready and willing to complete : P. C. 47/32 (P. L. R. 831, C .of J. 406) ; C. A. 100/34 (2 P. L. R. 409, C. of J. 1934-6 145).

2. The following cases are material on the assessment of damages : C. A. 157/22 (C. of J. 1626) ; C. A. 149/26 (C. of J. 1628) ; C. A. 147/26 (P. L. R. 116, C. of J. 378) ; C. A. 101/28 (C. of J. 389) ; C. A. 99/29 (C. of J. 1632) ; C. A. 105/30 (C. of J. 1636) ; C. A. 136/33 (2 P. L. R. 114, P. P. 5.vi.34, C. of J. 1415) ; C. A. 181/37 (2 Ct. L. R. 118, Ha. 18.xi.37) ; C. A. 191/37 — *Faruqi v. Ayub* (P. P. 6-9.xii.37, 2 Ct. L. R. 169, Ha. 23.xii.37).

FOR APPELLANT : B. Joseph.

FOR RESPONDENTS : Cattan.

JUDGMENT.

Frumkin, J. : The Appellant in this case is the landlord of a shop situated in Tel-Aviv let some time in December, 1935, to the Respondent for a period of 16 months. Rent was paid in advance for 4 months, and the balance was payable quarterly in advance. Promissory notes were given to secure those payments. It seems that the first of this quarterly instalment was duly paid.

2. On the 19th April, 1936, upon the outbreak of disturbances in Palestine the Respondent, an Arab, abandoned the shop, and has taken no steps in connection with the lease until November, 1936, when he sent a Notarial notice to the Appellant asking for the redelivery of the shop or, damages at the rate of LP. 1.— per day from the date of notice until the expiration of the lease. The Appellant has then already let the shop to another.

3. The Appellant maintains that he has done so, seeing that the Respondent has abandoned the shop and ceased to pay rent for many months.

4. The Respondent sued the Appellant before the Magistrate's Court and obtained judgment for LP. 100.— damages as claimed.

On appeal before the District Court the Judgment was confirmed, but unfortunately no reason was given for so doing.

5. Against this Judgment the owner of the shop now appeals, and his grounds of appeal might be summarised thus :

a) That he was entitled to let the shop to others upon its being abandoned by the tenant.

b) That the Respondent himself has committed a breach of the contract and has shown no willingness and readiness to perform the contract, and is therefore not entitled to sue for damages.

c) That, in the alternative, there being no bad faith on the part of the Appellant the most the Respondent can sue for is damages for direct loss under Article 109 of the Ottoman Civil Procedure Code and not damages for unearned profit under Article 110, and

d) that there was no evidence to support the finding of the Magistrate in fixing the damages.

6. In my view the Appellant committed a breach of the contract by letting the shop to a new tenant and allowing the latter to occupy it within the period of Respondent's lease.

7. The only obligation imposed upon the Respondent under the contract was to pay the rent. The payment of rent was secured by promissory notes. In strict application of the law there might be no obligation on the Appellant, to present the notes for payment to the Respondent who was the maker of the notes. Yet I am not prepared to go so far as to hold that by non-payment of the rent the Respondent has committed a breach of the contract or shown his unwillingness to perform it when the Appellant has taken no steps to collect the rent.

8. There is nothing, however, to show that by letting the shop to another the Appellant acted in bad faith or fraud, as under the special circumstances of the case he was justified in assuming that there was no desire on the part of the Respondent to carry on his business in that shop. It follows that Article 109 of the Ottoman Code of Civil Procedure and not 110 is applicable.

9. The appeal is therefore allowed and the judgments of both the Magistrate's Court and the District Court are set aside and the case remitted to the Magistrate with directions to determine, if, and to what extent, the Respondent has suffered any direct loss other than unearned profits, and give judgment accordingly.

Costs to follow the result.

Delivered this 5th day of May, 1938.

Puisne Judge.

CIVIL APPEAL No. 80/38.
CIVIL APPEAL No. 81/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Hanneh bint Khalil Abu Abdalleh. APPELLANT.

v.

Naser Mousa Ja'bour. RESPONDENT.

Appeal — Findings of fact — Application for assessment of deposit — C. A. 55/38.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 31st January, 1938 :—

HELD : 1. First appeal must be dismissed on the ground that it was based upon findings of fact.

2. As regards the second appeal, Appellant had neither submitted a proper guarantee nor lodged an application for the assessment of a deposit, together with the statement and grounds of appeal.

Followed : C. A. 55/38 (1938, 1 S. C. J. 250).

ANNOTATIONS : In addition to the authorities collected in the annotations to C. A. 55/38 (*supra*), see the following cases reported in this issue :— C. A. 87/38 (10.v.38) ; C. A. 82/38 (9.v.38) ; C. A. 86/38 (10.v.38) ; C. A. 91/38 (16.v.38).

FOR APPELLANT : Atalla.
FOR RESPONDENT : Kazimi.

JUDGMENT.

The two appeals must fail. The question involved in the first appeal is a pure question of fact, and such cannot be argued in this Court. The Land Court heard the produced evidence, weighed such evidence and gave its judgment on the base thereof, and we are of opinion that there was sufficient evidence to justify the findings arrived at.

In connection with the second appeal a preliminary objection was raised by the Respondent to the effect that the application of the assessment of a deposit submitted by the Appellant was out of time. It has been already, and recently, held by this Court in Civil Appeal No. 55/38 that when an appellant files an appeal he should do one

of two things ; he should either submit a proper guarantee or lodge an application for the assessment of a deposit together with the statement and grounds of appeal. In this case neither of these two requirements has been complied with. The original bond submitted by the Appellant is defective and the application of the assessment was filed after the appeal had been lodged. Even supposing that this Court overruled the preliminary point, the appeal would have equally been dismissed on the ground that it merely deals with a question of fact.

The two appeals are dismissed. Both parties to have their costs. No order is made as to Advocate's fees.

Delivered this 5th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 45/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khaldi, JJ.

IN THE APPEAL OF :

1. Yousef Mohammad Wahbab,
2. Said Abdullah Wahbab. APPELLANTS.

v.

The Attorney General. RESPONDENT.

Committal — Sentence on charge other than that on which committed — Perjury — Evidence to support charge — Criminal Procedure (Trial Upon Information) Ordinance, sec. 28(1)-(4).

In allowing an appeal from a judgment of the District Court of Nablus, sitting at Safad, dated the 6th April, 1938, whereby Appellant was convicted of perjury contrary to sec. 117(1) of the Criminal Code Ordinance, 1936, and sentenced to four months' imprisonment and in quashing the conviction :—

HELD : The conviction was in respect of an offence other than that on which the Accused was committed and there had been no evidence before the examining magistrate to support the new charge.

ANNOTATIONS : See the authorities collated in the annotations to CR. A. 13/38 (1938, 1 S. C. J. 93) — *amendment of informations.* See also CR. A. 18/38 (1938, 1 S. C. J. 156) and see CR. A. 53/38 (28.v.38), CR. A. 54/38 (30.v.38) and annotations.

FOR APPELLANTS : Hawa.

FOR RESPONDENT : Ghussein.

JUDGMENT.

This case comes to this Court by leave granted by me — the point being a technical one in that the Magistrate committed Appellants for perjury in respect of something said before a Magistrate's Court, and the District Court convicted them of perjury in respect of something said before a District Court.

Section 18 of the Criminal Procedure (Trial Upon Information) Ordinance which deals with the committal of persons by the Magistrate provides in Sub-Section 2 as follows :——

> "(2) If he (that is the Magistrate) is of opinion that there is sufficient evidence to put the accused upon his trial, he shall commit the accused person for trial for such offence or offences of which there appears to be such sufficient evidence, notwithstanding that it or they may differ from the offence or offences as originally charged".

so that in the first instance the Magistrate's obligation is to commit the person charged for the offence or offences that emerge from the evidence before him.

The matter is carried a step further by Section 28 of the Criminal Procedure (Trial Upon Information) Ordinance, Sub-Section 1 of which states as follows :—

> "(1) No person shall be put upon his trial upon information before the Court of Criminal Assize or District Court, notwithstanding that he may have been committed for trial by a Magistrate, except on an information filed by, or on behalf of, the Attorney General in the Court in which he is to be tried".

and in the ordinary way the information charges the accused person with the offence or offences for which he was committed, but Sub-Section 4 of the same Section provides :—

> "(4) Any offence may be charged in an information which is supported by evidence taken at the preliminary enquiry".

so that the Attorney General is not bound by the committal order of the Magistrate, but can extend the charge in the information, subject to this, that the new charge must be supported by evidence before the Magistrate.

In this case the point was raised before the Court of trial and overruled and that Court proceeded to hear the case and convicted the Appellants. Fawzi Bey has not been able to call our attention to any evidence before the Magistrate at the preliminary hearing which touched in any way the proceedings before the District Court, and it is remarkable that the evidence of the witness who supported the charge as laid before the Court of trial was a witness who was

not called before the Magistrate but was called for the first time before the trial Court.

In our view the information cannot be supported and the conviction is quashed. We would remark that Courts of trial should be careful to see that informations are properly drafted in accordance with the law.

Delivered this 5th day of May, 1938.

Chief Justice.

CRIMINAL APPEAL No. 48/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khaldi, JJ.

IN THE APPEAL OF :

Mustafa Mohammad Kaddour. APPELLANT.

v.

The Attorney General. RESPONDENT.

Burglary — Appeal without merits — Sentence.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 11th April, 1938, whereby Appellant was convicted of :—

(1) Burglary, contrary to Section 295(a) of the Criminal Code Ordinance, 1936 ; and

(2) Attempted murder, contrary to Section 222(a) of the Criminal Code Ordinance, 1936, and sentenced to seven years' imprisonment.

HELD : The appeal was without merit and the Sentence could be increased.

APPELLANT : In person.

FOR RESPONDENT : Ghussein.

JUDGMENT:

We see no grounds for allowing your appeal. There can be no doubt that you were guilty of the offence with which you were charged, that is, breaking into a house at night and attacking the people therein. A similar offence took place some time ago in Jerusalem which resulted in the death of two people and the offender was hanged. You are fortunate that in your case no death ensued. The sentence passed on you is light and in the circumstances we increase it to one of nine years' imprisonment.

Delivered this 5th day of May, 1938.

Chief Justice.

CIVIL APPEAL No.82/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

Mustafa Attallah Ibn el Haj Abdul Samad el Dajani. APPELLANT.

v.

Mansour Hassan Naser. RESPONDENT.

Appeal — Non compliance with Civil Procedure Rules — Guarantee for costs — No good cause shown for non compliance.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 10th December, 1937 :—

HELD : The guarantee securing the costs of the appeal was defective. No good cause was shown for granting leave to make good the defect.

ANNOTATIONS : See annotations to C. A. 80-81/38 (5.v.38).

FOR APPELLANT : Farajallah.

FOR RESPONDENT : Assal.

JUDGMENT:

As my brother Frumkin has pointed out the Rules are made to be complied with, and they must be complied with. In this appeal the guarantee securing the costs of the appeal is defective. The attorney for the Apellant urged for leave to make good the defect. This might be granted on good cause. No good cause having been shown, the appeal is dismissed with costs and LP. 5.— advocate's fees.

Delivered this 9th day of May, 1938.

British Puisne Judge.

HIGH COURT No. 26/38.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

David Nahum Adika. PETITIONER.

v.

District Commissioner, Jerusalem District. RESPONDENT.

Ottoman Law of Societies — Registration of Society — Not likely to affect public peace.

In granting an application for an order to issue to the Respondent directing him to apear and show cause why he should not approve and/or register "The Community of the Zako Jews — Eastern Zionists, Jerusalem" as a society under the Ottoman Law of Societies, of 29 Rejeb, 1327 and Public Notice dated 26th August, 1919.

HELD : The registration or existence of the Society was not likely to affect public peace.

FOR PETITIONER : Bruchstein.

FOR RESPONDENT : Salant.

ORDER.

We need not trouble you Mr. Bruchstein.

The reason given for the non registration of this Society is that the State's peace is likely to be disturbed. We do not think that the registration of this Society has to do anything with the public peace or that this Society is likely to affect it.

Therefore the Rule *Nisi* is made absolute. Respondent to pay Petitioner's coststo include LP. 5.— advocate's fees.

Given this 9th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 86/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

1. Mohammad Naser el Din el Basheiti,
2. Yusra Hussein el Basheiti,
3. Nafish, the widow of Hussein Basheiti, in her personal capacity and as guardian of her minor daughters, Widal, Shehira and Kouther, and on behalf of the Estate of Omar Hussein el Basheiti. APPELLANTS.

v.

Olaf Lind. RESPONDENT.

Appeal — Guarantee — Second appeal — Rules of Court — L. A. 43/36.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 2nd February, 1938 :—

HELD : 1. A fresh guarantee must be filed on a second appeal.
2. Although Appellant had applied for directions in his statement of appeal, he had not taken steps to ascertain the ruling of the Court.

Followed : L. A. 43/36 (not reported).

ANNOTATIONS : For cases on defective guarantees, see annotations to C. A. 80-81/38 (5.v.38).
Earlier proceedings in this case : C. D. C., Jm. 29/37 (2 Ct. L. R. 124) ; C. A. 168/37 (2 Ct. L. R. 123).

FOR APPELLANTS : Haddad.
FOR RESPONDENT : Olshan.

JUDGMENT.

In this case a preliminary objection had been raised, namely, that no guarantee was filed by the Appellant. This is a second appeal and the Appellant had asked that the guarantee produced in the first appeal be considered in the second one. It has been pointed out that the said guarantee has been partially executed by the Respondent to secure his costs under the judgment of the first appeal.

Therefore, and following the ruling in Land Appeal 43/36 we are

of the opinion that a fresh guarantee must be submitted on a second appeal.

The Appellant says that he has applied in his Notice of Appeal for direction by the Court in case the guarantee is found insufficient. He admits, however, that he has taken no steps to ascertain the Court's decision regarding this vital and important matter to his appeal. We had on previous occasions pointed out that the Rules are made to be complied with, and they must be complied with.

We have the power to grant leave to make good the defect on good cause shown. But we are not prepared to do this on the mere negligence of the parties on vital matters.

The appeal wil be therefore dismissed with costs and LP. 5.— advocate's fees.

We wish to point out that this is a third case within the last few days that mistakes have been made in connection with the bond. The rules regarding the bond are very simple and we do not see why such mistakes should occur.

Delivered this 10th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 87/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

Rahel Zabyczynsky. APPELLANT.

v.

Yeheskiel Zyskind Zabiczynsky. RESPONDENT.

Appeal — Bond — Authentication to be before Notary Public — Mortgage of property must be at Land Registry — No good cause shown.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 24th January, 1938 :—

HELD : A bond must be authenticated before the Notary Public and the property actually mortgaged at the Land Registry.

ANNOTATIONS : Authorities on defective bonds are collated in the annotations to C. A. 80-81/38 (5.v.38).

FOR APPELLANT : Spindel.

FOR RESPONDENT : Serlin.

JUDGMENT:

Again, for the second time this morning, a preliminary objection has been taken with regard to defects in the bond. The rules regarding these bonds are very simple. In these case there are two requirements that must be complied with, first that the bond must be duly authenticated and that secondly the property must be mortgaged.

With regard to authentication the proper procedure to be followed in this country is that the bond must be authenticated by a Notary Public. Mere testification by two witnesses is not sufficient as authentication.

As to mortgage, the property must be actually mortgaged at the Land Registry. In the present case no mortgage has been effected and the Respondent has no securities whatever.

No good cause having been shown, the appeal wil therefore be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 10th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No.88/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Mousa Nasar el Ja'bour. APPELLANT.

v.

Hannah Khalil Abdallah. RESPONDENT.

Appeal — Date of commencement of period — Service of summons on advocate's clerk — Judgment, whether delivered in presence or in absence.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 20th December, 1937 :—

HELD : The judgment did not state that it had been delivered in absence and the period of appeal therefore ran from the day of delivery.

ANNOTATIONS : As regards service of summons on an advocate's clerk, see also C. A. 17/34 (2 P. L. R. 93, P. P. 3.vi.34).

FOR APPELLANT : Asal.

FOR RESPONDENT : Atalla.

JUDGMENT.

We are quite satisfied that the apeeal is out of time. The service of the summons in respect of the date fixed for the delivery of the judgment was effected on the clerk of advocate for Appellant on the 17th December, 1937, and the judgment of the Court below was delivered on the 20th December, 1937. Moreover, the Court did not state in its judgment that it was delivered in absence of the Appellant and even Counsel for Appellant has admitted before us that his client was present in Court on the day of the delivery of the judgment but that his presence was in regard to a land case pending between him and the Respondent herself. The Appellant did not file his appeal against the judgment of the Court below until the 2nd April, 1938.

The appeal is dismissed with costs, to include LP. 3.— advocate's fees.

Delivered this 10th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 70/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

Haya Tenenbaum. APPELLANT.

v.

Aziz Mikati. RESPONDENT.

Bei bil wafa — "Once a mortgage always a mortgage" — Judgment of Court of Cassation 25.5.1318 *— Baz's Commentaries on the Civil Procedure Code.*

In allowing an appeal from a judgment of the Land Court of Haifa, dated the 21st February, 1938, and in remitting the case to the lower Court to be tried on its merits :—

HELD : (Following a judgment of the Ottoman Court of Cassation at Constantinople, dated the 25th May, 1318) — A sale with a right of redemption cannot operate as a final sale but the property must be sold by the Court.

Followed : Court of Cassation Decision of the 25th May, 1318.

ANNOTATIONS : There can be no doubt that the same result would have been reached by the Court had English authorities been followed ; for the maxim "once a mortgage always a mortgage" pertains to English law and the following authorities are to the same effect as the Court of Cassation judgment quoted above : Douglas *v.* Culverwell (English and Empire Digest, Vol. XXXV, pp. 443-4 652) ; Cleary *v.* Aitken (*Ibid.* p. 241 note 21xix) and in particular Waters *v.* Mynn (*Ibid.* p. 235) and generally, *op. cit. passim.* The Land Court of Jaffa in Land Case No. 27/35 (not reported) has recently admitted a claim similar to that in the present case but on the authority of English precedents.

The Turkish decision quoted in the judgment, however, can only be of doubtful value as it was delivered ten years prior to the enactment of the Provisional Law for the Mortgage of Immovable property. See also secs. 5 and 8 of the Mortgage Law Amendment Ordinance (Cap. 95) and Art. 17 of the Provisional Law Relating to the Disposition of Immovable Property. See also C. A. 3/38 (1938, 1 S. C. J. 136).

On the oter hand, it has been held, though on different facts, that a registered title is not indefeasible, particularly in view of the provisions of sec. 7(2) of the Land Courts Ordinance (Cap. 75) : L. A. 137/23 (P. L. R. 13, C. of J. 764) ; L. A. 113/24 (P. L. R. 36, C. of J. 15) ; L. A. 55/27 (C. of J. 1739) ; C. A. 182/37 (1938, 1 S. C. J. 163 and annotations) ; C. A. 32/37 (1937, 1 S. C. J. 258, 2 Ct. L. R. 12). The title may, however, only be upset by means of written evidence (L. A. 109/24, P. L. R. 44, C. of J. 771) unless the parties are related, when Art. 82 of the Code of Civil Procedure applies (C. A. 50/36, 1937, 1 S. C. J. 106, C. of J. 1934-6 497 and, as L. A. 50/36, in 1937, 1 S. C. J. 367 and 3 Ct. L. R. 6).

FOR APPELLANT : Abcarius Bey.
FOR RESPONDENT : Koussa.

JUDGMENT:

In this case the Appellant sued the Respondent in the Land Court of Haifa asking for the return to her of certain mortgaged property against repayment of the amount of the mortgage debt and for the cancellation of the registration of the property in his (the Respondent's) name and the registration in the name of the Appellant.

The action is based on an agreement between the parties dated 28th May, 1929. This agreement was in the nature of a compromise, and settlement, of the financial relations between the parties. In it the Appellant agreed to waive her right in an action brought by her in the High Court against the Appellant and consented to the order *nisi* being discharged and she agreed to transfer the plot of land, the subject matter of the present action, to the Respondent on the latter renouncing his rights under the mortgage subsisting between the parties.

The important clauses of the agreement are :—

1. "The second party undertakes to transfer to the first party the same plot whose locality, area and boundaries are described above for the sum of LP. 3,100.—."

2. "The second party undertakes to purchase the plot referred to above from the first party and to pay him its price amounting to LP. 3.100 — this difference being in lieu of certain money paid by the first party to the second party and costs — within three months from the date hereunder".

3. "In case the first party declines to transfer the said land to the second party within the period prescribed in the preceding section he shall be liable to pay to the second party the sum of LP. 1000 as liquidated damages".

4. "If the period of three months from the date hereunder expires before the second party shall have paid to the first party the sum of LP. 3.100 referred to in section 1 of this agreement the second party would not then be entitled to ask the first party to effect the transfer and the first party would not be obliged to accept the sum agreed upon as price to the said land and the land would become the property of the first party".

5. "The second party is entitled, if he so desires, to pay the sum of LP. 3100 before the termination of the said period of three months, and the first party is liable to transfer the said land to the second party or his nominee".

6. "If any action or opposition is lodged in respect of the said land or if its transfer is restrained by any obstacle whatsoever without the will of the first party the second party will have to await the result of such action or opposition, and if an action of priority is instituted the other party shall not be responsible for any one else".

The transfer was duly effected in the Land Registry, the three months period in clause 2 passed, and in fact nothing happened until 1934 when the Appellant served a notarial notice on the Respondent calling upon him to appear in the Land Registry, take his money, and return the land to the Appellant. The Respondent refused and the Appellant thereupon entered this action in the Land Court. The Land Court gave judgment for the Respondent, holding that any right to claim a retransfer of the property lapsed after the expiry of three months from the date of the contract. Hence this appeal.

The Appellant before this Court has argued that here there is a fictitious sale, and that it is perfectly clear that the real nature of the transaction is a mortgage *bei bil wafa,* that is, a sale with right of redemption, and argued that once a mortgage, always a mortgage. Her advocate, in support of this argument, has produced a judgment of the Court of Cassation dated 25th May, 1318, and quoted in

Baz's Commentaries on the Code of Civil Procedure *pp.* 277 *et seq.* This judgment says :—

> "If a definite and final sale be made and a Tabu Sanad is given, and if a document appears later, the contents of which show that the sale was in fact a sale with a right of redemption and stipulating that if the vendor does not return the amount of the purchase price within the stipulated period, he shall have no right to redeem ; such a sale shall not operate as a final sale but shall remain as a sale with a right of redemption so that if the vendor fails to pay the amount within the prescribed period, the Court shall order the sale of the mortgaged property and satisfy the debt out of the proceeds".

We think that this contention is right, and that the judgment of the Court of Cassation exactly fits the circumstances of this case.

That being so this appeal must be allowed, and the judgment of the Land Court set aside.

The case must go back to the Land Court to be tried on its merits.

The Appellant will have the costs of this appeal and LP. 5.— advocate's fees in any event.

Delivered this 11th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 83/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Hussein Muheisin 'Awad,
2. Khadr Muheisin 'Awad,
3. Mohammad Muheisin 'Awad. APPELLANTS.

v.

Handeh Mohammad Esh-Shibi, on behalf of the estate of her father. RESPONDENT.

Appeal — No legal evidence to support findings — Hearsay.

In allowing an appeal from a judgment of the Land Court of Jerusalem, dated the 19th March, 1938, and in setting aside the judgment of the lower Court and dismissing Respondent's action :—

HELD : There had been no legal evidence to support the finding of the lower Court.

ANNOTATIONS : As to hearsay see English and Empire Digest, Vol. XXII, *pp.* 76 *sqq.*, Sec. 4.

This case should be distinguished from the numerous authorities (*inter alia* C. A. 112/38 and C. A. 78/38 both 24.v.38, *post*) holding that an appeal will not lie on a question of fact, the credibility of witnesses being a question of *fact* reserved for the determination of the trial court whilst the absence of legal evidence is a question of *law*.

FOR APPELLANTS : Saleh.

FOR RESPONDENT : Farajallah.

JUDGMENT:

This is an appeal from the judgment of the Land Court of Jerusalem whereby they gave judgment concerning certain lands which they declared were mortgaged to the Appellants.

From the statements of the witnesses before the Court below there is no legal evidence to show that the Appellants were in possession of these lands by virtue of a mortgage deed made in favour of their father. All the evidence before the Land Court was hearsay. Respondent herself stated in the Court below that Appellants went into possession by force.

The apeal is allowed, the judgment of the Land Court is set aside, and Appellant's action is dismissed with costs to include LP. 3.— advocate's fees.

Delivered this 11 day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No.85/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene and Abdul Hadi, JJ.

IN THE APPEAL OF :

Haj Ragheb el Khaldi, in his capacity as Mutawalli of Salamieh Waqf, Jerusalem. APPELLANT.

v.

Shifra, wife of Noach Goldstein. RESPONDENT.

Suing in a representative capacity — L. A. 74/34 — Mutawalli suing in name of waqf.

In allowing an appeal from a judgment of the District Court of Jerusalem,

in its appellate capacity, dated the 28th February, 1938, and in remitting the case to the lower Court with directions :—

HELD : It was clear from the contents of the notice of appeal that Appellant was suing in the name of the waqf and not in his personal capacity. The lower Court should not have dismissed the appeal on the ground that Appellant was not a party to the proceedings before the Magistrate.

Followed : L. A. 74/34.

ANNOTATIONS : On representative actions, see also C. A. 56/38 (16.v.38) *post* and C. A. 215/37,*p.* 85, *ante.*

FOR APPELLANT : Atalla.

FOR RESPONDENT : Bruchstein by delegation.

JUDGMENT.

This is an appeal, by special leave, from the judgment of the District Court of Jerusalem, dismissing an appeal to it on a technical ground, in that the Appellant was not a party to the proceedings that were before the Magistrate, as the heading to the notice of appeal showed the name of the Appellant without stating his representatvie capacity.

After hearing counsel for both parties and following the ruling given by the Acting Chief Justice at that time in Land Appeal No. 74 of 1934, which is as follows :—

> "The heading to the notice of appeal names the Mamur Awqaf, Hebron, as Respondent, without stating that he is sued as Mutawalli of the Tamimi Waqf.
>
> The contents of the notice of appeal however clearly show that the appeal relates to that Waqf, and that it is as Mutawalli thereof that the Mamur Awqaf is sued.
>
> We hold therefore that the appeal is not to be rejected on the ground that the heading is defective, and this objection is overruled".

and whereas from the statement of appeal to the Court below it is clear that the appeal was on behalf of the Waqf and that Appellant did not claim in his personal capacity, we therefore allow the appeal and set aside the judgment of the District Court and remit the case back for them to hear the appeal and to consider the point raised by counsel for the Respondent with regard to the error in addressing the appeal to the wrong Court and to give a fresh judgment.

Costs to abide the event.

Delivered this 11th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 90/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin, and Khayat, JJ.

IN THE CASE OF :

Butros Hanna Mizida. APPELLANT.

v.

Issa Hanna Eassis. RESPONDENT.

Title to land — Evidence of possession — L. A. 13/34 — Werko receipts — Findings of fact — Points not taken in lower Court.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated 24th March, 1938 : —

HELD : 1. Where neither party has a registered title evidence of possession may be adduced.

2. *Werko* receipts are not conclusive evidence of possession.

3. The question of prescription not having been taken in the lower Court, it could not be raised on appeal.

Foollowed : L. A. 13/34 (2 P. L. R. 352).

ANNOTATIONS :

1. In addition to L. A. 13/34 (*supra*) the Court had the following decisions in mind : C. A. 238/37 (1938, 1 S. C. J. 32) and the cases set out in the annotations thereto, H. C. 91/36 (P. P. 29.iii.37, 1937, 1 S. C. J. 392) C. A. 228/37 (1938, 1 S. C. J. 99) and C. A. 85/37 (1937, 1 S. C. J. 310).

2. As to law far *werko* receipts are evidence of ownership or possession, see L. A. 42/33 (2 P. L. R. 201, P. P. 14.1.35, C. of J. 813) ; L. A. 39/24 (C. of J. 765) and L. A. 18/36 (1 Ct. L. R. 42, C. of J. 1934—6, 518).

3. See also C. A. 72/38 (12.v.38), *cf.* H. C. 32/38 (27.v.38) and see the annotations to C. A. 248/37 (1938, 1 S. C. J. 58) and add.: L. A. 73/28 (P. L. R. 395, C. of J. 998) ; C. A. 79/25 (C. of J. 701) ; C. A. 83/37 (P. P. 2, 3.viii.37, 2 Ct. L. R. 19, Ha 7, 21.x, 4.xi.37).

FOR APPELLANT : Assal.

RESPONDENT : In person.

JUDGMENT:

This Court has held on several occasions and in particular in Land Appeal No. 13/34 that when there is no registered title to the land the parties may submit evidence of possession. It was also held that an extract from werko Register was not conclusive evidence as to ownership.

In this case the Respondent's evidence as to possession of the land in dispute was believed by the Court below and with such finding we cannot interfere.

The Appellant raised the point that the land was Mulk and that the period of prescription should be not less than fifteen years. Having failed to raise this point in the Court below, he cannot raise it on the stage of appeal.

Therefore, the appeal will be dismissed with costs.

Delivered this 11th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 44/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

Khalil Mohammad Hassan. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Evidence — One witness sufficient under present law to support a conviction — Exceptions — Attempted murder — Sentence.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 11th April, 1938, whereby Appellant was convicted of attempted murder contrary to sec. 222(1) of the Criminal Code Ordinance, 1936, and sentenced to ten years' imprisonment with hard labour :—

HELD : 1. Under the law of evidence now in force one witness is sufficient to support a conviction.
2. The Appellant was properly convicted of attempted murder.

ANNOTATIONS : 1. Except in cases where, under English law, corroboration is either a requirement or a conviction cannot stand where the jury have not been warned of the danger of convicting on the uncorroborated evidence of a single witness : See annotations to CR. A. 160/37 (1938, 1 S. C. J. 103) and see CR. A. 54/38 (30.v.38).

FOR APPELLANT : Dajani.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT.

We need not trouble you Mr. Hogan.

In this case the Appellant was charged with the attempted murder of the manager of the German Bank of the German Colony, Jerusalem.

The District Court heard the evidence of the wounded man, believed that evidence when he said that he identified that accused as the one who attacked him and that evidence is sufficient for conviction. The Accused was also seen that morning not more than half a kilometre away from the scene of the crime. Under the new law which is now in force, the evidence of one witness, if believed, is sufficient for a conviction, without corroboration — corroboration is only necessary in certain crimes other than those like the present one, or whether the witness is an accomplice.

It has been argued before us that if one attacks another to commit theft and in course of the commission of the offence he stabs that other with a dagger and wounds him, this is not attempted murder, but it has not been suggested to us what kind of crime it is. But I can say that if one attacks another and stabs him thereby causing him two wounds one 25cm. long and the other 15 cm. long, one of which being 1 cm. off the carotid artery, this is certainly attempted murder.

As for the sentence of ten years, the Appellant has ten previous conviction other than this determined attack of attempted murder which only narrowly escaped causing death. I do not think that the sentence is one day too much.

There is nothing whatever in this appeal and it must be dismissed. The sentence will run from today.

Delivered this 11th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 72/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin, and Khayat, JJ.

IN THE APPEAL OF :

Moshe Kastero. APPELLANT.

v.

Mathilda Ben-Noon Richter. RESPONDENT.

Time for appeal — Exemption from court fees — Points not raised in trial Court — Application for variation orders in cases of maintenance and alimony.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 16th February, 1938 :—

HELD : 1. All the points raised on appeal should have been taken in the lower Court.

2. In cases of maintenance and alimony there is always an opportunity to apply to the Court to vary the rate of payments if the circumstances of the applicant have changed.

3. *Quaere* whether the Registrar can grant exemption from payment of fees for appeal.

ANNOTATIONS : 1. See also annotations 3 to C. A. 90/38 (11.v.38) *ante*.

FOR APPELLANT : Nishri.

FOR RESPONDENT : Mrs. Hershman.

JUDGMENT.

As regards the objection raised that the appeal is out of time, we feel that the Chief Registrar was right, even supposing that the Registrar of the District Court had no authority to exempt the Appellant from payment of the fees on appeal which question I do not intend to decide, in using his discretion in granting an exemption.

We need not trouble you Mrs. Hershman.

This appeal has no merits whatsoever. The Appellant appeared on the first day in the Court below, when the case was called upon on the second day he did not appear and he states that he was five minutes late in so doing. All the points he tried to raise here should have been raised in the Court below which he did not do. The appeal is a frivolous one and should not have been brought.

I may remark here that in cases of maintenance and alimony there is always an opportunity for a party to apply to the Court below to vary the rate of payment if circumstances have changed.

The appeal will be dismissed with costs to include LP. 3.— advocate's fees.

Delivered this 12th day of May, 1938.

British Puisne Judge.

I concur.

Puisne Judge.

I concur.

Puisne Judge.

CIVIL APPEAL No. 74/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

The Anglo Palestine Bank, Ltd. APPELLANTS.

v.

General Manager, Palestine Railways, on behalf of the Railways administration. RESPONDENT.

Railway receipts — Documents of title to goods — Pledge of goods by deposit of receipts — Delivery of goods without requiring return of receipts — Official Assignee of Madra v. Mercantile Bank of India — Pledge under the Mejelle — Statutes.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 23d February, 1938 :—

HELD : 1. Both under the Mejelle and English Common Law a pledge is constituted by delivery of the pledge itself and not by a pledge of documents.

2. A pledge of the goods could not, therefore, be effected by pledging railway receipts which were not documents of title but merely tokens of an authority to receive possession.

3. Moreover, Appellants could not be affected by the pledge of the documents as they had had no notice.

4. The effect of the "Instructions" endorsed on the railway receipts was to safeguard Appellants. They did not contain any guaranty or warranty upon which one could construct a contracting obligation.

Followed : Official Assignee of Madra *v.* Mercantile Bank of India (15? L. T. R. 170 [1935], A. C. 53.

FOR APPELLANT : Levin.

FOR RESPONDENT : Salant.

JUDGMENT:

The Appellants are the Anglo Palestine Bank Ltd., and the Respondent is the General Manager Palestine Railways who will be referred to hereafter as the Railways.

The question for determination in this apeal is whether the Appellants who were the holders for value though neither consignors nor consignees of certain goods invoices or railway receipts issued by the Railways in respect of goods consigned from Haifa to Rehovoth can

can claim for the value of these goods from the Railways, the goods having been delivered to persons other than the holders of the railway receipts.

There is no dispute about the facts. A Mr. Bressler was in the habit of consigning wagon loads of manure from Haifa to Rehovoot by rail. The railway receipts, in which Bressler was named as consignor, were handed by him to the Appellants who advanced sums of money on the security of the receipts. The Appellants then sent the railway receipts to their agents in Rehovot together with Bills of Exchange drawn to the order of the Appellants by Bressler on the consignees, or other persons who desired to purchase the manure, with directions to their agents to hand over the railway receipts against acceptance of the bill or cash payments. On the presentation of the bills to the drawees, the latter refused to accept the bills or to pay their value, and when the Appellants came to withdraw the consignments they found that the Railways had delivered the manure to the assignees or to other persons against indemnity without requiring the production and handing over of the railway receipts.

The Appellants sued the Railways in the District Court Haifa for the sum advanced against the documents to Bressler, and the District Court dismissed their claim holding that there was no contractual relationship between the Appellants and the Respondent. The Appellants have appealed.

Each railway receipt shows the names of consignor, consignee full particulars relating to the goods, the wagon number, the amount and so forth. It contains on the back the following paragraphs headed "Instructions" :

> 1. "This invoice is not valid unless the goods have actually been surrendered to the Administration".
>
> 2. "This invoice is deemed to be a receipt for the goods and for the money in the case of prepaid consignments) and is to be transmitted to the consignee who is considered the rightful owner of the Goods. The holder presenting this invoice will be regarded in all cases as the rightful claimant".
>
> 3. "This invoice must be surrendered to the Railway at destination station against delivery of the goods to the consignee".

The Railways recognise a practice of allowing delivery without production of the receipt analogous to that often followed in the case of bills of lading whereby delivery is made on an indemnity if bills of lading are not forthcoming. There is nothing to show that the Railways had any knowledge of the transaction between Bressler and

the Appellants or knew that the latter were the holders in fact of the receipts.

The main question (putting aside for the moment consideration of the effect of the "Instructions") is whether the handing over of the railway receipts against advances, in other words whether the pledging of the railway receipts, was a pledge of the goods represented by them, or merely a pledge of the actual documents.

There is nothing in the statute law of Palestine to support this first theory. Under the Mejelle, a pledge is only completed by the handing over of the pledge itself to the pledgee, or its deposit with consent of both parties, and of the bailee, with a bailee. Nowhere can we find that a pledge of the documents is a pledge of the goods represented by them. And the common Law of England is much the same. In Official Assignee of Madras *v.* Mercantile Bank of India (168 L. T. Rep. 170 ; [1935] A. C. 53) Lord Wright in delivering the judgment of the Judicial Committee summarised the Common Law, and I cannot do better than repeat his words.

He said :—

> "At the common law a pledge could not be created except by a delivery of the possession of the thing pledged either actual or constructive. It involved a bailment. If the pledge (*sic*) had the actual goods in his physical possession he could affect the pledge by actual delivery ; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him ; there was thus a change of possession and a constructive delivery : ; the goods in the hands of the third party became by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained on the ground that the goods being at sea the master could not be notified ; the true explanation may be that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law,

> and the matter remained stereotyped in the form which it had taken before the importance of documents of title in mercantile transactions was realised. So things have remained in the English law ; a pledge of documents is not in general to be deemed a pledge of the goods ; a pledge of the documents (always excepting a bill of lading) is merely a pledge of the *ipsa corpora* of them ; the common law continued to regard them as merely tokens of an authority to receive possession, though from time to time representations were made by special juries that in the ordinary practice of merchants transfers of documents were understood to pass possession, as for instance in 1815, in Spear *v.* Travers (4 Camp. 251). The common law rule was stated by the House of Lords in McEvan *v.* Smith (2 H. L. Cas. 309). The position of the English Law has been fully explained also more recently in Inglis *v.* Robertson and Baxter (79 L. T. Rep. 224 (1898) ; A. C. 616) and in Dublin City Distillery Limited *v.* Doherty (111 L. T. Rep. 81) ; (1914) A. C. 823).

Lord Wright then proceeded to deal with the Factors Acts which made an inroad on the common law rule — it is unnecessary to remark that in Palestine there is no legislation of the nature and effect of these Acts. Neither is there in Palestine law any definition of a document of title. I therefore hold that a pledge of the railway receipts is not a pledge of the goods represented by them — the receipts are merely tokens of an authority to receive possession and do not actually pass the possession.

In the case which I have just cited, the Board held that railway receipts were documents of title under Section 103 of the Indian Contract Act, 1872, and that by virtue of section 178 of the same Act, a pledge of the documents was a pledge of the goods. There is in Palestine no such statutory authority, as I have already pointed out. But even in the case cited, it was pointed out that a third party, that is someone other than the pledgor or pledgee, holding the goods would not be affected without notice of the pledge. Their Lordships said (at p. 174) "In the same way in the present case though it is true that no third party holding the goods or dealing with them without notice of the Respondent's lien, would be affected by that lien, this is a consideration which is irrelevant to the equitable rights constituted as between the Respondents and the insolvents". (In that case the Respondents and insolvents were the assignees and assignors respectively of documents of title to the goods).

In just the same way in this present case the Railways cannot be affected by the pledge of the documents given by Bressler to the Appellants without notice of that pledge.

The above conclusions are sufficient to dispose of this appeal, but

I must deal with the effect of the "Instructions" printed on the back of the receipts.

These "Instructions" are not very clearly or happily worded, and in fact the first and second halves of paragraph 2 are in a sense contradictory, or at any rate very difficult to reconcile. But I think that their effect is in the nature of a safeguard to the Railways, as for example if the railway receipts had been stolen and had been presented by an unauthorised person. Even if their effect be to constitute the railway receipts documents of title, and they may well be documents of title even without the "instructions, the "Instructions" do not contain any guarantee or warranty by the Railways to the Appellants or any other third person out of which one can construct a contractual obligation.

For these reasons I think that this appeal fails and should be dismissed with costs and LP. 5.— advocate's fees.

Delivered this 12th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 93/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Abraham Saporta. APPELLANT.

v.

Yehoshua Wolfsohn. RESPONDENT.

Evidence — Findings of lower Court supported by evidence — Proof of documents — Evidence cannot be heard on appeal — C. A. 81/33.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 8th March, 1938 :—

HELD : The agreement had not been properly proved in the lower Court and it was too late to ask for fresh evidence to be called on appeal.

Followed : C. A. 81/33 (P. P. 12.1.34, C. of J. 819).

ANNOTATIONS : *Vide* CR. A. 1/38 (1938, 1 S. C. J. 54) and annotations thereto.

FOR APPELLANT : Goitein, Luchinsky.

FOR RESPONDENT : Schmetterling.

JUDGMENT:

This is an appeal from the District Court, Jerusalem, in which they gave judgment against the present Appellant for the sum of LP. 2707.077 mils. It was a long and complicated case and large amount of evidence was heard in the District Court in great detail. The District Court made certain findings of facts and drew inferences from those facts.

In the first place, we think, taking the main claim, that is No. 2, there was ample evidence before the District Court in the finding they made that the agreement made with Reichman for the sale at LP. 3.— a dunam was tainted with fraud and was not a genuine transaction. Therefore the Appellant was due to account for more than LP. 3.— which is the amount that he admits that he is liable to account for.

With regard to the other transactions, the subsequent transactions after the Reichman's agreement, it has been argued by the Respondent that the District Court did not believe the evidence of the Appellant and that the subsequent agreements adduced were not proved and therefore were not evidence. We agree with that contention. They were signed by persons who are not parties to this present action or present appeal. The persons alleged to have been parties to those agreement were not called to prove them as they ought to have been called, and the Respondent very truly says, relying on a judgment of the Court of Appeal, Civil Appeal No. 81 of 1933, that it is too late now on an appeal to ask the Court to call further evidence that was available in the Court below which was not in fact called. If the Appellant was under the misaprehension that the Court was satisfied and it did not want any more evidence, I am afraid that that is his misfortune.

We therefore came to the conclusion that the District Court was right in its judgment and we see no reason to upset it.

With regard to the first claim, we agree with the reasons of the District Court and we adopt their arguments and it is not necessary for us to say anything more.

The appeal will therefore be dismissed with costs, Advocate's fees LP. 5.—.

Delivered this 12th day of May, 1938.

British Puisne Judge.

HIGH COURT No. 35/38.

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

BEFORE : Copland, Greene, JJ.

IN THE APPLICATION OF :

1. Kamel Diab Hassan,
2. Issel Din Diab Hassan. PETITIONERS.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Jacob Heftzal,
3. Isaac Gabrilovitz,
4. Joseph Isaac Rivlin. RESPONDENTS.

Mortgage — Amount and liability to pay contested — Contingent liability — Injunction to prevent realization of mortgage — High Court.

In refusing an application for an order to issue to the First Respondent calling upon him to show cause why he should not refrain from making an order of sale in Execution File No. 9303/37 (Tel-Aviv) and further why he should not direct the Second, Third and Fourth Respondents to go the competent court, in order that they may establish their claim under the mortgage which they allege they hold on Petitioner's property, and in allowing the Petitioner time to seek his remedy in the proper Court :—

HELD : 1. Petitioner (Mortgagor) should apply to the competent court for a judgment that the mortgage is not for an ascertained debt but for a contingent amount. This was not a matter for the High Court.

2. The competent court would then be entitled to grant an injunction restraining the Respondents from enforcing their security until liability was so established.

ANNOTATIONS : 1. "Where the President of the District Court finds that the mortgagor has *prima facie* grounds for contesting the amount due on the mortgage, his proper course is to refuse to make an order for sale until the amount due has been ascertained by judgment of a competent Court". — H. C. 90/32 (2 P. L. R. 6, C. of J. 291), followed in H. C. 47/34 (2 Ct. L. R. 162, C. of J. 1934—6, 391). See also H. C. 65/37 (1938, 1 S. C. J. 43).

Cf. C. A. 170/37 (2 Ct. L. R. 122, P. P. 13.ii.38).

FOR PETITIONERS : Cattan.

FOR RESPONDENTS : *Ex parte.*

ORDER.

In this case we think that the Petitioners' proper remedy is to go to the competent Court and obtain a judgment that this mortgage in respect of which an order for sale has been made against them is a security not for an ascertained debt but for a contingent amount, the amount of which and liability to pay which is contested and not ascertained. If they can establish this to the satisfaction of that Court, then in our opinion they will be entitled to an injunction restraining the Respondents from enforcing the security untill liability is established. It is not for us to say whether this mortgage is or is not a security — that will of course be determined by the competent Court.

We grant a temporary stay of 14 days to enable the Petitioners to take this course.

Subject to that the order is refused.

Given this 13th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No.56/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE CASE OF :

1. Mohammad Ibrahim el Ahmad,
2. Ahmad Kassem el Ahmad,
3. Talal Taha el Haj Ahmad. APPELLANTS..

v.

1. Sheikh Asa'd Kaddoura on behalf of the heirs of his father,
2. Abed Saleh el Ibrahim. RESPONDENTS.

Confirmation of award — Third party opposition — Representative action — Mukhtars — Mejelle, Art. 1645.

In allowing an appeal from a judgment of the District Court of Nablus, dated the 9th February, 1938, and in remitting the case to the lower Court to hear the opposition and give a fresh judgment :—

HELD : 1. The Land Court was wrong in dismissing the opposition on the ground that Appellants had been represented in the original action as *Mukhtars* are not competent to represent individuals of their village.

2. The only circumstances in which representation can be made by one person is under Art. 1645 of the Mejelle which does not apply in this case.

ANNOTATIONS :

1. This case is distinguished in C. A. 57/38 (16.v.38).

2. See also C. A. 215/37 (1938, 1 S. C. J. 85) and C. A. 85/38 (11.v.38) on representative actions and see L. A. 92/26 (C. of J. 1014).

FOR APPELLANTS : Koussa.

FOR RESPONDENTS : Abbasi for 1st Respondent, 2nd Respondent — absent — served.

JUDGMENT.

This case was originally brought by the first Respondent against the second Respondent. It appears that the case was adjourned after the first hearing and at a subsequent hearing the first Respondent produced a submission to arbitration and an Arbitration Award and asked for the confirmation of the said award, and the Court confirmed the award as between the parties to the original action.

Later Appellants came to the Land Court and entered a third party opposition against the judgment confirming the award of the arbitrators, and the Land Court dismissed the opposition and this judgment is now appealed against.

In our opinion the Land Court was wrong in dismissing the opposition on the grounds that Appellants were represented in the original proceedings and we are of opinion that the Mukhtar is not competent to represent the individuals of his village who are considered by Plaintiff as his parties in the action. The only circumstances in which representation can be made by one person is under Article 1645 of the Mejelle, and this article does not apply in this case because it has not been established that the matter involved is one of public benefit or that the number of the individuals in question is limited.

Inasmuch as Appellants were not represented in the original proceedings they were entitled to enter a third party opposition in the Land Court.

The appeal must be allowed and the judgment of the Land Court set aside and the case remitted to the Land Court to hear the opposition on the merits and to give a fresh judgment.

Costs to abide the event.

Delivered this 16th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 57/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE CASE OF :

Talal Taha el Ahmad el Haj. APPELLANT.

v.

Sheikh Asa'd Kaddoura on behalf of the heirs of his father. RESPONDENT.

Land Court — Failure to appear — Proceedings in absence — C. A. 56/38 — Third party opposition and defendant's opposition.

In dismissing an appeal from a judgment of the Land Court of Nablus, dated the 9th February, 1938 :—

HELD : The Land Court was justified in proceeding in the absence of Appellant who had been duly summoned and had not appeared.

Distinguished : C. A. 56/38 (16.v.38).

FOR APPELLANT : Kassab.

FOR RESPONDENT : Abbasi.

JUDGMENT:

This case differs from case 56/38 as in the case Appellant filed an opposition against a judgment given in default against him, wheereas in case 56/38 the Appellant is a third party opposer.

It appears from the judgment appealed, that the Appellant in this case raises two points. First that he did not sign the Submission to Arbitration and second that the Land Court was wrong in giving judgment in his absence. As regards the first point, the Land Court was satisfied that Appellant had signed the Submission to Arbitration and dismissed his opposition. As regards the second point we are of opinion that the Court was justified in proceeding with the cases in absence of Appellant. Appellant did not put in an appearance during the whole of the proceedings before the Land Court although he was duly served.

We see no reason to interfere with the finding of the Land Court and the appeal is dismissed and the judgment of the Land Court confirmed, with costs to include LP. 5.— advocate's fees.

Delivered this 16th day of May, 1938.

British Puisne Judge.

CIVIL APPEAI No. 63/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khayat and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Suleiman Salem Abu Aroun,
2. Musallah Salem Abu Aroun. APPELLANTS.

v.

Abed Suleiman el Hitrasi. RESPONDENT.

Appeal — Finding of Lower Court.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, sitting at Beersheba dated the 18th day of January, 1938.

HELD : There was no reason to interfere with the finding of the lower Court that the land was the property of Respondent.

FOR APPELLANTS : Khalafawi.

RESPONDENT : In person.

JUDGMENT.

In this case the Attorney for the Appellants raised the point that Respondent fled away and when he returned he found Appellant in possession of the land in question and that Respondent did not bring an action to dispute possession.

The Court below found as a fact that the land in question was the property of Respondent, and we see no reason why we should interfere with the findings of the Court below and we do not think that we can usefully add anything to what the trial Court has said.

The appeal is therefore dismissed with costs to include LP. 2.— travelling expenses for Respondent.

Delivered this 16th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 91/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

1. Abdel Qader Haj Ismail Barqawi, in his personal capacity.
2. Rashiqa Khadr 'Iqab Barqawi,
3. Rafiqa Khadr 'Iqab Barqawi,
4. Mariam Khadr 'Iqab Barqawi, on their own behalf and on behalf of the heirs of Khadr 'Iqab Barqawi. APPELLANTS.

v.

1. The Attorney General, on behalf of the Government of Palestine,
2. Hanoteiah Co. Ltd.,
3. Sea-Shore Development Co., Nathania,
4. Liquidator of Pardess Hagdud. RESPONDENTS.

Bond for appeal — Property to be actually mortgaged at Land Registry — Deposit in lieu of bond — Rules 99, 93 — *No good cause shown for granting time.*

In dismissing an appeal from a judgment of the Land Court of Nablus, dated the 5th March, 1938 :—

HELD : 1. When a bond is filed by a guarantor under Rule 93, the property must be actually mortgaged at the Land Registry.
2. A mistake caused ignorance of the Rules is not a sufficient cause to grant an extension of time to remedy the defect.
3. The simplest course is to pay the deposit into Court.

ANNOTATIONS : See annotations to C. A. 80-81/38 (5.v.38) *supra*.
1. That the property must be mortgaged is apparent from the wording of Form 19. The corresponding form under the 1938 Civil Procedure Rules differs in this respect and may perhaps be construed as making the mortgage of property optional.

JUDGMENT:

In this case again, for about the sixth time within a week, the question comes up as to the sufficiency of the security to be given before the appeal can be heard.

The Appellant can do one of three things ; (1) he can file a duly

authenticated bond in form 19 of the Schedule to the Rules ; (2) he can offer to pay a deposit ; (3) he can attach his own immovable properties. It is admitted that he did not suffer an attachment nor did he offer to pay a deposit and he elected under Rule 93 to file a bond by guarantor. The bond filed is in form 19, but form 19 says that the guarantor undertakes to be responsible for the mortgaging of the properties mentioned in the schedule hereunder. Now it is perfectly obvious that that means that the properties must be mortgaged — must be mortgaged in the Land Registry. It is admitted that this has not been done. There being no mortgage, there is no security for the costs of this appeal.

The Appellant asks us to apply, in this case, the provisions of Rule 96 and allow him an extension of time to remedy the defect, but an extension may be allowed by the Court only on good cause being shown. The reason shown for non-compliance with the Rules is the mistake on the part of the Appellant and in not reading the Rules and the Form and that reason is not good cause and the Court cannot allow an extension of time.

The appeal is dismissed with costs and LP. 3.— advocate's fees to Counsel of each of the Respondents.

It is quite obvious that it would be much simpler for Appellants to pay deposits in Court and to avoid the difficultty of complying with the Rules. In nearly all cases the amount assessed as deposit does not exceed LP. 10.— to LP. 15.—, and the Appellants by paying such deposits save the fees to be paid by them in respect of attachments or mortgages.

Delivered this 16th day of May, 1938.

British Puisne Judge.

HIGH COURT CASE No. 25/38.

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

BEFORE : Copland, Khayat, JJ.

IN THE APPLICATION OF :

1. Butros Hanna Ghanayem,
2. Nicola Hanna Ghanayem,

3. Mousa Hanna Ghanayem,
4. George Hanna Ghanayem. PETITIONERS.

v.

1. Chief Execution Officer, Jerusalem,
2. Hanna Jaber. RESPONDENTS.

Execution — Judgment to be served.

In making absolute an order *nisi* to issue to the First Respondent calling upon him to show cause why his orders dated the 20th December, 1937, and the 25th February, 1938, in Execution File No. 165/38 should not be set aside :—

HELD : One of the Petitioners had not been served with copy of the judgment. This should be done in addition to serving notice of execution.

ANNOTATIONS : See H. C. 78/32, (P. P. 24.1.33, C. of J. 663) to the same effect.

FOR PETITIONERS : Kamal.

FOR RESPONDENTS : No. 1 — No appearance.
No. 2 — Salah.

ORDER.

In this case, the rule *nisi* was issued on the application of four Petitioners. The argument in Court had been as to one Petitioner — the question of the other three is not now in dispute and the rule as regards them is discharged.

With regard to Butros, the circumstances of his case are different. It does not appear that he was ever served with a copy of the judgment and we think that it is necessary that the Execution Office should serve a copy of the judgment. It is essential they should do so in addition to the notice of execution. With regard to Butros, the rule is made absolute, but no costs.

Given his 16th day of May, 1938.

British Puisne Judge.

HIGH COURT No. 29/38.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

Abdul Mu'ti Bamieh. PETITIONER.

v.

1. Chief Execution Officer, Jaffa,
2. Haj Hassan Abu Mahmoud. RESPONDENTS.

Preference of debts in execution — Art. 123 of the Law of Execution — Document not officially authenticated.

In making absolute an order to issue to the First Respondent calling upon him to show cause why his order dated the 18th March, 1938, in Execution File No. 8250/36, Jaffa, should not be set aside :—

HELD : Neither debt in this case was entitled to preference as under Art. 123 of the Law of Execution it does not matter with debt is the first one in order of origin except to the extent which is set out in the article.

ANNOTATIONS : The following decisions bear upon Art. 123 of the Law of Execution : H. C. 60/27 (C. of J. 840) ; H. C. 28/33 (P. L. R. 829, P. P. 3.x.33) ; H. C. 43/27 (C. of J. 1057, P. L. R. 194) ; H. C. 88/30 (P. L. R. 644, C. of J. 847) ; H. C. 38/31 (C of J. 852) ; H. C. 13/33 (P. P. 20.xi.33, C. of J. 864) ; H. C. 9/25 (C. of J. 830) ; H. C. 53/33 (C. of J. 868).

FOR PETITIONER : Nijem.

FOR RESPONDENTS : No. 1 — No apearance.
No. 2 — Ousta.

O R D E R.

The question for determination is whether the debt of the Petitioner or that of the second Respondent should be preferred over the other. The Chief Execution Officer decided that the second Respondent was entitled to preference for his debt. We think that in so holding, the Chief Execution Officer was wrong. Under Article 123 of the Execution Law, it does not mater which debt is the first one in order of origin except to the extent which is set out in the Article, as for example where it is based upon a document not officially authenticated.

That being so, neither debt in this case is entitled to preference and both Petitioner and Respondent shall share *pro rata*.

The rule is made absolte with costs and LP. 5.— advocate's fees.

Given this 16th day of May, 1938.

British Puisne Judge.

HIGH COURT No. 31/38.

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

BEFORE : Copland, Khayat, JJ.

IN THE APPLICATION OF :

Siegbert Schwartz. PETITIONER.

v.

1. His Worship, the Chief Magistrate, in his capacity as Chief Execution Officer, Haifa,
2. The Anglo Palestine Bank, Haifa,
3. The Palestine Engineering Corporation,
4. The Palestine Engineering Stores,
5. Matatyahu Greenbaum. RESPONDENTS.

Right of preference in execution procceds — Laches — Pledgee abandoning his security by conduct.

In refusing an application for an order to issue to the First Respondent directing him to show cause why a right of preference in the distribution of the proceeds from the sale in the Execution File No. 5385/36 should not be granted to the Petitioner on account of his claim in accordance with the judgment in file No. 51/36 of Magistrate Court, Haifa, with costs and advocate's fees to be paid by the Respondents Nos. 2 to 5.

HELD : 1. Petitioner was guilty of laches.
2. Instead of executing the pledge, Petitioner had chosen to obtain a judgment and provisional attachment in the Magistrates Court. He must therefore be held to have renounced his right under the pledge.

ANNOTATIONS : C. A. 85/31 (C. of J. 1467) is to the same effect. See also H. C. 14/31 (C. of J. 1641) and *cf.* C. A. 101/34 (23.v.38).

FOR PETITIONER : Scharf.

FOR RESPONDENTS : *Ex parte.*

ORDER:

We are of opinion this rule must be refused for two reasons: in the first place there is no doubt that the Petitioner came here after a long lapse of time, and in the second place, instead of executing the pledge, the Petitioner went to the Magistrate's Court and obtained judgment and a provisional attachment. In following this course, he must be deemed to have renounced his rights under the pledge. For these reasons the application must be refused.

Given this 16th day of May, 1938.

British Puisne Judge.

HIGH COURT 34/38.

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

BEFORE: Copland and Frumkin, JJ.

IN THE APPLICATION OF:

Ada Harris. PETITIONER.

v.

1. The President of the District Court, Tel-Aviv, in his capacity as Chief Execution Officer,
2. "Yachin", Hevra Shitufit Lekablanut Haklait, Ltd.,
3. Mr. B. Rappoport, Receiver of the proceeds of the fruit of Moshe Patt, District Court, Tel-Aviv. RESPONDENTS.

Pledge of fruit — And rights of prior mortgagees of grove — Construction of mortgage conditions — No intention to include fruit in mortgage — Mortgage does not generally include fruit.

In dismissing a petition for a *mandamus* to issue to the Chief Execution Officer to cancel the order given by given by him on the 3rd May, 1938, and to give a new order.

HELD: The fruit was not included in the mortgage as no specific provisions had been made to that effect in the mortgage conditions.

ANNOTATIONS: See also H. C. 93/36 (C. of J. 1934—6 412, Ha. 10.xii.36).

FOR PETITIONER : Sassoon.

FOR RESPONDENTS : *Ex parte.*

ORDER:

Frumkin, J.: The Applicant was the mortgagee of an orange grove which mortgage was foreclosed upon the default of the mortgagor. The mortgagor subsequent to the mortgage of the orange grove to Applicant, in May, 1937, pledged the fruit of the same orange grove to the second Respondent an Agricultural Co-operative Society.

2. The dispute at present is between the Applicant and the second Respondent as regards the proceeds of last season's crop of the orange grove, whether it belongs to the Applicant as part of his mortgage or to the second Respondent under the pledge made to it.

3. The mortgage in favour of Applicant contained special conditions of which clause 1(a) enumerates the following items being included in the mortgage in addition to the land, namely :—

> "all buildings, fixtures, accretions, trees benefits and easements that are now on the land or that shall be during the duration of this mortgage, including any well, water installation, and things on or about the said land or appurtenant thereto or enjoyed therewith".

4. In the said clause the parties went into great detail as to what they meant to be included in the mortgage but no mention was made to either fruit or crops. On behalf of the Applicant it has been argued that fruit was included in such general terms as fixtures, accretions and benefits.

5. In my opinion if the intention was to include fruit the parties should have mentioned the baby by its name and not hide it under such general terms as accretions, which might mean anything but fruit.

6. It is therefore not necessary to deal with the general question whether a mortgage of an orange grove includes also the fruit of such grove without mentioning it particularly nor is it relevant at this stage to deal with the question whether by law fruit might be so included in a mortgage.

7. In the circumstances of this case when the parties went to the trouble of mentioning what they intended to include in the mortgage omitting fruit it cannot be held that the fruit was included.

There will therefore be no order.

Given this 16th day of May, 1938.

Puisne Judge.

I concur.

British Puisne Judge.

CIVIL APPEAL No. 53/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

Albert Fisher. APPELLANT.

v.

Michaels & Baer. RESPONDENTS.

Building contract — Premature action — Estoppel by admission — Liability for extra works — Waiver of provisions in contract.

In allowing an appeal from a judgment of the District Court of Tel-Aviv, dated the 27th January, 1938 :—

HELD : 1. Appellant was not liable to pay more than he admitted in the District Court, in view of the provisions of clause 8 of the contract which required written orders for any extra work, no such written orders having, in fact, been given.

2. The counterclaim was rightly dismissed as the provisions of clause 15 of the contract could not support an action for damages in respet of delay.

FOR APPELLANT : L. Rabinovitch.

FOR RESPONDENTS : Gershman.

JUDGMENT:

In this appeal from a judgment of the District Court of Tel-Aviv, the first point taken was that, no Architect's Certificate having been produced, the claim for the work done under the contract was premature. The Appellant, however, who was the defendant in the Court below, admitted that the sum of LP. 333.257 was due to the Respondents under the contract and this point therefore fails.

2. The second point was that the Appellant was not obliged to pay for any additional works other than works executed under the contract because, by clause 8 of the contract, any payment in respect of extra works could only be made if the works done were executed on the written request of the Appellant or his agent. That, indeed, is the effect of clause 8, but it has been argued by the Respondents that, in his (the Appellant's) statement of defence in the Court below, the Appellant said that he would pay for any extra work not included in the contract if were proved (*sic*). This statement, it is said, is a waiver

of all the provisions of clause 8 of the contract. We do not, however, think that this is so. We do not think that there was any waiver. Clause 8 is one of the few clauses in this contract which at any rate is clear and unambiguous, and the effect of it is that no extra work should be charged unless authorised in writing. The request had to be in writing. It is admitted that there was no written demand or authorisation. In this case the Appellant, however, admitted that he was prepared to pay the sum of LP. 77.380 mils for extra work, and he must therefore pay this sum and not the sum of LP. 160.705 mils as found due by the District Court.

3. We turn now to the counterclaim. The counterclaim was for LP. 5.— per day for delay in completing the building as from 19th December, 1933. This claim depends upon the true construction of clause 15 of the contract. Clause 15 is extremely badly drawn and vague to a degree, but whatever it may mean, we are quite clear that it does not mean that he must pay LP. 5.— for each day of delay from 19th December, 1933. To our thinking the commencing day from which these damages are payable for delay in the non-completion of the whole work is not fixed in this clause. The only fixed commencing day is in respect of delay in completion of the first story. The District Court was therefore right in disallowing the counterclaim.

4. The last point is with regard to the confirmation of the provisional attachment with costs. The Respondents admit that this was wrong because the provisional attachment was withdrawn by him in the course of the protracted proceedings in the Court below.

5. The result is that this appeal is allowed in part ; the sum of LP. 83.325 mils must be deducted from the sum found due by the District Court, and judgment must be entered for the Respondents for the sum of LP. 352.458 mils together with legal interest as from the 9th October, 1934, and the costs of the trial in the District Court. The clause in the judgment with regard to the provisional attachment is to be deleted. No costs of this appeal, and no advocate's fees on either side here.

Delivered this 17th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 92/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Said Ibn Muhammad Ibn Suleiman Bitar,
of Safad. APPELLANT.

v.

A'ysheh Bint Ibrahim Ibn Ahmad Khalil Hadideh,
of Safad, in her personal capacity and on
behalf of the heirs of her mother Karma
Bint Shehab Ibn Ahmad el Badrani. RESPONDENT.

Title to land — Power of attorney barred by prescription — L. A. 46/36.

In dismissing an appeal from a judgment of the Land Court of Nablus, dated the 8th March, 1938 :—

HELD : The power of attorney used in connection with the transaction had been executed more than 15 years ago and was prescribed.

Followed : L. A. 46/36 (3 Ct. L. R. 17, Ha. 17.ii.38).

FOR APPELLANT : Abbasi.

FOR RESPONDENT : Kankar.

JUDGMENT.

There is nothing in this appeal. The Land Court found that Appellant was never in possession of the property in dispute, and the transfer of the land took place by a Power of Attorney which was executed more than 15 years ago and has been prescribed.

Following the ruling laid down in Land Appeal 46/33 the appeal must be dismissed with costs to include LP. 3.— Advocate's fees.

Delivered this 17th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 109/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Hassan Saleh Habhan. APPELLANT.

v.

Hamideh Ibn Muhammad Eid. RESPONDENT.

Appeal — Case remitted with directions — Directions to be complied with — Mortgage, prescription.

In allowing an appeal from a judgment of the Land Court of Jaffa, sitting at Gaza, dated the 21st March, 1938 :—

HELD : The case had been remitted to the Land Court in order to determine two points. The Land Court had gone into one only of these two points and the case must therefore be remitted again.

ANNOTATIONS : See C. A. 76/38 (4.v.38) and annotations.

FOR APPELLANT : Abcarius Bey — by delegation.

FOR RESPONDENT : Shawwa.

JUDGMENT:

This case comes before this Court for the second time. The first time it was before this Court it was sent back to the Land Court with a direction to that Court to decide the rights of the parties.

Two points were raised before the Court below as well as before this Court ; 1) whether there was a mortgage or not, and 2) whether the absence of Appellant's father interrupted the running of the period of prescription. The Court below decided the first point, namely, that of the mortgage and with that finding we are in agreement, but failed to give a decision on the second point. We are therefore reluctantly compelled to remit the case for the second time to the Land Court to decide the rights of the parties, namely, the point whether the absence of the Appellant's father interrupted the running of the period of prescription. It may be that the Appellant knew before obtaining this certificate of succession that his father was dead, but the Court did not go into this question and, as I have said, we are compelled to send it back for the determination of the question of prescription and whether the absence of the father of Appellant interrupted it or not.

The appeal is allowed, the judgment of the Land Court is set aside, and the case remitted to that Court to deal with the question of prescription.

Costs to abide the event.

Delivered this 18th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 111/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Salimeh Bint Sheikh Muhammad Sofan,
2. Khadijeh Bint Sheikh Muhammad Sofan. APPELLANTS.

v.

Hussein Muhammad Buqqa. RESPONDENT.

Possession by co-heirs — Prescription.

In dismissing an appeal from a judgment of the Land Court of Nablus, and in setting aside the judgment of the lower Court and remitting the case for evidence to be heard on the question of adverse possession :—

HELD : The period of prescription does not run in the case of possession by co-heirs unless such possession is adverse.

ANNOTATIONS : Earlier proceedings in this case : C. A. 244/37 (1938, 1 S. C. J. 37).

See the annotations to C. A. 228/37 (1938, 1 S. C. J. 99) and see C. A. 26/38 (1938 1 S. C. J. 171).

FOR APPELLANTS : Buchnaq.

FOR RESPONDENT : Seifi.

JUDGMENT.

This case comes before this Court for the second time. The first time it was before this Court it was sent back to the Land Court with a direction to that Court to hear evidence as to possession.

It is obvious from the judgment of the Land Court that that Court found that Appellants' father was in possession of the land in dispute up to nearly 22 years ago, and that after his death Appellants' brothers

went into possession who, in their turn, sold the land to the Respondent more than nine years ago, but the Court did not state whether this sale was more than ten years ago, which is the time for prescription. As a result of this finding the Court considered the Appellants to have failed in proving their claim for possession and dismissed the Appellants' claim.

We hold, following the principle laid down by the Court of Appeal, that the possession of the Appellants' brothers is possession on behalf of the Appellants in respect of the latter's shares in the land, unless it is established and proved that the possession by Appellants' brothers was an adverse possession.

The appeal is allowed, the judgment of the Land Court is set aside, and the case remitted to that Court to hear evidence on the question of adverse possession, if any, and to give judgment accordingly.

Costs to abide the event.

Delivered this 18th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 47/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

Ibrahim Manad Aziz. — APPELLANT.

v.

The Attorney General. — RESPONDENT.

Evidence — Voluntary confession.

In dismissing an appeal from a judgment of the District Court of Nablus, dated the 7th April, 1938, whereby Appellant was convicted of breaking into a building and committing theft therein contrary to sec. 297(a) of the Criminal Code Ordinance, 1936, and sentenced to two years' imprisonment :—

HELD : Appellant had made a voluntary confession which had been believed by the lower Court.

ANNOTATIONS : *Vide* CR. A. 19/38 (1938, 1 S. C. J. 199) and annotation.

APPELLANTS : In person.

FOR RESPONDENT : Crown Counsel. (Hogan).

JUDGMENT.

We need not trouble you Mr. Hogan.

The evidence before the District Court in this case was perfectly clear. You made a confession which they believed and which they state in their judgment to have been made freely and voluntarily. There was ample evidence on which they could, if they believed that evidence, convict you.

The appeal is dismissed and the conviction and sentence confirmed.

Delivered this 19th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 49/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Khayat, JJ.

IN THE APPEAL OF :

1. Mohammad Suleiman al Ubeid,
2. Abdallah Said Abu Heitun,
3. Rashid Ali el Abod. — APPELLANTS.

v.

The Attorney General. — RESPONDENT.

Murder — Dying statement — Identification — Summing up — Credibility of witnesses.

In dismissing an appeal from a judgment of the Court of Criminal Assize sitting in Jerusalen, dated the 28th April, 1928, whereby Appellants were convicted of murder, contrary to sec. 214 of the Criminal Code Ordinance, 1936, and sentenced to death :—

HELD : The case depended entirely upon the credibility of the evidence as there was evidence against the Appellants which, if believed, was sufficient to support a conviction.

FOR APPELLANTS : No. 1 — Abcarius Bey.
No. 2 — „
No. 3 — 'Akel.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

We need not trouble you, Mr. Hogan.

This is an appeal against sentence of death passed by the Assize Court on the three Appellants.

A man, called Abdallah Hamdan Esh-Shubqi, was killed by a shot fired by one of three persons. In his statement to a cousin of his, he himself admits that he did not mention any names, and the cousin says, in addition to that, that the dying man said that he did not know the people who shot him. In a second statement made a very short time later on the same night, he gives the names of the three Appellants as the persons involved. These three Appellants were picked out on an identification parade by the widow; No. 1 was equally identified at the parade by the daughter. In the case of the second Appellant, a necklace of blue beads was found in his premises which was definitely identified by the mother as being the property stolen on that night.

The summing up of the learned Chief Justice has been subjected to a certain amount of criticism by the defence, but it is, if I may say so, a model of clarity and fairness and no exception can be taken to it.

This case depends entirely upon the credibility of the evidence, since there was evidence against these Appellants which, if believed, was sufficient to convict. The learned trial Judge bore in mind all the discrepancies in the evidence and he was satisfied that the prosecution had established the charge which they had laid. That of course is the end of the case.

There is nothing in this appeal except that it is an appeal in a murder case.

The appeal is dismissed and the conviction and sentence of death confirmed.

Delivered this 19th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 61/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPLICATION OF :

Schimon Baer (Dov) Lande. APPELLANT.

v.

Abraham Ryndsunski. RESPONDENT.

Appeal — Settlement — Dismissal by consent — Refund of deposit.

Appeals from the judgments of the District Court of Tel Aviv, dated the 4th and 6th February, 1938, respectively, dismissed for failure of prosecution, the parties having come to a settlement.

ANNOTATIONS : See C. A. 235/37 (1938, 1 S. C. J. 49) and C. A. 60/38 (1938. 1 S. C. J. 249) for earlier proceedings in these cases.
C. A. 60/38 also dismissed on the same terms.

JUDGMENT:

There being no appearance by or on behalf of both parties, upon whom service has been duly effected, and at their joint written request, the Court orders that the appeal be dismissed.

Upon the application of the Appellant, the Respondent consenting thereto, the Court orders that the deposit be returned in full to the Appellant.

Delivered this 20th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 100/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Adolf Reiss. APPELLANT.

v.

1. Hassan Amsuri,
2. Abdul Fattah Irani. RESPONDENTS.

Sale of goods — Claim for purchase price as distinct from damages — Costs.

In allowing an appeal from a judgment of the District Court of Haifa, sitting in its appellate capacity, dated the 24th February, 1938, and in quashing the judgment of the District Court and restoring the judgment of the Magistrate's Court :—

HELD : When a contract of sale has been made, the vendor may sue for the price of the goods.

ANNOTATIONS : The cases on the measure of damages referred to in the judgment are quoted in the annotations (second paragraph) to C. A. 54/38 (5.v.38). See *per contra* C. A. 67/36 (1937, 1 S. C. J. 122, 1 Ct. L. R. 20, C. of J. 1934-6, 186).

See also Halsbury's Laws of England (old edition) Vol. XXV, p. 266, *para.* 464.

FOR APPELLANT : J. Gavison.

FOR RESPONDENTS : Atalla — by delegation.

JUDGMENT:

This appeal must be allowed.

We are aware of nothing in the law of Palestine which says that when a contract for sale has been made, the vendor cannot bring a claim for the price of the goods he supplied, but were not taken over by the purchaser. The case cited in support of the theory, that he cannot, is concerned with damages and the rule as to measuring of damages. There is nothing in this case which says that a man cannot ask for the price of the goods.

The judgment of the District Court is quashed and the judgment of the Magistrate is restored with costs on the lower scale to be taxed by the Chief Registrar and LP. 5.— advocate's fees.

Delivered this 23rd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 101/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Nayef Jarjoura el Khoury. APPELLANT.

v.

Moise Carasso. RESPONDENT.

Mortgage — Suing on promissory notes separately.

In dismissing an appeal from an order of the District Court of Haifa, in its appellate capacity, dated the 31st January, 1938 :—

HELD : There was nothing in the mortgage to prevent Respondent from suing on the notes which he held. The mortgage was the security and the Respondent did not dispense with the notes.

ANNOTATIONS : *Cf.* H. C. 31/38 (16.v.38) *ante* and annotations.

FOR APPELLANT : Jarjoura.
FOR RESPONDENT : Kitay.

JUDGMENT:

We need not trouble you Mr. Kitay.

We are of opinion that the District Court was perfectly correct in their judgment. There is nothing whatever in this mortgage which prevents the Respondent from suing on the notes which he already holds. The mortgage is a security and the Respondent did not dispense with the notes.

The appeal must be dismissed with costs on the lower scale to be taxed by the Chief Registrar, and LP.5.— advocate's fees.

Delivered this 23rd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 114/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Fatmah Abed Rabbo Abu Swaihel. APPELLANT.

v.

Qasem Mustafa el J'eidi. RESPONDENT.

Prescription — Findings by trial court — Date of entry into possession.

In allowing an appeal from a judgment of the Land Court of Beersheba, dated the 7th March, 1938, and in remitting the case to the trial Court to determine the question of prescription and the validity of the sale :—

HELD : Respondent having entered into possession only four years ago he could not raise the defence of prescription.

FOR APPELLANT : Haddad.
FOR RESPONDENT : Shawwa.

JUDGMENT:

We are of opinion that this appeal must be allowed.

The first question is the question of prescription. The Respondent himself said that the mortgage was redeemed 15 years ago, and that he then went into possession, whereas Kishawi, who was the mortgagee, says that the mortgage was not redeemed until four years ago, and it was not until the mortgage was redeemed that Qasem alleges any possession. The Land Court seem to have adopted Kishawi's version that the mortgage was not redeemed until four years ago, but if Qasem in fact only entered into possession four years before this action was brought, then there can be no prescription, since his predecessor in title was in possession as mortgagee.

Further evidence should if possible be heard on this point. The Land Court only can solve this point. The case, therefore, will have to go back on that point, no doubt. At the same time, we think it would be as well that the question of the validity of the sale be investigated by the Land Court, and determined.

The appeal must therefore be allowed, the judgment of the Land Court quashed, and the case remitted for retrial on the lines indicated in this judgment.

Costs to await the result of retrial.

Delivered this 23rd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 104/38.
(Leave application).

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :

Michael Watikay. APPLICANT.

v.

Rosa Limansky. RESPONDENT.

Arbitration — Leave to appeal — Award, whether uncertain or ultra vires — Clerical error patent — Evidence not before arbitrators.

In refusing an application for leave to appeal from a judgment of the District Court of Tel-Aviv, dated the 22nd February, 1938, whereby Applicant's opposition to the confirmation of an award was refused :—

HELD : 1. The award was not uncertain or *ultra vires*.
2. The error on the face of the award was a clerical error which could be corrected.
3. Applicant had not satisfied the Court that he had requested the arbitrators to allow him to produce certain documents to which the arbitrators could have had access.

ANNOTATIONS : 2. See H. C. 92/32 (P. L. R. 860, C. of J. 1100, P. P. 24.iv.33).

APPLICANT : In person.
FOR RESPONDENT : Shwartzman.

ORDER:

This is an application for leave to appeal from a judgment of the District Court of Tel-Aviv confirming an award of arbitration in a dispute between the two parties concerning their relations as partners in a business concern in Tel-Aviv. The Applicant submitted several reasons why the judgment of the District Court was wrong and why the award should not be confirmed.

2. There is nothing whatsoever in his claim that the award was uncertain, the award is quite clear. Nor is the award *ultra vires*. As to the error which appears to be on the face of the award it is clear, as the Court below found it, that it was a clerical mistake in adding up the figures. This error was corrected and it could certainly not serve a ground to have the award set aside.

3. The only point which needs some consideration is the ground submitted by the Applicant that certain documents were not before the arbitrators and if they were brought before them, they might have come to a different conclusion.

4. He maintains that the documents were locked up in the business shop. The Applicant could however not satisfy us that at any stage of the proceedings before the arbitrators had be clearly or even impliedly requested to allow him to bring such documents to their notice.

5. True the shop was closed by an order of the Court and the arbitrators were appointed receivers, but there was nothing to prevent him from obtaining an order to have the shop opened and produce

such documents as he thought fit. There is therefore no reason for granting the application which will be dismissed with costs at LP. 5.— inclusive of advocate's fees.

Given this 23rd day of May, 1938.

British Puisne Judge.

HIGH COURT No. 24/38.

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

BEFORE : Copland and Abdul Hadi, JJ.

IN THE APPLICATION OF :

1. Abdul Mu'ti Bamieh,
2. Abdul Hamid & Tahir Bamieh, on behalf of the estate of Ahmad Bamieh. PETITIONERS.

v.

The Chief Execution Officer, Jaffa. RESPONDENT.

High Court — Prescription — Application for adjournment.

In refusing an application for an order to issue to Respondent, directing him to show cause why his order, dated the 29th October, 1937, and delivered on the 12th November, 1937, in Execution File No. 3086/34, Jaffa, should not be set aside on the ground that the judgment was prescribed at the date of such order :—

HELD : There was no prescription and the High Court did not act as a Court of appeal to decide whether the judgment was correct.

FOR PETITIONERS : Saleh.

FOR RESPONDENT : Akel.

ORDER :

In this case we are satisfied that there is no prescription. We are also not a Court of Apeal to say if this judgment was a wrong judgment. I may remark that the only effect of these proceedings is to avoid the evil day of paying the judgment debt. If there had been anything in the application at all, we would have granted an adjournment, but there is nothing in it. I find it a little difficult to understand how the Petitioners had got their original order.

The rule *nisi* is discharged with costs and LP. 5.— advocate's fees.

Given this 23rd day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 112/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Musa Ibrahim Khalil Saleh,
2. Abdallah As'ad,
3. Mahmoud Jaber Awadallah,
4. Abdel Karim Ahmad Ali Sharars,
5. Jum'a Ahmad Mohammad 'Ifana. APPELLANTS.

v.

1. Abdel Fattah Darwish,
2. Said Darwish. RESPONDENTS.

Appeal — Findings of fact — No points of law.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 31st March, 1938 :—

HELD : No points of law being raised the appeal must be dismissed.

ANNOTATIONS : See C. A. 78/38 (24.v.8) *post.*

FOR APPELLANTS : Nashashibi.
FOR RESPONDENTS : Haddad.

JUDGMENT:

We need not trouble you Rashed Effendi.

This appeal fails. The whole of the appeal has been directed entirely to query the apprecitation of the evidence which was accepted by the Court below. Not one point of law was raised before us and the appeal therefore meets with the same fate that all such appeals meet, namely, "dismissed". There is nothing in it whatever and it should not have been brought.

The appeal will be dismissed with costs on the lower scale to be taxed by the Chief Registrar, together with LP. 5.— advocate's fees.

Delivered this 24th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 78/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Joseph Francis Jada'. APPELLANT.

V.

1. Badi'a Haddad,
2. Samir Abu Shabab. RESPONDENTS.

Appeal — Findings of fact — Leave to appeal.

In dismissing an appeal from a judgment of the Land Court of Haifa, sitting in its appellate capacity, dated the 27th January, 1938, confirming the judgment of the Magistrates Court, Haifa, dated the 15th December, 1937 :—

HELD : Leave to appeal should not have been granted as the appeal was based on questions of fact.

ANNOTATIONS : See C. A. 112/38 (24.v.38) *ante.*

FOR APPELLANT : Haddad.
FOR RESPONDENTS : Asfour.

JUDGMENT:

We need not trouble the Respondents.

This appeal again, the second time this morning, is entirely on a question of fact — on the appreciation of evidence before the Magistrate. The Land Court said that it was entirely a matter of the appreciation of the evidence and could not interfere with the evidence for that was a matter for the Magistrate. In spite of that the Land Court gave leave to appeal. There is nothing in this appeal and it is waste of time, and I cannot imagine how leave to appeal was ever given.

The appeal is dismissed with costs on the lower scale to be taxed by the Chief Registrar together with LP. 3.— advocate's fees.

Delivered this 24th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 115/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Mohammad Hussein Khattab, on his own behalf and on behalf of his son, Ahmad Mohammad Hussein,
2. Salameh Hussein Khattab,
3. Fatmah Hussein Khattab. APPELLANTS.

v.

1. Ahmad el Haj Yousef Hathat,
2. Abdel Qader Haj Yousef Hathat. RESPONDENTS.

Prescription — Admission by Appellants — Record — Evidence of possession.

In allowing an appeal from a judgment of the Land Court of Beersheba, dated the 7th March, 1938, and in quashing the judgment of the Land Court and remitting the case for evidence of possession to be heard and a fresh judgment given :—

HELD : Although Appellants had admitted that Respondents were in possession, there had been no finding that the possession was in respect of the period of prescription.

FOR APPELLANTS : Farajallah.

FOR RESPONDENTS : Shawwa.

JUDGMENT:

We have come to the conclusion that this appeal must be allowed.

The important point, it seems to us, on which the case will really hinge, is the question of possession. The Land Court, it is true, said in their judgment that the Plaintiffs, the present Appellants, admitted that the Defendants were in possession of the lands in dispute ; in the record, however, we are unable to find any statement that the Respondents were in possession for the period of prescription. It is true that the Appellants in the Court below stated that they could prove their possession by evidence ; unfortunately, however, that evidence was not heard.

The judgment of the Land Court must be quashed and the case

remitted to that Court to hear evidence *re* possession of both parties and to give a fresh judgment.

Costs to abide the event.

Delivered this 25th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 116/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Hassan Atiyeh Abu Khattab,
2. Mohammad Atiyeh Abu Khattab. APPELLANTS.

V.

1. Ahmed Yousef Hathat,
2. Abdel Qader Yousef Hathat. RESPONDENTS.

Appeal — Cannot lie against judgment given in favour of appellant.

In dismissing an appeal from a judgment of the Land Court of Beersheba, dated the 7th March, 1938 :—

HELD : Appellant could not appeal as the judgment had been given in his favour.

ANNOTATIONS : See, to the same effect, C. A. 193/26 (P. L. R. 120, C. of J. 486).; L. A. 74/32 (C. of J. 1752) and C. A. 37/34 (2 P. L. R. 205, C. of J. 1934-6, 693).

FOR APPELLANTS : Husseini.

FOR RESPONDENTS : Shawwa.

JUDGMENT:

We need not trouble you, Sheikh Said Effendi.

This is an appeal from a judgment which was in favour of the Appellants inasmuch as the claim by some persons against them and the Respondents was dismissed. The reason for the appeal, we think, is because the present Apellants did not like the reasons given by the Land Court in their judgment. Nobody can appeal against a judgment dismissing a case against him. We get plenty of people appealing

from judgments given against them, but we cannot allow people to appeal against judgments given in their favour.

The appeal must be dismissed with costs assessed at LP. 5.— and LP. 5.— Advocate's fees.

Delivered this 25th day of May, 1938.

British Puisne Judge.

HIGH COURT No. 33/38.

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

BEFORE : Copland and Khayat, JJ.

IN THE APPLICATION OF :

Anisch Hassan Hamideh. PETITIONER.

v.

1. Ex Chief Execution Officer, Haifa,
2. Mohammad Baradey Abbassi,
3. Mohammad el Kalla,
4. Shihadeh As'ad el Khouri. RESPONDENTS.

Change of venue — Allegations against judge — Duty of Court avoid appearance of injustice.

In allowing an application for a change of venue :—

HELD : The order would be granted as the duty of the Court is to determine not what is necessary to avoid injustice but what is necessary to avoid any appearance of injustice.

ANNOTATIONS : Earlier proceedings in this case (C. A. 17/38) are reported on *p.* 208, *ante.*

Applications for change of venue were granted in the following cases :—

H. C. 21/34 (P. P. 29.iv.34) ; H. C. 32/34 (2 P. L. R. 79, P. P. 23.iv.34) ; H. C. 15/30 (P. L. R. 455, C. of J. 1835) ; H. C. 51/31 (P. L. R. 588, C. of J. 1836) ; H. C. 98/32 (C. of J. 1838) and H. C. 36/34 (2 P. L. R. 124).

They were refused in the following cases :—

H. C. 31/34 (2 P. L. R. 31, P. P. 13.v.34) ; H .C. 7/34 (2 P. L. R. 47, P. P. 5.iii.34) ; H. C. 67/33 (P. L. R. 865, P. P. 19.xii.33, C. of J. 1839).

PETITIONER : In person.

FOR RESPONDENTS : No. 1 — No appearance.

Nos. 2 to 4 — Cattan.

ORDER:

We do not need to hear the Petitioner.

We have come to the conclusion that this motion should be granted. The duty of the Court, in this matter, is to determine, not what is necessary to avoid injustice, but what is necessary to avoid any appearance of injustice.

Certain allegations have been made against the judge of the District Court of Nablus, who is one of the Respondents. I make no comment upon them, but it is unfortunate that they should be given such a wide circulation by the opposition to this motion.

It is better, in our opinion, in the interests of both parties, to transfer the case to another Court. The rule *nisi* for the change of venue is made absolute and the case is ordered to be transferred to Jerusalem.

The Petitioner will have the costs of this petition and LP. 2.— travelling expenses.

Delivered this 25th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 48/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: Copland, Greene and Khayat, JJ.

IN THE APPEAL OF:

Tewfiq Naser el Daoud. APPELLANT.

v.

Ezra Hazkiel Zakey. RESPONDENT.

Bona fide purchasers for value — Notice of claim before registration but after contract made — Notarial warning — Purchase by wakale dawryeh — Purchase from vendor with notice of defective title — Duty to enquire — Equities.

In allowing an appeal from the judgment of the Land Court of Haifa, sitting in its appellate capacity, dated the 23rd December, 1937, and in quashing the judgment of the Land Court and restoring the judgment of the Settlement Officer:—

HELD: 1. The Respondent was not a *bona fide* purchaser without notice as he had been warned by Appellant, albeit after Respondent had concluded a contract to purchase.

2. A purchaser from a *bona fide* vendor would be protected but the vendor in this case had taken no steps to enquire into the facts of possession of the land and must be deemed to have had constructive notice of Appellant's rights.

ANNOTATIONS: Se and *cf.* the following cases: L. A. 135/23 (C. of J. 1489), L. A. 51/26 (C. of J. 1491) — *Rights of purchaser by wakale dawryeh ;* L. A. 173/26 (P. L. R. 269, C. of J. 1843), L. A. 96/27 (C. of J. 1740) ; L. A. 39/32 (P. P. 23.iv.33 ; C. of J. 1746); L. A. 58/25 (as L. A. 88/25 — C. of J. 1777), L. A. 49/35 (1937, 1 S. C. J. 20, as C. A. 49/35, 1 Ct. L. R. 38, C. of J. 1934—6,491, Ha. 6.vii.37) — *Position of bona fide purchaser.*

On equities, see the fallowing decisions: L. A. 102/24 (C. of J. 745); L. A. 91/26 (P. L. R. 128, C. of J. 747); L. A. 83/27 (C. of J. 749); C. A. 15/38 (1938, 1 S. C. J. 204) and annotations.

FOR APPELLANT: Sahyoun.
FOR RESPONDENT: A. Levin.

JUDGMENT:

This is an appeal from a judgment of the Haifa Land Court reversing a judgment of the Settlement Officer.

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

The facts of this case are set out in great detail by the Settlement Officer and have been summarized in a shorter form, but none the less adequately by the learned Relieving President. It is not necessary to restate them here. There are two questions for us to determine (leaving on one side for the moment the question of equities), namely whether either Miss Abella or the Respondent were *bona fide* purchasers for value or not. And in the first place we are satisfied that the Settlement Officer was right in finding that the Respondent was not a *bona fide* purchaser. This view is also supported by Shems J. in the Land Court, where he said that the Respondent had notice of the claim of the present Apellant "before the land was registered in his name, and as such, he cannot be considered to have become a *bona fide* purchaser himself".

The Respondent had been served by the Appellant with a notarial notice before the transfer was effected in which he was definitely informed that the Appellant had purchaesd the land in dispute by means of an irrevocable power of attorney, the date and number of which were duly set out in the notice, he was warned that the purchase by Miss Abella, his vendor, was in bad faith, as she as well as her father knew that the Appellant was the purchaser and had been in

possession for a long time, and he was also warned that he would purchase the land at his own risk.

It makes no difference in our opinion that the Respondent had already made the contract with Miss Abella before he received the notice — he knew that there was a definite adverse claim to this land before registration was effected. He had due notice and must take the consequences.

The fact, however, of his not being a *bona fide* purchaser without notice, would not affect him if he could show that his vendor, Miss Abella, was herself a *bona fide* purchaser, because he would then take her title.

The Land Court, reversing the Settlement Officer, came to the conclusion that Miss Abella was a *bona fide* pnrchaser without notice, on the ground that the Respondent had failed to take any steps in the Land Registry to have the land registered in his own name, or to enter a caveat, and that there was no evidence that Miss Abella knew that the Certificate of the Mukhtars was false. Also that Miss Abella had taken all reasonable steps as regards enquiries and that since a portion of the land had been ploughed by her vendor, Tahir Haj Ali, she was entitled to assume that the latter was in possession, in addition to the evidence afforded by the Certificate. We do not, however, think that this is so.

It must be remembered that the only registration of this land was an old Turkish one, and that fact in itself should have caused her to take extra precaution. The Settlement Officer has found as a fact that Taher Haj Ali, her vendor, only entered into possession of the land earl yin 1934, not by right but arbitrarily, and then only of a small portion of some six dunams. He also found as facts that the Appellant had been in undisturbed possession of this land for at least 14 years prior to 1934, and that the Mukhtars' Certificate re Taher Haj Ali's possession was false to their (the Mukhtars') knowledge at any rate. He further found that Miss Abella had acquired no valid title to the land, that she had no lawful possession of any of it, and that she could not have made a valid transfer to the Respondent since Miss Abella took no adequate steps as a reasonable and prudent person to enquire into the actual facts of possession of the land which she purchased from Tahir Haj Ali, which for over 14 years had been in the uncontested possession of the Respondent.

We think that it was gross carelessness in this case on the part of Miss Abella not to have made enquiries in the neighbourhood with regard to the true facts of Tahir Haj Ali's alleged possession and we

agree with the Settlement Officer that she must be deemed to have had constructive notice of the defect in her vendor's title, since the most superficial enquiries on the spot on her part would have revealed the true state of affairs. She was therefore not a *bona fide* purchaser without notice and we agree in this respect with the Settlement Officer.

As to whom of Miss Abella and the Respondent has the greater equity, that is, who showed the lesser degree of negligence, we think that the Respondent is the less to blame. After all he had undisturbed possession for over 14 years and the land had only recently been seized arbitrarily by Tahir Haj Ali, while Miss Abella, relying on the Mukhtars' Certificate, and knowing that the registration was only an old Turkish one, took no steps to make any local enquiries as to the true facts of possession of her vendor.

For these reasons we think that this appeal must be allowed, the judgment of the Land Court quashed, and the judgment of the Settlement Officer restored.

The Appellant will have all costs here and below, and LP. 5.— advocate's fees.

Delivered this 27th day of May, 1938.

British Puisne Judge.

HIGH COURT No. 32/38.

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

BEFORE : Copland and Frumkin, JJ.

IN THE APPLICATION OF :

Hashem Ramadan Abu Khadra. PETITIONER.

v.

1. Chief Execution Officer, Jaffa,
2. Anglo Palestine Fruit Export Co. RESPONDENTS.

Execution — Points not raised before Chief Execution Officer — Change of mortgagee during execution proceedings — Time to apply to the High Court — H. C. 73/37 — Strong grounds to be urged in application to set aside final order of sale.

In dismissing an application for an order to issue to the First Respondent directing him to show cause why his order dated the 14th April, 1938, in Execution File No. 4654/35, Jaffa, ordering the final sale of the mortgaged

property, should not be set aside, and why the sale proceedings should not be cancelled :—

HELD : 1. The great majority of points were not raised before the Chief Execution Officer and could not be raised for the first time before the High Court.

2. The fact that the mortgage was transferred during the execution proceedings did not affect the Petitioner.

3. Petitioner should have applied to the High Court as soon as his application was dismissed and not waited till a final order of sale.

Followed : H. C. 73/37. (1938, 1 S. C. J. 5).

ANNOTATIONS :

1. See annotation 3 to C. A. 90/38 (11.v.38).

3—4. See annotations to H. C. 73/37, (*supra*).

FOR PETITIONER : Homsi.

FOR RESPONDENTS : No. 1 — No appearance.
No 2. — Seligman.

JUDGMENT:

A great number of points have been raised in this case, the vast majority of which were not brought to the notice of the Chief Execution Officer, except some of them which were brought to his notice in a very vague manner. The point about the change of the mortgagee is one which definitely will not affect the mortgagor. All these points should have been brought to the notice of the Chief Execution Officer, and apart from that, such points that have been brought to his notice have been rejected by him on the 24th March, 1938. At that time the Petitioner should have come to this Court, he should not have waited until the final order for sale had been given.

In High Court case No. 73 of 1937, we held that :

1. there must be very strong grounds for asking the High Court to upset a final order for sale and in the present case it could find none.

2. the judgment-debtors had ample time within which to bring to the notice of the Second Respondent (Chief Execution Officer) the matters which they had raised before the High Court and if his answer were unfavourable to them to apply to the High Court. They had not done so, and it was too late for them to come to the High Court.

That case largely covers the present case and the rule must be discharged with total costs to include advocate's fees, assessed at LP. 5.—.

Delivered this 27th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 52/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

Khalil Ismail of Khalil, alias Khalil el 'Urf. APPELLANT.

v.

The Attorney General. RESPONDENT.

Evidence before the trial Court — Application to brief counsel — Opportunity to call witnesses.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 3rd May, 1938, whereby Appellant was convicted of robbery, contrary to secs. 287 and 288(1) of the Criminal Code Ordinance, 1936, and sentenced to ten years' imprisonment :—

HELD : Appeal must be dismissed in view of the fact that there had been evidence before the trial Court and that the Appellant had been given an opportunity to brief counsel and call witnesses.

ANNOTATIONS : *Cf.* C. A. 242/37 (1938, IS. C. J. 51) and annotations, and see CR. A. 2/38 (1938, IS. C. J. 60).

APPELLANT : In person.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

There was evidence before the Court below, which if believed, was sufficient to convict you. The Court believed that evidence and you were properly convicted.

The Court gave you every possible indulgence in adjourning the case twice and on the third occasion it was adjourned for one hour in order that you might get your advocate and you did not do so.

As regards the question of calling witnesses, you were given an opportunity of calling all your witnesses, but you called one witness and dispensed with the other witnesses.

The appeal will be dismissed and the conviction and sentence affirmed.

Delivered this 28th day of May, 1938.

Chief Justice.

CRIMINAL APPEAL No. 53/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

Mohammad Hamoudeh Ismail. APPELLANT.

v.

The Attorney General. APPELLANT.

Evidence — Time for objecting to production of evidence — Admissibility of plan in evidence — What a plan should not contain — Experiments carried out by the Police — Evidence not connected with other evidence in the case — Offence of violence — Alteration of charge by Appellate Court — Criminal Code Ordinance, 1936, *secs.* 287, 295.

In dismissing an appeal from a judgment of the District Court of Jaffa, dated the 27th April, 1938, whereby Appellant was convicted of robbery contrary to sec. 287 of the Criminal Code Ordinance and sentenced to seven years' imprisonment :—

HELD : 1. The proper time to take objection to any evidence is when that evidence is tendered and before the Court has had an opportunity of hearing or seeing it.

2. A plan should not contain descriptive notes relating to the case and is otherwise admissible and of assistance to the Court.

3. The experiment carried out by the Police was part of their investigations and need not have been made in the presence of the Accused. This evidence, however, was not admissible as it was not connected with other evidence.

4. There was no evidence to convict the Accused under sec. 287 of the Criminal Code Ordinance but there was evidence which would justify the Court in finding that the house had been broken into by persons of whom the Accused was one and the charge would therefore be amended to one under sec. 295.

ANNOTATIONS : 4. See CR. A. 45/38 (5.v.38) and annotations.

FOR APPELLANT : Cattan.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

The Appellant in this case was convicted before the District Court of Jaffa with robbery under Sections 287 and 288(1) of the Criminal Code Ordinance.

Considerable criticism has been made of the conduct of the trial

by Mr. Cattan who appeared for the Appellant. In the first place, he criticises the admission in evidence of a plan. It seems that the plan was tendered by a Police Officer and at the end of his evidence the advocate, Mr. Kanafani, who then appeared, objected to the plan.

In my view the proper time to take objection to any evidence is when that evidence is tendered and before the Court has had an opportunity of hearing or seeing it.

So far as this plan is concerned, we do not know precisely what the objections were, but Mr. Cattan said it contained certain statements which might influence the mind of the Court which should not have been upon it. It is not easy to lay down precisely what a plan should or should not contain. Generally speaking plans are prepared in order to assist the Court. In this country many witnesses are incapable of reading a plan and marking points thereon, and in my view a prepared plan is often very useful to the Court. I think a witness may indicate certain places to the person preparing the plan and that person should mark them on the plan. The witness should then state to the Court : I have shown such and such a point to the Police Officer, or other person making the plan, and the maker of the plan may then come and say : this is the point on the plan which the witness "A, B", indicated to me on the ground. Then I think the plan is admissible. It should not contain descriptive notes relating to the case, for example, "this is the spot where the murder was committed", as thereby the maker of the plan may give evidence which is in reality the evidence of another witness.

A second point is taken that some sort of experiment was carried out to show how much light would be thrown from a lamp to a certain spot. It is said by Mr. Cattan that such experiments should be carried out in the presence of the accused person himself, and that was not done. That argument, it seems to me, could be extended to the whole of the police investigations of a case. I do not think that an accused person is entitled to be present when investigations are being carried out. I think all relevant investigations should be made by the police and other officers, and the results tendered in evidence, and it must be remembered that if that evidence is given in the preliminary enquiry before the Magistrate, the accused knows what case is made against him and can adduce evidence to contradict or rebut it, and in many cases experiments are also made by the defence and put in evidence, in order to assist the Court to make up its mind. So far as this particular piece of evidence is concerned, it is unfortunate that the investigation of the Police Officer was not connected up by

the evidence of other witnesses in particular the evidence of the witness who indicated to the Police Officer where the incident took place. Evidence of that sort must be connected with other evidence to make it clear to the Court, and we do not think, in this case, that that piece of evidence by itself was admissible.

A further point was made, that in order to convict the accused under the Section under which he was convicted, it is necessary to prove violence. So far as this is concerned, in our view the judgment of the Court is not satisfactory.

The termination of the judgment is as follows :—

> "The accused and the other two unknown men used actual violence to Bedwan by firing two shots from a firearm in order to retain the stolen property and we therefore find him guilty of robbery contrary to Article 287 of the Criminal Code Ordinance, 1936".

The evidence of that is the evidence of Bedwan from which it is by no means clear who fired the two shots, and we are not satisfied therefore that the Court was justified in convicting the accused under the Section under which he was convicted. On the other hand it is quite clear from the evidence that the Court was justified in its finding of fact that the house of Sheikhah was broken into by three persons and that the accused was recognised as one of them. There was evidence upon which the Court could come to those findings. We are, therefore, of opinion that, by virtue of the powers vested in us, the conviction should be changed to one under Section 295. We change it accordingly and reduce the sentence to one of five years imprisonment.

Delivered this 28th day of May, 1938.

Chief Justice.

CIVIL APPEAL No. 94/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

Yehezkiel Weniger. — APPELLANT.

v.

1. Moise Carasso,
2. Ernst Brener. — RESPONDENTS.

Sale in public auction — Hire purchase agreement — Ownership remains vested in hirer — C. A. 42/36, Mejelle, Arts. 365, 378 — Owner should oppose sale in execution of his property in another person's hands — Bona fide purchaser.

In dismissing an appeal from a judgment of the District Court of Tel-Aviv, dated the 21st February, 1938 :—

HELD : 1. A *bona fide* purchaser of goods sold through the Execution Office is protected and it is for the owner of the goods to oppose the sale before it is completed.

2. Appellant had not satisfied the Court that the sale was properly conducted and that he was a *bona fide* purchaser without notice.

Considered : C. A. 42/36 (1937, 1 S. C. J. 103, P. P. 31.1.37, C. of J. 1934—6 460).

ANNOTATIONS : Only the true owner or his agent may alienate (C. A. 42/36 *supra*) or charge (C. A. 34/31, P. P. 12.v.33, C. of J. 978) property. A hire-purchase agreement does not give title to the hirer before all the conditions of the agreement have been carried out in full (C. A. 42/36, C. A. 34/31 and C. A. 44/36, 2 Ct. L. R. 49, C. of J. 1934—6 462).

The doctrine of *caveat emptor* may be said to apply in Palestine — see C. A. 42/36 and a purchaser does not obtain a better title than his vendor. Exception is made, however, in the case of sales through the Execution Office, when the purchaser acquires a good title : C. A. 3/38 (1938, 1 S. C. J. 136) but only if the sale is conducted in accordance with the procedure laid down by law : C. A. 41/33 (C. of J. 867) ; L. A. 75/34 (P. P. 5.iv.36) ; L. A. 60/22 (C. of J. 1775). This is the sense in which the annotations to H. C. 73/37 (1938, 1 S. C. J. 5) and C. A. 3/38 (1938, 1 S. C. J. 136) should be read.

See and *Cf.* C. A. 48/38 (27.v.38) ; L. A. 42/33 (2 P. L. R. 201, P. P. 14.1.35, C. of J. 813).

FOR APPELLANTS : Kleinzeller.

FOR RESPONDENTS : No. 1 — S. Gratch.
No. 2 — No appearance.

JUDGMENT:

Frumkin, J. This is the considered judgment of the Court.

The Appellant in this case bought a car in a public auction conducted by the Execution Officer of Tel Aviv. The car was sold in satisfaction of moneys due from one Ernst Brenner to other parties. Brenner acquired the car by a hire-purchase agreement from the Respondent.

2. The Respondent sued Brenner before the Magistrate's Court claiming alternatively an amount of LP. 50.— still due on the car or the car itself. The present Appellant joined as third party. The

Respondent failed before the Magistrate and succeeded on appeal to the District Court.

Now the Appellant appeals.

3. He does not seriously maintain that a hire purchase agreement confers title upon the hire-purchaser before all the conditions of the agreement have been carried out in full. The ownership of the car having remained with the Respondent, Brenner himself could not validly have sold the car. This principle was already laid down in Civil Appeal 42/36 where it was held that under Art. 365 and Art. 378 of the Mejelle only a true owner, or his agent may effectively alienate property to another person.

4. The Appellant's stronger point, however, is that he is in better position than an ordinary purchaser since he bought the car in a public auction from the Execution Officer.

5. In fact both the Execution Law and the Magistrate's Law provide for a certain amount of protection to purchasers of goods from the Execution Officer. An owner of goods attached when in possession of a judgment debtor who is not the owner has to take steps to oppose the sale within prescribed periods. If he takes no steps to oppose the sale in due time a purchaser from the Execution Officer is entitled to assume that there is no claim on the goods.

6. When goods in possession of a judgment debtor are sold in the manner prescribed in the Execution Law, this Court would certainly not interfere to upset the title of a person who has purchased such goods even if the goods sold were not the property of the judgment debtor, so long as it is satisfied that any person claiming title to such gods had actual knowledge, or could reasonably be assumed to have had such knowledge, that his property was about to be sold in satisfaction of a debt due by another, and had taken no steps to prevent such sale.

7. The Appellant neither in this Court nor before the District Court, nor the Magistrate's Court took any pains whatsoever to satisfy the Court that the sale by the Execution Office was conducted in the prescribed manner by publication in the local press and in accordance with other requirements of the law, nor did he prove that the Respondent knew, or could reasonably be assumed to have had knowledge of the sale.

8. The Apellant cannot therefore succeed and this appeal will be dismissed with costs assessed at LP. 5.— and LP. 5.— advocate's fees.

Delivered this 30th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 95/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Frumkin and Khayat, JJ.

IN THE CASE OF :

1. Albert Cohen,
2. David Cohen. APPELLANTS.

v.

Moses Valero. RESPONDENT.

Shuf'a — Adjoining neighbours — Remittal — Points raised on appeal — Estoppel — Waiver before approval of sale — Actions relating to Shuf'a strictly construed.

In allowing an appeal from a judgment of the Land Court of Jerusalem, dated the 9th March, 1938, and in remitting the case to the lower Court with directions :—

HELD : 1. Actions relating to *Shuf'a* are regarded strictly.
2. Respondent would be entitled to succeed if he had not been aware of the existence of the plan produced in this case.

ANNOTATIONS : Previous proceedings in this case (L. A. 37/34) were reported in P. P. 14.iv.35.

Other cases on *Shuf'a* (Preemption) : — L. A. 59/24 (C. of J. 1513) ; L. A. 121/24 (C. of J. 1514) ; L. A. 13/25 (P. L. R. 46, C. of J. 1515) ; L. A. 94/25 (C. of J. 1516) ; L. A. 20/31 (C. of J. 1517) ; L. A. 39/31 (C. of J. 1438) ; L. A. 44/32 (P. L. R. 809, P. P. 3.v.33, C. of J. 1518) ; C. A. 192/33 (2 P. L. R. 228, C. of J. 1110) ; L. A. 49/34 (P. P. 26.ii.36, C. of J. 1934-6 682) and L. A. 85/34 (2 P. L. R. 397, P. P. 5.xi.35).

FOR APPELLANTS : Levitsky.
FOR RESPONDENT : Misrachi.

JUDGMENT:

This is a second appeal from a judgment of the Land Court, Jerusalem in the same matter.

The case concerns a claim for *shufa'* by the Respondent, who claims that he is the owner of property adjacent to that bought by the Appellants and that he is therefore entitled to have the land purchased by them transferred to him at the price paid by them to their vendor. The Land Court originally gave judgment for the Respondent, but when the case came on appeal before this Court in April, 1935, a plan was produced by the Appellants showing a road dividing the plots owned respectively by the Respondent and the Appellants and bearing the signature of the Respondent. It seemed that this plan had not

been produced to the Land Court ; this Court therefore allowed the appeal and remitted the case for the Land Court to consider this plan. The Land Court thereupon proceeded to do so, considered the plan, heard further evidence and in fact inspected the area in question. In their second judgment, they state that in their opinion the plan is merely, as it states, a "Proposed Development Scheme," and has no legal bearing on the cause of action, and that the result of the inspection showed that there was no sign of any road and that the area was simply a rubbish heap, and they gave judgment for the second time in favour of the Respondent. The Appellants have again appealed.

The Appellants have raised many points before us, and have argued them at inordinate length. We are satisfied that with one exception, there is nothing in them. Many of them were argued on the first appeal, and cannot now be raised again. The only point that merits any consideration is that of the date of signing of this plan, which is marked c 3. The Appellants have argued that the Respondent is now estopped from claiming *shufa'* because he had agreed, prior to the sale to the Apellants, to a road being constructed between his land and the plot purchased by the Appellants, and that his signature on the plan c3 is sufficient proof of his agreement.

The sale to the Appellants took place in March, 1933, and the Respondents says that he only heard of the sale in August, 1933, whereupon he immediately filed his action, and he argues further that the plan only contemplates a proposed scheme,and that in fact there is no road existing — that there can be no estoppel until the sale came to his knowledge, and that any waiver or estoppel must take place after and not before sale. He further argues that the Town Planning scheme could not become binding on anyone until approved by the High Commissioner, and that this approval was not given until the 16th January, 1934 — that is a long time after the sale.

Action regarding *shufa'* however, are always regarded strictly as these provisions, however suitable they might have been to a rural community, are totally unsuited to the conditions of modern life in civilized towns.

We think that before this appeal can be satisfactorily determined, that two points must be decided, first, did the Respondent sign the plan c3 before the date of the sale to the Apellants or not, and secondly, if the Respondent did sign the plan before the date of sale, then were the Appellants at the time of purchase by them aware that a plan, showing a proposed road between the plot purchased by them and

that owned by the Respondent, had been agreed to and signed by the Respondent and that the Respondent had agreed to a road being planned between the said two plots. To determine the first point it will be necessary to hear the evidence of the Respondent and to consider it together with that of Mr. Meyuhas who gave evidence in the Court below. If the plan were open to inspection by the public prior to the date of sale, then we think that that would be the presumptive evidence, at any rate, that the Appellants were aware of its existence. There may of course be other evidence of their knowledge. If the Appellants were aware of the existence of this plan, before they completed their purchase, then we think that they will be entitled to judgment, since, seeing that there was a road proposed between the two plots, they may well have been led to the opinion that the Respondent would not be claiming *shufa'*, as by his own act he had waived any right in that respect that he might have had. If they were not so aware, then the Respondent will be entitled to succeed.

If the Appellants fail on the main grounds of appeal, it has been admitted by the Respondent that the correct price is £. 528, and not £. 400, and the Land Court will then give judgment that the price is £. 528, and we also think that they will be entitled to interest at the legal rate on this sum. This will be in addition to the other items awarded in the judgment now set aside, though we would observe that the phrase "expenses incidental to the sale" should be detailed in order to avoid further argument.

The appeal must therefore be allowed, and the judgment appealed from set aside, and the case remitted to the Land Court for the consideration of the points and observations set out above and for a new judgment to be given.

Costs of this appeal will await the result of the retrial.

Delivered this 30th day of May, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 54/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

Shafiq George Halaby. APPELLANT.

V.

The Attorney General. RESPONDENT.

Criminale Procedure (Trial Upon Information) Ordinance, sec. 52 — Substitution of charges — CR. A. 13/38 — Evidence to support amended charge — Criminal Code Ordinance, 1936, secs. 152, 157 — Corroboration required for a conviction of a sexual offence — Identification as corroboration — A. G. v. Stavsky.

In allowing an appeal from a judgment of the District Court of Jaffa, dated the 26th April, 1938, whereby Appellant was convicted of committing an indecent act by use of force, contrary to sec. 157 of the Criminal Code Ordinance, 1936, and sentenced to eighteen months' imprisonment :—

HELD : 1. The proper reading of sec. 52 of the Criminal Procedure (Trial Upon Information) Ordinance, was that where the findings of fact in the particular case include findings which are necessary to support a lesser charge, the accused could be convicted of the lesser charge. The Section applied in the present case which was distinguishable from CR. A. 13/38.

2. According to English Law, which was applicable in this respect, in order to convict of a sexual offence, the evidence of the complainant must be, to some extent, corroborated.

3. The identification in this case was insufficient to corroborate the evidence of the complainant.

Distinguished : CR. A. 13/38 (1938, 1 S. C. J. 93).

Followed : A. G. *v.* Stavsky (P. P. 22.vii.34).

ANNOTATIONS :

1. See annotations to CR. A. 13/38 (*supra*) and CR. A. 18/38 (1938, 1 S. C. J. 156).

2. See annotations to CR. A. 160/37 (1938, 1 S. C. J. 103) and CR. A. 44/38 (11.v.38).

FOR APPELLANT : Cattan.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

This is an appeal from the District Court of Jaffa which convicted the Accused, the Appellant, of an indecent assault under Section 157 of the Criminal Code Ordinance.

During the hearing we discussed at considerable length the effect of Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance, Mr. Cattan submitting on behalf af the Appellant that by reason of that Section and the interpretation which was given to it by the Court of Criminal Appeal in Criminal Appeal No. 13/38, the Court of trial was not justified in convicting the Accused, in that he

was originally charged with attempts to commit offences under Section 152 and that the Court substituted a conviction under Section 157. The point is of considerable importance. Section 52 of the Criminal Procedure (Trial Upon Information) Ordinance provides :—

> "The Court may find an accused person guilty of an attempt to commit an offence charged, or of being an accomplice or accessory thereto, or may convict him of an offence not set out in the information and without amendment of the information if such offence be covered by the evidence in the case and by the findings for facts necessary to establish an offence charged".

The important words with which we are concerned are : "if such offence be covered by the evidence in the case and by the findings of facts necessary to establish an offence charged". Taken literally, that Section may be said to be ambiguous. It has always been interpreted by the Courts, I think, as meaning that where the theoretical findings of facts, that is, not the actual findings of facts in the particular case, include findings which are necessary to support a lesser charge the accused could be convicted of that lesser charge. Take the most common and simple example, that is, where the accused is charged with murder ; it is necessary to have a finding of fact that the accused, has killed the deceased. The Courts have taken the view, and so far as I am concerned, I think rightly, that the charge may be changed and the accused may be convicted of any lesser offence involving killing. In this particular case, we are of opinion that the theoretical findings of facts necessary to establish a charge under Section 152 cover the facts necessary to establish a charge under Section 157, if I may say so, put it, the greater includes the lesser, and we are of opinion that the Court below was justified, so far as that part of the case is concerned, in doing what it did. The distinction in the case to which I have referred (No. 13/38) is that it was there necessary in order to convict to introduce some new finding of fact not merely to bring the case within the findings of fact necessary for the original charge.

It was also argued that there was no sufficient corroboration to justify this conviction. It is quite clear that according to English Law which for this purpose now applies, in order to convict of sexual offences, the evidence of the complainant must be, to some extent, corroborated. It is obvious that, as a matter of safety, this must be so, otherwise charges could be made which it might be very difficult for an innocent person to refute. The only evidence in this case which could possibly be regarded as corroboration is the evidence

of a witness, Goldberg, to whom the girl made a statement and the girl's own identification.

In Goldberg's evidence, he says :—

> "She told me a man had taken her in his car and had attempted to rape her. She said she would recognise the man if she saw him again. Next morning I took her to the Police Station where she gave a statement".

and he also describes her condition when she came to him as follows :—

> "She came to my house one night. She left us about 10.00 p. m. to go home. At 1.00 a. m. she came back. She was distressed. She had a wound on her eye. Her hair was disordered and she had blood on her hand. Her clothes were all disarranged".

We are of opinion that that is not sufficient to corroborate her story against the accused.

It is also said that she identified the accused and identified the motor-car. This seems to me very much on the case lines as the evidence of Mrs. Arlosoroff in Attorney General v. Stavsky and others, who identified one accused and his coat, and the Court, in that case, took the view that that was one identification and the identification of the coat was not corroboration of the witness's story. In the circumstances, we do not think it would be safe to convict on the evidence in this case. We therefore discharge the accused unless he is detained on any other charge.

Delivered this 30th day of May, 1938.

Chief Justice.

HIGH COURT No. 36/38.

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

BEFORE : Green and Frumkin, JJ.

IN THE APPLICATION OF :

1. Ali Sheikh Ahmad Attar,
2. Alamieh Sheikh Ahmed Attar. PETITIONERS.

v.

1. Chief Execution Officer, Magistrate's Court, Ramleh,
2. Hafiseh el Abed el Shafi'e. RESPONDENTS.

Execution — Enforcement of compromise — Variation of order.

In refusing an application for an order to the Chief Execution Officer, Magistrates Court, Ramleh, directing him to show cause why his order dated the 13th April, 1938, should not be set aside and a partition judgment executed :—

HELD : There was no authority for the proposition that a Chief Execution Officer could not reconsider his first order and give a fresh judgment in its stead.

ANNOTATIONS : A Chief Execution Officer may revoke his own order : H. C. 52/31 (C. of J. 853). This case should be distinguished from H. C. 11/33 (C. of J. 291) where the Chief Execution Officer, acting under express directions imposed upon him by the High Court, was held not to have authority to vary his decision given in compliance with such directions.

FOR PETITIONERS : Wasef Anabtawi.
FOR RESPONDENT : *Ex parte.*

JUDGMENT:

In this case an application was made by the present Petitioners to the Chief Execution Officer of Ramleh to execute a judgment of the Magistrate's Court, Ramleh, confirming a compromise reached at by the parties regarding the partition of an orange grove. The Chief Execution Officer first ordered execution on the 13th March, 1938, but later when he came to find that the compromise between the parties did not embody their consent as regards the boundaries he gave another order dated the 13th April, 1938, whereby he ordered the withholding of execution of the partition judgment. In other words the Chief Execution Officer, upon reconsidering his first order, found that he is not in a position to execute the partition judgment being incomprehensible for the reason that the parties had not given their consent to the boundaries, a matter which is of course of fundamental importance.

In this application the attorney for Petitioners is seeking to move the Court to set aside the second order of the Chief Execution Officer dated the 13th April, 1938, on the sole ground that the Chief Execution Officer is not entitled to withhold execution after he had ordered same in an earlier order, but he cites no authority for the proposition that a Chief Execution Officer could not reconsider his first order and give a fresh one in its stead.

The application is therefore refused.

Delivered this 30th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 108/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Jamileh Jahshan. APPELLANT.

V.

1. Raji Abu Zalaf,
2. Carmella Shleivit. RESPONDENTS.

Action for return of purchase price before transfer — Evidence on alleged breach of contract mentioned in statement of claim need not be heard — Vendor at liberty to counterclaim for damages — Time to counterclaim.

Appeal from the judgment of the District Court of Haifa, dated the 3rd April, 1938, dismissed.

Respondents sued Appellant for the return of a deposit made on an agreement to sell land and alleged, in their statement of claim, that Appellant had committed a breach of the agreement. The District Court held that the Respondents could recover irrespectively of whether there had been a breach of the contract, and refused to hear evidence regarding the alleged breach. They also held that the Appellant was at liberty to counterclaim for damages.

HELD : 1. It was not necessary to hear evidence on the alleged breach.
2. The Appellant had had sufficient time within which to file his counterclaim.

ANNOTATIONS : This decision confirms C. A. 50/26 (P. L. R. 131, C. of J. 29) and C. A. 31/37 (1937, 1 S. C. J. 256, 1 Ct. L. R. 51) and disregards the *dicta* in C. A. 253/37 (1938, 1 S. C. J. 67). And see now C. A. 132/38 (30.vi.38), and annotations.

FOR APPELLANT : Asfour.

FOR RESPONDENTS : 1. Abcarius Bey.
2. Hakim.

JUDGMENT.

There is nothing in this appeal.

Respondents merely ask for the return of LP. 500.— out of the sum of LP. 525.— which they paid to the Appellant.

Counsel for Appellant argued before us that the Court below should have heard evidence as regards the breach simply because Respondents

said in their statement of claim that there was a breach of agreement by the Appellant. The Court decided it was not necessary to hear evidence on this point and with this decision we are in agreement.

As regards the discharge we do not think that it was a valid discharge because the Power of Attorney was not made use of for the reasons stated before us, namely, the existence of an attachment and the Municipal taxes.

As regards the point that the Court below did not allow Appellant sufficient time to file a counterclaim we are satisfied that Appellant had ample time to file a counterclaim and the Court in its judgment gave Appellant the right to bring any action he desires for damages.

The appeal must be dismissed with costs to include LP. 5.— advocate's fees to each of Respondents' advocates.

Delivered this 17th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 6/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE CASE OF :

Nathan Sheinkar. APPELLANT.

V.

Dov Segalovitch. RESPONDENT.

Application for enforcement of award — Opposition filed but no application to set aside — Judgment should be to refuse to enforce and not a rejection of original application.

In dismissing, without costs, an appeal from a judgment of the District Court of Tel-Aviv, dated the 14th October, 1937, and in amending the judgment of the lower Court :—

HELD : The lower Court could not set aside the award as there had been no application to set aside but only an opposition to the enforcement of the award. The proper order should be a refusal to enforce.

ANNOTATIONS : Earlier proceedings in this case are reported on p. 98, *ante*, when leave to appeal from the judgment of the District Court was given. See annotations thereto.

FOR APPELLANT : Fellman.

FOR RESPONDENT : Hamburger.

JUDGMENT:

This is an appeal from the judgment of the District Court of Tel-Aviv coming to us by way of leave to appeal on the ground that the District Court could not set aside an award by the arbitrators when there was no application before it to that effect. The Appellant had applied for leave to enforce the award and the Respondent filed an opposition thereto.

It is obvious that the District Court on hearing the case rejected the original application for the enforcement of the award. Therefore, the judgment of the District Court will be amended, to the effect that they refuse to enforce the award.

The appeal will be dismissed without costs.

Delivered this 25th day of May, 1938.

British Puisne Judge.

Frumkin, J. Leave to appeal in this case was granted on the ground that the Respondent in opposing, in the Court below, the application for the enforcement of the arbitration award, did not formally ask the Court that the award be set aside nor did he pay the necessary fees for such application. The Court not being moved, could not set the award aside on its own motion.

On the evidence before it, however, the Court below could certainly come to the conclusion that they could not enforce the award.

The judgment of the District Court will therefore be amended to the effect that the application for the enforcement of the award be refused. The appeal is dismissed without costs.

Delivered this 25th day of May, 1938.

Puisne Judge.

CIVIL APPEAL No. 99/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE CASE OF :

George Ibrahim Haddad. . APPELLANT.

v.

1. Yousef Issa Mansour,
2. Mikhail Issa Mansour. RESPONDENTS.

Purchase of land — Agreement to pay per square pic — Divergence between sold and registered area — Claim for purchase price paid in excess — No warranty of area.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 25th February, 1938 :—

HELD : There had been no warranty of the area to be transferred and the Appellant could not, therefore, claim the refund of the purchase price paid in excess of the area actually transferred.

ANNOTATIONS : For a definition of warranty, see Digest, Vol. XII, p. 413, case no. 3328.

FOR APPELLANT : Koussa.
FOR RESPONDENTS : A. Levin.

JUDGMENT:

This is an appeal from the judgment of the District Court of Haifa dismissing the claim of the Appellant for return of money and promissory notes which, allegedly, were paid in excess for the purchase of a plot of land.

The Appellant alleged that the area disclosed in the register of deeds was less than the actual area sold, and that this fact was discovered by him after the transfer.

It is quite clear from the agreement that the price of the land should be paid per square pic of the registered area.

The District Court found that Exhibit P/2 refers to the original agreement, Exhibit P/1, and is not independent of it and that that exhibit cannot be deemed to constitute by itself a warranty as to the area therein mentioned nor can any such warranty be implied from any of its actual terms or from the documents when looked at altogether, and with this finding we cannot interfere.

The appeal, therefore, falls and must be dismissed. We award the Respondent LP. 5.— as costs on the lower scale and LP. 5.— fees for attending on the hearing of the appeal.

Delivered this 25th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 59/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene and Khayat, JJ.

IN THE APPEAL OF :

Kalman Shwartz. APPELLANT.

v.

Leo Zeidel. RESPONDENT.

Appeals from Magistrates Courts — Bond not required — C. A. 68/36 — Res judicata.

Appeal from a judgment of the District Court of Jaffa, sitting in its appellate capacity, dated the 28th July, 1936, allowed, case remitted to the District Court to hear on the merits.

On the 30th June, 1936, the District Court, Jaffa, composed of Copland (President) and Many gave judgment in favour of Respondent.

On the 4th January, 1937, leave to appeal was granted to Appellant by Shaw, then Relieving President District Court.

When the case came up for appeal the following decision was given by the Court :

> "There is no appeal properly before us as leave was not granted by the judicial authority as laid down by law.
>
> "The appeal as it stands (there being no leave) must be dismissed with costs to include LP. 3 advocates fees.
>
> "Delivered this 23rd day of June, 1937."
>
> *Senior Puisne Judge.*

Appellant then applied to Copland, J. (as he then was) for leave to appeal and this was granted on the 15th February, 1938.

HELD : 1. (Following C. A. 68/36) It is not necessary, under the Civil Procedure Code, on an appeal from a Magistrates Court to the District Court, to produce a bond to cover the costs of the Respondent.

2. The decision of the Court in C. A. 92/37 may be considered as a mere application and the plea of *res judicata* was therefore not open to Respondent.

Followed : C. A. 68/36 (1937, 1 S. C. J. 124, P. P. 1.ix.37, 1 Ct. L. R. 46, Ha. 2.v.37, C. of J. 1934—6 107).

ANNOTATIONS : C. A. 92/37 is reported in 1937 1 S. C. J. 216. See also C. A. 79/38 (*post*, 7.vi.38).

FOR APPELLANT : Pevsner.

FOR RESPONDENT : Silberg.

JUDGMENT.

We allow this appeal.

The question whether under the old Ottoman Code of Civil Procedure, on an appeal from a judgment of the Magistrate's Court to the District Court it was necessary for an Appellant to produce a bond to cover the costs of the Respondent, has been already decided by this Court in Civil Appeal No. 68/36. In this case the Court held :—

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

As to the point of "res judicata" raised by the Respondent we do not think that the judgment of this Court in Civil Appeal No. 92/37 on the very same matter and between the same parties, may be considered as affecting the present appeal. That one may be treated as a mere application.

The appeal is therefore allowed, the judgment of the District Court set aside and the case remitted to that Court to give a decision on the merits of the case.

Appellant to have LP. 2.— as costs including advocate's fees.

Delivered this 27th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 20/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF :

Zahra Yehya Akel. APPELLANT.

v.

Khalil Ibrahim Abu Alayyan. RESPONDENT.

Penalty and liquidated damages — Breach of contract for sale of land — C. P. C. 111 *— French Civil Code, Arts.* 1152, 1226 *sq. — P. O. in C. Art.* 46 *— Principles of equity.*

In allowing, by a majority, an appeal from a judgment of the Destrict Court of Jerusalem, dated the 25th October, 1937 :—

HELD : (Trusted, C. J. dissenting) Art. 111 of the Ottoman Code of Civil Procedure deals with damages only and, there being no provision

in the Ottoman laws dealing with penalties, the courts must, by virtue of Art. 46 of the Palestine Order in Council, enquire whether an amount constitutes liquidated damages or a penalty. If it be established that the amount is a penalty the plaintiff must prove the amount of damage actually suffered by him.

Considered : C. A. 191/37 (P. P. 6—9.xii.37, 2 Ct. L. R. 169, Ha. 23.xii.37).
C. A. 85/26 (C. of J. 377).
C. A. 44/27 (C. of J. 381).
C. A. 53/32 (P. P. 19.vii.37, C. of J. 435).
C. A. 93/32 (P. P. 20, 27.ii.34, C. of J. 1790).
P. C. 47/32 (P. L. R. 831, C. of J. 406).
C. A. 9/31 (P. L. R. 593, C. of J. 425).
CR. A. 19/38 (1938, 1 S. C. J. 199).
H. C. 13/38 (1938, 1 S. C. J. 187).
C. A. 138/37 (P. P. 5-8, 10.x.37, 2 Ct. L. R. 73, Ha. 4.xi.37).
C. A. 240/37 (1938, 1. S. C. J. 148).
P. C. 1/35 (2 P. L. R. 390, P. P. 22.i.36, C. of J. 1934-6 331, Ha. 20.ii.36).

ANNOTATIONS : In addition to the authorities considered in the judgment, see C. A. 126/38 (*post*, 29.vi.38) on the measure of damages.

See also C. A. 135/38 (29.vi.38) laying down the test to ascertain whether an amount constitutes damages or a penalty.

FOR APPELLANT : Herson.

RESPONDENT : In person.

JUDGMENT.

By a contract in writing dated 3rd November, 1934, El Sitt Zuhra, a Moslem lady, undertook to sell and transfer to Khalil Abu Alayyan certain lands amounting to some 279 dunams, at LP. 4.750 per dunam. She undertook to hand over the lands, free from disputes, etc., within forty-five days. LP. 650, part of the purchase price, was to be paid in advance, and clause 10 of the agreement provided as follows :—

> "Any of the parties committing a breach of this contract or of any of its provisions he will be liable to pay to the other party the sum of LP. 1500 as calculated damages".

It seems that the LP. 650 and other sums on account of the purchase price were paid, and agreements, as to the effect of which there was some dispute, were made by the lady "represented by" her son and signed by him, extending the time for completion.

In the result, the property was not transferred and the purchaser brought an action in the District Court to recover the moneys paid on account of the price,amounting to LP. 1331, and LP. 1500 as damages.

Owing to the non-appearance of the Plaintiff or his advocate, the

case was struck out on 6th February, 1936. It was re-instated without the payment of fees, the actual order being as follows :—

> "The Court has reached the limit of patience with last minute adjournments and let it be understood that this will be the last occasion any leniency will be exercised. Case may be re-instated without fees.

Several hearings took place in December, 1936, and January, 1937, but owing to the illness of one of the judges the case was adjourned and re-heard by another Court which, on 25th October, 1937, found :—

> "The Court is satisfied that Defendant has broken the contract, having failed on his (her) own admission to transfer the land. Moreover, Defendant admits, and it is clear that LP. 1331 were paid by Plaintiff as purchase money. The Court is also satisfied that the amount of the damages payable is the sum stated on the original agreement, *viz.* LP. 1500.
>
> "The Court therefore gives judgment for Plaintiff for LP. 2831, costs and advocate's fee LP. 8."

The Defendant (that is the vendor) now appeals to this Court. Unhappily she is not represented by an advocate but is assisted by her son, who argued the case for her. The Respondent also appeared in person.

The grounds of appeal occupy eleven pages and it is not easy to discover exactly what they are, but in my view there are two points of substance ; in the circumstances, had the District Court jurisdiction to try the case ; and, is the sum of LP. 1500 described in the contract as calculated damages, and in the statement of claim as liquidated damages, recoverable.

As to the first point, Rule 13 of the Court Fees Rules, 1935, provides that when an action is struck out it may be re-instated upon the payment of half fees or full fees, according to the circumstances, or the Court, when ordering an action to be struck out, may order that it may be restored without fees. I do not therefore think the learned President was entitled to make the order which he did reinstating the case without fees. I do not however think that because fees had not been collected the Court had no jurisdiction.

The second question raises several points of importance, which it is desirable should be authoritatively settled.

There is a judgment of this Court, No. 191/1937, to which I will refer later, which deals with some of them and which I understand is under appeal to the Privy Council. I do not know if the present appeal will be carried further, but I will state my views upon the points involved.

Article 111 of the Ottoman Code Civil Procedure is generally translated as follows :—

> "If the contract contain a clause binding either party in case of non-performance to pay a definite sum to the other party by way of damages, such sum may be awarded as damages, but neither more nor less than such sum".

On first reading it the English lawyer is inclined to enquire, does "damages" mean damages in the English sense of compensation, a genuine pre-estimate of which will be enforced, or is it wide enough to include what to English law is known as a penalty.

I am told that the word in the Turkish text is "tadminat" which should be given the wider meaning, and it may be interesting to note that in the Turkish commentaries on Article 111 the following example appears :—

> "If a mason undertakes to build a shop in accordance with an agreement, within a period of one month, and if it be provided in the contract that the mason shall pay as "tadmin" the sum of LP. 50, if he does not deliver the shop within the time agreed upon, and if he commits a breach thereof for any reason, he shall be obliged to pay the LP. 50 *tadminat*, so that if the other party contends that his loss was more than LP. 50 or if the mason contends that the other party's loss is less than LP. 50 no notice shall be taken thereof but the sum of LP. 50 shall be awarded".

There is no doubt that the Turkish Courts and the Courts of this Territory have given the article the wider meaning and enforced penalties. The question has been before this Court on numerous occasions and so far as I am aware this has been done without dissentient voice, examples will be found in Civil Appeals No. 85/26 and 44/27, 43/28, 53/32 and 93/32, and I understand that in Civil Appeal 191/37 this Court agreed with that view, subject to the application of the provisions of the Palestine Order in Council.

I am of opinion that the wider meaning is the right meaning of Article 111, and that it provides for the enforcement of what in English law might be a penalty. The question arises therefore, is it to be modified by the Palestine Order in Council ?

The material Article is 46. This lays down that certain laws — within which Article 111 is included — shall apply in Palestine and goes on to provide that — "subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England", and there is a proviso as follows :—

> "Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances

> of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."

To guide the Courts of this Territory in the application of this provision there are two judgments of the Privy Council. The first is Abdullah Chedid v. Tanenbaum P.L.R. 831. That case appears to be authority for the proposition that if any branch of the law, as to which there are certain provisions in the Palestine laws, is in the English sense defective, that defect may be made good by regard being had to English principles. That case dealt with the law of contract, as to which there are provisions in the Mejelle, and the Courts here have in other instances modified or amplified those provisions by English law, *e. g.* the doctrine of consideration has been introduced, see Civil Appeal No. 9/31, P.L.R. 593.

Similarly the Law of Evidence has been amplified by the introduction of English principles, see Criminal Appeal 19/38, which deals with confessions, and certain English principles have been applied to bills of exchange.

Again the Trade Marks Ordinance contains no definition of "distinctive" and the English definition has been applied. High Court 13/38, and other instances could be cited.

In Civil Appeal 138/37, Manning J. in this Court expressed the view that — "If the Ottoman Law is considered too vague and general to extend and apply to the circumstances of the case, the principles of English law may be resorted to".

Some doubt may have been thrown upon this principle by Civil Appeal 240/37 in which Manning J. stated — Khayat agreeing —

> "It may be as well that I should state my view on what I conceive to be the effect of Article 46 of the Order-in-Council. So far as the Ottoman Law and local legislation do not extend or apply the jurisdiction of the Courts is exercised in conformity with the common law and the doctrines of equity in force in England. The Law of Equity, as it is known in England, has no counterpart in the Ottoman Law ; that is, the doctrines are not collected as one definite part of the substantive law, though some of them may well be present to the minds of judges and others who have to expound the law. In general the Ottoman Law does not extend as to comprise the doctrines of equity in force in England. These doctrines may therefore be applied so far as the circumstances of Palestine and its inhabitants permit ; if they already exist in Ottoman Law, well and good ; if they do not exist, they may be resorted to. Where, however, there exists an Ottoman Law on particular subjects, such as sale, hire, guarantee or agency, then that law both extends and applies to all questions that have to be determined with

reference to these species of contracts. Two things have to be remembered, first, that the law in force is the Ottoman Law as it existed on November 1st, 1914, save in so far as it has been altered by legislation. The second thing is that the Mejelle is not exhaustive. I am in agreement with what Mr. Hooper says at p. 23 of Volume II of his "Civil Law of Palestine and Trans-Jordan" —

> "As regards points where the Code is silent, it is submitted that it is the obvious duty of Courts to examine the sources in order to ascertain what the law is".

"In the present case we are dealing with the law of guarantee. The Ottoman Law has its own law of guarantee. It is silent on the doctrine of consideration and it must be concluded that it never occurred to the lawgiver to include such an artificial restriction on the freedom to contract. Where there is no Ottoman Law dealing with branches of jurisprudence which are necessary to the ordered life of civilised communities, such as those branches of the law of torts which are concerned with negligence and defamation, then the Courts of Palestine have to consider whether in the circumstances English common law may be resorted to."

"Further the English doctrine of consideration stated in its simplest form is that a promise not under seal cannot be enforced unless there is consideration to support it. The Ottoman Law knows of no such distinction as that between simple contracts and contracts under seal, and it is difficult to see how the English doctrine could ever be applicable in Palestine. When the law as to a contract is covered by the Ottoman Law, then the Ottoman Law on the particular kind of contract has to be studied to see if consideration is necessary. In the judgment of the Court below and in the argument before us local cases were cited in which agreements had been held to be unenforceable because they were not supported by consideration. These agreements were not guarantees and the authorities are therefore not applicable. It must be assumed that the Court in these cases found that consideration was necessary in the particular kinds of contract with which the cases were concerned".

and Frumkin J. said —

> "It is quite clear therefore that on this point the Mejelleh is exhaustive, and contains no provision that consideration is required in order to make a guarantee binding, and it is therefore not necessary to resort to either Section 46 of the Palestine Order in Council or to the sources of the Mejelleh".

With respect I find it difficult to appreciate why the law in the Mejelleh as to guarantees is to be regarded as exhaustive, when other matters dealt with therein are not so regarded, and in so far as this case lays down that regard is not to be had to the English principle of consideration in the case of guarantees it appears to me to be inconsistent with principles followed in the earlier authorities.

These authorities in my judgment lay down the proposition that a *lacuna* or ambiguity in any branch of the law of this Territory can be made good by resort to English Common Law and Equity, and if this proposition be accepted the question arises — can it be carried further, and an express provision, which is contrary to such English law, be in consequence varied ; *e. g.* Section 5, Partnership Ordinance, Chapter 163, makes certain provision as to infant partners — are these to be modified by English principles ? Or, in the terms of the present case — assuming that these Courts were right in the view which they have taken, that Article 111 means that the sum agreed upon will be adjudged notwithstanding that it may amount to what the English law would regard as a penalty, is that express provision to be modified by regard being had to the English distinction between damages and penalty ?

The question has recently been considered by another division of this Court in Civil Appeal 191/37, to which I have already referred. As I understand the judgment in that case on this point it lays down that although the Courts in the past have given the meaning to Article 111 which I have indicated, the Judical Committee of the Privy Council in earlier proceedings between the same parties, P. C. No. 1/35 (the other case before the Privy Council to which I referred) have held that the English principle is to be applied. The actual words of Manning J.'s judgment are :—

> "I take it that their Lordships have held the distinction between a penalty and liquidated damages forms, and has formed since the date of the Order-in-Council, part of the Law of Palestine."

From their Lordships' judgment it appears that two actual questions were before the Board upon which the case was remitted for determination — one was as to Article 112 of the Ottoman Code of Civil Procedure ; the other, whether Article 111 was limited to cases of non-performance of the whole contract. Their Lordships then referred to the Order in Council and went to say —

> "All that it is necessary to say about that is that in exercising any such jurisdiction and in dealing indeed with the present case no doubt the Courts will bear in mind the powers which are vested in them under article 46, subject to the provision of the Ottoman Law and the Order in Council and the Ordinances in force, to exercise their jurisdiction "in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the peace of England." There is the necessary proviso, of course, "that the said common law and doctrines of equity shall be in

> force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualification as local circumstances render necessary." All that, of course, has to be very carefully considered; but, subject to all those observations, their Lordships think there can be no doubt that the provisions of the Order in Council do enrich the jurisdiction of the Courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their jurisdiction with the principles of equity, among other things the well-established distinction between a penalty and liquidated damages. All that their Lordships say is that no doubt the Courts in Palestine when dealing with this question and any other question that arises will bear in mind the provisions of article 46 of the Order in Council".

I do not take this to be a decision that Article 111 is to be modified by the English principle but a direction to these Courts to consider carefully whether the English principles, *inter alia* the one with which we are concerned, apply, or having regard to local circumstances, should be applied.

In my judgment, bearing in mind the provisions of Article 46 of the Order in Council to which I have referred where there is an express unambiguous provision of Palestinian law the English principles are not to be applied, and that provision should be enforced, and in my view Article 111 is such a provision.

It is obvious that the proviso to Article 46 imposes a burden upon the Courts and would seem to vest in them some of the functions of a legislature. Having expressed the view which I have, it is unnecessary to consider them in relation to this case. It may be of interest to recall that in the Palestine Gazette of 7th March, 1935, a bill, entituled the Damages Bill, was published modifying Article 111 with regard to contracts for the sale of immovable property, and that in the Palestine Post of 15th March, 1935, an article appeared headed: "POLITICS IN LEGISLATION — The Damages Bill 1935", by Bernard Joseph, a leading advocate and English barrister. The Article in question was a long attack upon the bill. For reasons for which it is not for me to enquire, the bill has not been promulgated.

I regret that I should differ from another division of this Court and from the other members of this Court, but I feel justified in doing so as I am following a long series of judgment of this Court, and the other decision of this Court from which I differ is, as I have stated, being taken to the Privy Council.

No question arose in this present case as to mutual obligations not that the breach did not go to the root of the contract.

In my judgment the appeal should be dismissed, but the other members of this Court think otherwise.

Delivered this 28th day of May, 1938.

Chief Justice.

Khayat J. This is an appeal from the judgment of the District Court of Jerusalem, whereby the Appellant was ordered to return to the Respondent the sum of LP. 1331.— paid by the latter as purchase money together with the sum of LP. 1500.— damages on a breach of agreement by reason of Appellant's failure to transfer the land purchased to the Respondent.

The only important point in this case is the interpretation to be given to Article 111 of the Ottoman Code of Civil Procedure. This Article is stated to have been taken from Article 1152 of the French Civil Law. The latter Article contains provisions dealing with damages, and the Ottoman Legislator did not import from the French Law the provisions dealing with penalty which are to be found under Articles 1226 *et. seq.* of that Law. And in spite of the fact that the Turkish Courts, as well as the Palestinian Courts, did not distinguish between penalty and damages, I am of opinion that Article 111 of the Code of Civil Procedure does not provide for penalty and its limits. As to the question whether the restriction provided for in Article 111, "prohibiting the Courts from interfering with the amount agreed upon as liquidated damages," includes penalty or not, and bearing in mind the established principle that when there is a restriction in the law, that law cannot be generalised, I am of the opinion that it is difficult to hold that penalty falls within the ambit of the said Article. If that Article then contains provisions dealing with damages only and prohibits the Courts from enquiring into the amount agreed upon, I can see no other provision in the Ottoman Laws dealing with penalty and, further, the Courts are not precluded from enquiring into, and modifying the sum agreed upon, in cases in which they feel that the amount involved is by way of penalty and not damages.

It is not disputed that most of the contracts entered into in Palestine do not distinguish between damages and penalty, and it frequently happens that what is termed as damages is, in fact, intended to secure the execution of the contract and not the liquidated damages that may result from the non-execution of the contract — the amount stipulated in the contract is in no way proportional to the anticipated damages at the time of making the contract. Is this course in conformity with the principles of justice, or, is it not advisable to apply

the English principles of Equity in such cases ? Before deciding this point, I find it necessary to consider the provisions of Article 46 of the Palestine Order-in-Council which lay down that the substance of the common law and the doctrines of equity in force in England shall be applied where the Ottoman Laws do not apply or extend to the point arising in a case. In my view, if Article 111 of the Code of Civil Procedure was applied generally and no distinction was ever made between damages and penalty, this is due to the interpretation given thereto by the Turkish Courts, and as I have already said, there is no provision in the Ottoman Laws, as in the French Civil Law, dealing with penalty.

I am therefore of the opinion, so long as Article 111 of the Civil Procedure Code deals with damages only and so long as there is no provision in the Ottoman Laws dealing with penalty, that the Courts of Palestine may, if it is established to their satisfaction, from the circumstances of the case before them, that the amount stipulated as being damages, exceeds any damage that may possibly be suffered or that may happen, or that there is no damage at all and that the amount was put in merely as penalty, enquire into the matter and decide whether the amount is by way of damages or by way of penalty, and the determination of such a question is to be left to the Courts below without any condition or restriction. It may be argued that the question of importing the principle of imposing penalty or rejecting it, or estimating and limiting it, in contracts, when there is no clear provision in the Ottoman Laws, is a wide interpretation by the Courts which falls near to legislation and may be taken to mean that the Courts have exeeded their jurisdiction, but as Article 46 of the Palestine Order-in-Council provides clearly that the substance of the common law and the doctrines of equity in force in England shall be applied when there is no clear provision in the Ottoman Laws, or where these Laws do not apply or extend, I am of the opinion that the Courts are covered against any such argument with regard to creating legislation or exceeding jurisdiction, and that the English principles must be applied when the Ottoman Laws are silent on the point in issue. It is also my view that the application of England principles in cases of this sort will not in any way cause confusion in the circumstances of Palestine.

In my view the appeal must be allowed, the judgment of the Court below is set aside and the case remitted to that Court to determine whether the amount stipulated in the agreement is damages or penalty, and, if it is established to the satisfaction of the Court below that that

amount is penalty, to require the Respondent to prove the amount of damages he suffered.

As the appeal has been allowed on the point stated above, I do not propose to deal with the other points raised in the appeal which are not of vital importance to this appeal.

Costs to abide the event.

Delivered this 28th day of May, 1938.

Puisne Judge.

Khaldi J. I entirely concur in the Judgment, the reasons contained therein and the conclusions arrived at by my brother Khayat J. and this case is similar to Civil Appeal No. 191/37 in which I laid down the same principle laid down by my brother Khayat J. in the present appeal.

The appeal must, therefore, be allowed, the Judgment of the District Court be set aside and the case remitted to the District Court to determine whether the amount stipulated in the agreement is damages or penalty and if it be established that that amount is penalty to require the Respondent to prove the damages he suffered.

Cost to abide the event.

Delivered this 28th day of May, 1938.

Puisne Judge.

CIVIL APPEAL No. 113/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE CASE OF :

1. Fathmeh bint Ahmad Mustafa Hilou,
2. Aisheh bint Ahmad Mustafa Hilou,
3. Ahmad ibn Mustafa Ahmad Mustafa Hilou,
4. Hi'meh bint Muhamad Ahmad Mustafa Hilou,
5. Muhamad ibn Ali Ahmad Mustafa Hilou,
6. Sabha bint Ali Ahmad Mustafa Hilou,
7. Fatmeh bint Mahmoud Hasr, wife of Ibrahim Ahmad Mustafa Hilou,
8. Hassibe bint Ibrahim Ahmad Mustafa Hilou,
9. Khalil ibn Ibrahim Ahmad Mustafa Hilou,
10. Adibeh bint Ibrahim Ahmad Mustafa Hilou,

11. Hussein ibn Ibrahim Ahmad Mustafa Hilou,
12. Hassan ibn Ibrahim Ahmad Mustafa Hilou,
13. Aisheh bint Ibrahim Ahmad Mustafa Hilou,
14. Amneh bint Abdallah Muhammad Abu Habi',
wife of Ibrahim Ahmad Mustafa Hilou. APPELLANTS.

v.

Jacob Naski. RESPONDENT.

Appeal dismissed for insufficient fees — C. A. 141/35 followed.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 28th March, 1938 :—

HELD : Where the correct fees have not been paid within the prescribed period the appeal must be dismissed.

Followed : C. A. 141/35, 1 Ct. L. R. 15.

ANNOTATIONS : See also C. A. 36/38 (1938, 1 S. C. J. 246), and annotations.

FOR APPELLANTS : Atalla, Hanania.
FOR RESPONDENT : Olshan.

JUDGMENT:

In this case the Appellants did not pay the proper fees. It was held by this Court in Civil Appeal No. 141/35 that where the correct fees have not been paid within the prescribed period the appeal must be dismissed.

The appeal is thereforo dismissed with costs assessed at LP. 5.— to include Advocate's fees.

Delivered this 30th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 98/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE CASE OF :

Selim D. Sabty. APPELLANT.

v.

1. Josephine Kobler,
2. Dunamo Novak and Tulchinsky,
3. Engineering Corporation of Palestine. RESPONDENTS.

Evidence — promissory notes to secure payment of rent — Defect in premises — Oral evidence to prove lack of consideration for promissory notes C. A. 87/37 — Ownership in hire purchase agreement — Attachment of hired goods — Creditor may not step in shoes of debtor — C. A. 94/37 — Costs.

In dismissing an appeal from a judgment of the Land Court of Haifa, in its appeallate capacity, dated the 11th March, 1938 :—

HELD : 1. (Following C. A. 87/37) Oral evidence was admissible to prove lack of considertion for the promissory notes.

2. (Following C. A. 94/38) A hire purchase agreement does not transfer ownership to the hirer unless and until all the conditions of the agreement have been carried out in full.

3. Appellant could not step in the shoes of the hirer and claim the goods after payment of any amounts due thereon, there being no authority in law allowing a creditor to stand in the place of a debtor and there being no privity of contract between the creditor and the owner of the goods.

Followed : C. A. 87/37 (P. P. 28.viii.37, 2 Ct. L. R. 19, Ha. 7, 21.x, 4.xi.37). C. A. 94/38 (1938, 1 S. C. J. 335).

ANNOTATIONS : See annotations to C. A. 94/38 (*Supra*).

FOR APPELLANT : Asfour.

FOR RESPONDENTS : No. 1— Argaman.
No. 2, 3, — Levin.

JUDGMENT:

Frumkin J. : The Appellant in this case is the landlord of premises which he in August 1936, let to the 1st Respondent allegedly for a period of three years. The 1st Respondent on the 15th of November, 1937, left the premises on the alleged ground that some of the rooms were leaking and thus she could not derive the benefit expected from the lease.

2. As it is usual in this country, promissory notes were given to cover instalments due under the lease. When the Appellant sued the 1st Respondent before the Magistrates' Court on two promissory notes, the 1st Respondent pleaded lack of consideration and wanted to prove her case by evidence oral and otherwise.

3. The Magistrate refused to allow her to bring such evidence and gave judgment against her for the amounts of the promissory notes with liberty for her to take such steps as she thinks fit on the matter of the defective lease by separate action.

4. During the proceedings before the Magistrate a wireless set and

a frigidaire found in possession of the 1st Respondent were attached and the second and third Respondents joined as third parties claiming that the wireless set and frigidaire were let by them respectively to the first Respondent on a hire-purchase agreement and that they still are the owners of those machines and that the 1st Respondent has never acquired ownership.

5. The Appellant then offered to pay to the second and third Respondents the amounts due to them from the 1st Respondent under the hire-purchase agreement and the Magistrate ordered that only upon such sums being paid the attachment will be removed. The second and third Respondents, however, refused to accept these payments.

6. All the three Respondents then appealed to the District Court and were all successful in their appeals. The Respondent (*sic*) now appeals to this Court.

7. To deal first with the appeal as against the 1st Respondent. It is uncontested that the promissory notes were given in relation to a lease agreement between the very same parties. The District Court was therefore right in following the decision of the majority in Civil Appeal 87/1937 as this was clearly a matter between the immediate parties. I need not emphasise again my own views as to admissibility of oral evidence against documentary evidence expressed in my judgment in that case.

8. In any way the promissory notes forming part or parcel of the lease agreement between the same parties the District Court was right in remitting the case to the Magistrate who should now upon retrial accept such evidence as the 1st Respondent is entitled to bring against the lease and then decide whether or not in law and in fact the 1st Respondent is liable to pay the rent instalments expressed in the promissory notes and give judgment accordingly.

9. On the appeal as against the second and third Respondents we might deal with them together as they involve the same points of law. It has been decided on several occasions by this Court, and recently in Civil Appeal 94/38 that a hire-purchase agreement does not transfer ownership to the hirer unless and until all the conditions of the agreement have been carried out in full. If follows that until all the instalments are paid the hirer acquires no right of ownership and the title remains with the original owner.

10. We need not at the present stage consider whether a hirer could force upon the owner premature instalments and thus acquire title before the time stipulated for the payment of all the instalments. Most probably it will be found that a hirer has such a right.

11. It is less likely that a hirer in default of paying certain instalments may nevertheless force the owner to accept such overdue instalments thus preventing him from making use of the provisions of the hire-purchase agreement. But this point again is not relevant at present.

12. It is not necessary to decide these points because no such offer to pay premature or overdue instalments were ever made by or on behalf of the hirer. The Appellant says that he can step into the shoes of the hirer and make use of such rights as the hirer has, but we know of no authority in law allowing a creditor to stand in the place of a debtor without the consent of the latter. As between the creditor and the owner there is no privity of contract. The appeal against the second and third Respondents must therefore also fail.

13. Nor do we see any ground in interfering with the decision of the District Court as regards costs. If the ownership of goods held by virtue of a hire-purchase agreement remains to be vested in the owner, it remains so vested for all events and purposes including these of attachment and sale and is to be regarded as goods not belonging to the Judgment Debtor in whose possession they happened to be. If a Judgment Creditor chooses to attach goods belonging to a stranger, he has to bear the consequences as to costs.

14. It follows that the appeal fails on all points and the judgment of the District Court will be confirmed. The Appellant will pay the costs of all Respondents assessed at LP. 5.— for each of them, and LP. 5.— for each of the two advocates.

Delivered this 3rd day of June, 1938.

Puisne Judge.

CIVIL APPEAL No. 120/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Francis Zakharia, on his own behalf and on behalf of the estate of Zakharia Khaldi Bkheit. — APPELLANT.

v.

Mariam Anton Bkheit. — RESPONDENT.

Bond for appeal — Time to pay deposit or lodge guarantee.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 6th April, 1938 :—

HELD : The guarantee for appeal must be filed or an offer to pay a deposit made at the time of filing the appeal and not when the appeal has been listed for hearing.

APPELLANT : In person.
FOR RESPONDENT : Aboulafia.

JUDGMENT:

This appeal must be dismissed because no offer to pay a deposit has been made in the appeal and no guarantee was filed when the appeal was lodged. These things must be done at the time of filing the appeal — it is too late when the case has been listed for hearing to come and ask the Court to adjourn the case in order to comply with the rules of procedure.

The appeal must therefore be dismissed with costs and fees for attending the hearing fixed at LP. 8.—.

Delivered this 3rd day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 124/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Sh. Cohen. APPELLANT.

v.

E. Ajashvilli. RESPONDENT.

Opposition — Judgment by Default (Magistrates Courts) Rules, 1928, rule 4(1) intra vires — C. A. 130/36 distinguished — Practice and procedure.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 28th February, 1938 :—

HELD : Rule 4(1) of the Judgments by Default (Magistrates Courts) Rules, 1928, deals solely with a matter of practice and procedure

and does not affect the right of opposition but merely the mode in which that right should be exercised. The Rule is therefore *intra vires*.

Distinguished : C. A. 130/36 (1937 1 S. C. J. 219, P. P. 4.vi.37, C. of J. 1934—6 643, 2 Ct. L. R. 166).

ANNOTATIONS : The distinction between a rule of practice and a rule of substantive law was also drawn in C.. A. 247/37 (1938, 1 S. C. J. 95) and CR. A. 160/37 (1938, 1 S. C. J. 103).

FOR APPELLANT : Frank.

FOR RESPONDENT : Bithan.

JUDGMENT:

We need not trouble you, Mr. Bithan.

This appeal fails — the only point first to be determined is whether under the Judgment by Default (Magistrates Courts) Rules of 1928, an opposer is limited to entering his opposition in the Court which gave the original judgment.

The validity of the Judgments by Default (District and Land Courts) Rules was equally in question in a recent case, Civil Appeal No. 130 of 1936. In this case, this Court held that unless the rules dealt with matters of practice and procedure only they could not alter the substantive law. Therefore the success of this appeal depends on whether this Rule 4(1) regulates a matter of practice or procedure or not, and we are of opinion that it deals solely with a matter of practice and procedure. The right of opposition has in no way been affected — merely the mode in which that right should be exercised. That being so, we are of opinion that this case is distinguishable from the one quoted to us, Civil Appeal No. 130 of 1936, and this appeal, as I have said, fails.

The appeal must be dismissed with costs and fees for attending the hearing for the Respondent which we fix at an inclusive figure of LP. 5.

Delivered this 3rd day of June, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 51/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Copland, Greene and Frumkin, JJ.

IN THE APPEAL OF :

The Attorney General. APPELLANT.

v.

Fishel Abraham Moskovitz. RESPONDENT.

Immigration — Illegal entry and stay — Whether prescribed — Interpretation of statutes — Immigration Ordinance, sec. 12 — "Found in Palestine" — Moran & an. v. Jones.

In allowing an appeal from a judgment of the District Court of Haifa, dated the 14th April, 1938, reversing a decision of the Magistrates Court, Haifa, whereby Respondent was convicted under sec, 12(2)(a) of the Immigration Ordinance and sentenced to two months imprisonment :—

HELD : The words "is, on being found in Palestine, guilty of an offence", can only mean that unless and until found in Palestine no offence has been committed. The offence was, therefore, not prescribed.

Considered : Moran & an. v. Jones (104 L. T. Rep. 921, English and Empire Digest, Vol XXXVII, pp. 364—5).

ANNOTATIONS : On the interpretation of statutes, see annotations to C. A. 234/37 (1938, 1 S. C. J. 27).

This decision was followed in CR. A. 62/38 (28.vi.38).

FOR APPELLANT : Crown Counsel (Hogan).

FOR RESPONDENT : Argaman.

JUDGMENT:

The Respondent, one Fishel Abraham Moskovitz, a foreigner, was charged before and convicted by the Chief Magistrate, Haifa under Section 12(2)(a) of the Immigration Ordinance (Cap. 67) for illegally entering Palestine in April, 1935, and remaining illegally in the country until found by Immigration Officers on 3rd March, 1938. He was sentenced to two months' imprisonment and was recommended for deportation. He appealed to the District Court, Haifa which quashed the conviction holding that on the facts the offence was prescribed under Section 12(5) of the Ordinance because the offence under Section 12(2)(a) was "entering Palestine", and not "being found in Palestine", that the offence was committed on entering, and since more than two

years had passed since his illegal entry he could now no longer be prosecuted. The Attorney General has now appealed to this Court.

The relevant sections of the Ordinance are :—

> "Sec. 12(2) Any foreigner who —
>
> (a) enters Palestine in contravention of section 5. or
> (b) having entered Palestine as a traveller or on a transit visa with permission to remain in Palestine for a limited period remains in Palestine after that period has expired without having obtained permission from the Director,
>
> is, on being found in Palestine, guilty of an offence under this Ordinance."
>
> "Sec. 12(5) No prosecution for an offence under this ordinance shall be commenced after the expiration of two years next after the commission of the offence."

The facts of this case are not in dispute, and can be stated quite shortly. Moskovitz arrived in Haifa Port on the S. S. Palestina in April, 1935. He was refused permission to land, but escaped from the ship, and was not found by the authorities until the 3rd March, 1938, when he presented himself at an Immigration Office and asked for the return to him of his passport which had remained on the ship as he wished to leave the country.

Mr. Hogan, on behalf of the Attorney General, has argued that there are two constituent elements of the offence set out in Sec. 12(2)(a) — first that the foreigner must have entered the country illegally, and secondly, that he must be found here — that the offence cannot be completed until these two requirements have been satisfied, and that, therefore, in this present case no offence was committed until the Respondent had been found on the 3rd March, 1938. If that argument be correct, then the two years mentioned in Sec. 12(5) did not commence to run until 3rd March, 1938.

Counsel for the Respondent, on the other hand, has argued that the offence was committed, and completed, in April, 1935, when to the knowledge of the Immigration authorities, the Respondent entered Palestine. In effect, his argument is that the words "on being found in Palestine" are superfluous and should be disregarded.

No exactly parallel case can be found in any English reports, but there have been brought to our notice certain cases, in which the word "found" has had to be construed — for example the phrase "found committing an offence" has been held to mean that the person must be actually found in the act of commission, and then again, it has been held that to constitute the offence of "being found on enclosed premises for any unlawful purpose" the offender must have been actually found

on the premises that is discovered on them, though, as Jankes J. (as he then was) pointed out, it was not necessary that he should actually have been arrested on the premises. See Moran and another *v.* Jones (104 L. T. Rep. 921). From this latter case, it is clear that, leaving on one side the question of intent, the offence consists of two parts, being on premises and being found on them, and if this second requirement be not fulfilled, then the offender could not, at any rate, be convicted under that particular section of the Larceny Act.

It is useless for us to speculate on what the intention of the legislature was — their intentions can be best be gathered from the words used by them, if capable of a reasonable meaning — and it seems to me that the words "is, on being found in Palestine, guilty of an offence", can only mean that unless and until found in Palestine no offence has been committed. These words cannot have been inserted as a safeguard to prevent extradition, because offences under the Immigration Ordinance are not extraditable offences, not being mentioned in the 1st Shedule to the Extradition Ordinance (Cap. 56).

If illegal entry, by itself, were to be an offence, then the words "on being found in Palestine" would be superfluous. In a sense of course any person guilty of any offence must be found before he can be prosecuted, but these words in Section 12(2) are not used in this sense, otherwise they would need to be inserted in every penal enactment.

The words have some meaning, and it is our duty to interpret the law as we find it, not as we think it ought to be. It has been argued that this view may cause great hardships in certain cases. If that be so, then the remedy is to alter the law, which is entirely a matter for the Legislature.

I think that this appeal should be allowed, the judgment of the District Court quashed, and the Respondent should be convicted of an offence under Section 12(2)(a) of the Ordinance as found by the Chief Magistrate.

With regard to the penalty to be imposed, bearing in mind that there have been a number of conflicting decisions given in the Courts below on various occasions, and that this is the first case of its nature to come before this Court — and is therefore in the nature of a test case, we think that the appropriate penalty will be a fine of LP. 10.— or six weeks' imprisonment in default. We also recommend that the Respondent be deported from this country.

Delivered this third day of June, 1938.

British Puisne Judge.

CIVIL APPEAL No. 79/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE CASE OF :

Suleiman Cotran. APPELLANT.

v.

1. Raji El-Eissa,
2. Bahjat El-Eissa.

Res judicata — Cause of action same.

In allowing an appeal from a judgment of the District Court of Haifa, sitting as a court of appeal, dated the 31st January, 1938, whereby a judgment of the Magistrates Court, Haifa, dated the 9th November, 1937, was set aside and the case remitted for trial on its merits ; and in setting aside the judgment of the District Court and restoring the judgment of the Magistrates Court :—

HELD : The Magistrate was correct in holding that the case was *res judicata,* the matter and amount being the same.

Distinguished : C. A. 12/36 (P. P. 5.viii. 37, 1 Ct. L. R. 47, 1937, 1 S. C. J. 89, C. of J. 1934—6 752).

ANNOTATIONS : See C. A. 59/38 (27.v.38) for another decision on *res judicata.*

FOR APPELLANT : Eliash.

FOR RESPONDENTS : Dajani.

JUDGMENT:

In this case, the Appellant was the Defendant in an action on two promissory notes in the sum of LP. 40.— in proceedings before the Magistrate's Court. The Plaintiffs, the present Respondents stated that the promissory notes were lost and called the Defendant, the present Appellant, as a witness. The Appellant was put into the witness box and denied on oath that he was indebted for the amount, and the Magistrate dismissed Plaintiffs' claim. The Respondents took a separate action alleging that this amount was a loan and the Magistrate held that it was the same amount and that it became *res judicata.* The Respondents appealed to the District Court and that Court held that the matter is not *res judicata* and remitted the case to the Magistrate to hear it on its merits.

In our opinion, the matter is the same, the amount is the same, and the Magistrate has heard that cause of action and decided it.

The appeal is therefore allowed, the judgment of the District Court is set aside, and the Magistrate's judgment is restored, with costs fixed at LP. 5.— and LP. 5.— fees for attending the hearing of this appeal.

British Puisne Judge.

Frumkin, J. I agree in the result that the appeal must be allowed, the judgment of the District Court set aside and the judgment of the Magistrate restored. I would like to add that the present case is distinguishable from Civil Appeal No. 12 of 1936, in which case the Court of Appeal held that where promissory notes were not accepted in evidence before the Court below for the reason that they were insufficiently stamped, an action on the debt represented in the notes might nevertheless be heard, because there was previously no decision on the merits.

In the present case, however, the promissory notes were not produced at all and the action was heard on its merits, and it was found that there is no debt due by the Defendant to the present Appellant on these notes. The new action was merely an attempt to re-open the case in another way, but that cannot be allowed.

Delivered this 7th day of June, 1938.

Puisne Judge.

CIVIL APPEAL No. 110/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE CASE OF :

Milian Daniel. APPELLANT.

V.

Hanna Epstein. RESPONDENT.

Civil Procedure Code, Art. 80 — *Agreement customarily reduced to writing in foreign country — Allegation that employee was engaged verbally fatal to plea of custom that this must be done in writing.*

In dismissing an appeal from a judgment of the District Court of Jerusalem, sitting in its appellate capacity, dated the 31st day of March, 1938, whereby the judgment of the Chief Magistrate, dated the 3rd January, 1938, was confirmed.

HELD : Appellant having maintained that in the present case Respondent had been engaged verbally, there was nothing to support his argument that in the particular place in Germany employment of staff is customarily done in writing.

ANNOTATIONS : As to agreements customarily reduced to writing, see C. A. 230/23 (quoted in Hooper's Civil Law of Palestine & Trans-Jordan, Vol. II, *p.* 132) and Constantinople Cassation Decision No. 169, Vol. IV, *p.* 352 (*op. cit.* p. 129).

FOR APPELLANT : Landau.
FOR RESPONDENT : Amdur.

JUDGMENT:

Frumkin, J. : The Respondent in this case was engaged as assistant manager of a firm in Germany. He claims that the terms of his remuneration as such included a monthly salary commission on the turn-over of the business and a bonus when the business is sold. He received apparently his salary in accordance with the terms of the agreement, but sued the present Appellant and another partner of the business for his commission and bonus, the business having been sold.

2. The other partner of the business who is not a party to this appeal admited the claim of the Respondent. The present Appellant, however, contested it and judgment was given against him by the Chief Magistrate and was confirmed by the District Court.

3. The present appeal has been lodged on one ground only and that is that under the custom prevailing at the particular place in Germany where this agreement was entered into, agreements of this nature are customarily reduced into writing and that under Article 80 of the Ottoman Code of Civil Procedure oral evidence in inadmissible.

4. It seems that both parties to this appeal agree that in settling the relations between the parties, German Law and custom is to be applied and while on behalf of the Respondent it is maintained that the judgment of the Magistrate's Court is not entirely based on oral evidence, but that there was also a certain amount of written evidence, Counsel for Respondents seems to agree that if the custom in Germany were that agreements of this nature are customarily and exclusively reduced into writing oral evidence would not be admissible. He strongly denies, however, that such a custom prevails.

5. The Appellant relies on an alleged custom that agreement between an employer and employee are reduced into writing. At the same time he maintains that in the present case there was no such agreement in writing, yet he does not deny the actual employment of the Appellant

by the firm of which he was a partner. This admitted fact, however, is fatal to this argument. It cannot be said that a firm may employ an assistant manager by an oral agreement, but when it comes to fixing the terms of such employment it has to reduce it into writing.

6. It is therefore not necessary to examine any further the matter of the existence or otherwise of a custom in the particular place to reduce agreements of that sort into writing and whether even in the existence of such a custom oral evidence would not be admissible. From Appellant's own words there is nothing to support his argument that in the particular place in Germany employment of staff by firms is customarily done only in writing so as to exclude any possibility of appointment by oral agreement.

7. The appeal must therefore fail and the judgment of the District Court confirming the judgment of the Magistrate's Court will be upheld. The Appellant will pay the costs of the Respondent assessed at LP. 10 to include advocate's fees.

Delivered thise 7th day of June, 1938.

Puisne Judge.

HIGH COURT No. 28/38.

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

BEFORE : The Chief Justice and Greene, J.

IN THE APPLICATION OF :

Badiah Nicola Kassis of Ramallah — PETITIONER.

v.

1. Chief Execution Officer, Jerusalem,
2. Khalil Issa Rashed. — RESPONDENTS.

Execution of judgments of Religious Courts — Power of Execution Offices of Civil Courts to enquire into jurisdiction constitution etc. of Religious Courts — Catholic Melkite Church one of the recognised Communities — Khayat v. Khayat — Exclusive and concurrent jurisdiction of Courts of Communities — "Alimony" and "Maintenance" — Maintenance within the jurisdiction of Court of Community only if all parties consent to the jurisdiction — Reference to Special Tribunal of

question as to whether a matter is one of personal status within exclusive jurisdiction of Religious Court — C. A. 62/37, C. A. 52/37, Palestine Order in Council Arts. 51, 55.

In discharging an order *nisi* directed to the First Respondent to show cause why his order dated the 8th April, 1938, should not be set aside :—

HELD : 1. In executing judgments of Religious Courts, the offices of the Civil Courts are competent to enquire into the *prima facie* jurisdiction and constitution of the Religious Courts and even to determine whether a judgment is contrary to natural justice.

2. (Following Khayat v. Khayat) The Catholic Melkite Church is one of the recognised Religious Communities contemplated by the Palestine Order in Council.

3. There being a doubt as to whether the matter was one of alimony, within the exclusive jurisdiction of the Religious Court, or of maintenance, this question should be referred to a Special Tribunal.

Followed : Khayat v. Khayat (S. T. 4/25, C. of J. 1244).
C. A. 62/37 (p. p. 6.11.37, 2 Ct. L. R. 133).
H. C. 52/37 (P. P. 21.xi.37, 2 Ct. L. R. 138).

ANNOTATIONS : The words "alimony" and "maintenance" should be given their English meaning (C. A. 62/37. *supra* and H. C. 49/32, C. of J. 1610). Religious courts have exclusive jurisdiction in actions relating to alimony and concurrent jurisdiction in claims for maintenance (C. A. 178/34, 2 P. L. R. 282 ; P. P. 3.iv.35 ; S. T. 1/28, P. L. R. 395, C. of J. 126). In cases of concurrent jurisdiction consent to the jurisdiction is essential (H. C. 70/28, P. L. R. 343, C. of J. 1606.).

1. See *e. g.*, H. C. 49/37 (2 Ct. L. R. 112.).

FOR PETITIONER : Abcarius Bey.

FOR RESPONDENTS : No. 1— No appearance.
No. 2— Salah, Elia.

JUDGMENT:

By the Palestine Order in Council certain jurisdiction is vested in certain Religious Courts and by that Order the execution of the judgments of those Courts is effected through the process and offices of the Civil Courts.

In such execution proceedings the Civil Courts have in the past enquired if the matter was, *prima facie,* within the jurisdiction of the Religious Court, if that Court was properly constituted, and objection was taken in one case to a judgment which was found to be contrary to natural justice. In my view, the Civil Courts are justified in enquiring

into these matters before executing the judgments of the Religious Courts.

It was argued before us that the Chatholic Melkite Church was not one of the Communities contemplated by the Order-in-Council. This point was considered by the then Chief Justice in the case of Salim Khayat v. Marie Khayat before the Special Tribunal — Rutenberg, 1244 when after discussing the history of the Community His Honour held—

> "I have no doubt that the Melkite is one of the recognised Communities for the purpose of my present jurisdiction."

We see no reason to disagree with this finding.

The. Order-in-Council, in dealing with the jurisdiction of the Courts of the several Christian communities draws a distinction between matters of marriage and divorce, alimony, confirmation of wills and the jurisdiction in other matters of personal status as defined in Article 51. In the latter case they have no jurisdiction unless all the parties consent.

In Civil Appeal No. 62/37 this Court held that the words "alimony" and "maintenance" in the Order-in-Council should be given their English meaning, and, no doubt having that judgment in mind, the Execution Officer, in the order with which we are concerned, stated, that as the proceedings were in respect of maintenance, the Religious Court had no jurisdiction, and therefore refused to execute the order.

The question, therefore, arises whether the case is one of personal status within the exclusive jurisdiction of a Religious Court, as it would be if the amount awarded were alimony, or if both parties had consented to the jurisdiction of the Court, or if the case is not within the jurisdiction of such a Court, as it might not be if the amount awarded was maintenance, in contradistinction to matters of marriage and divorce, and the parties had not consented to the jurisdiction.

Article 55 of the Order-in-Council provides that when a question arises as to whether or not the matter is one of personal status within the exclusive jurisdiction of the Religious Court it shall be referred to a special tribunal, and in my view the position in this case is the same as in High Court case 52/37, where this Court decided that in the first instance the question should be referred to a special tribunal to decide whether the matter was in the circumstances one of such personal status.

In my judgment the rule should be discharged and the matter so referred.

Delivered this 7th day of June, 1938.

Chief Justice.

CIVIL APPEAL No. 119/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Mohammad Ra'afat Dajani,
2. Safwat Dajani. APPELLANTS.

v.

Wadad bint Haj Omar Dajani, wife of Ribji Murad, in her capacity as one of the heirs of the late Omar Daoudi, and on behalf of the remaining heirs. RESPONDENT.

Land Court appeal — Power of attorney — Evidence before lower Court — Costs.

In allowing an appeal, as to part thereof, from the judgment of the Land Court of Jerusalem, dated the 31st March, 1938 :—

HELD : 1. As regards first Appellant who was not represented, there was no appeal before the Court.

2. There was evidence before the Land Court to show that the two rooms in dispute were built by the Respondet's father but there was no evidence of possession of the land in dispute.

FOR APPELLANTS : Goitein for 2nd Appellant,
1st Appellant absent.

FOR RESPONDENTS : Haddad.

JUDGMENT:

Mr. Goitein who appears for 2nd Appellant states he has no Power of Attorney for 1st Appellant and his name appears in statement of appeal by mistake. Therefore as regards 1st Appellant there is no appeal before this Court.

In this case it is clear that there was evidence before the Land Court to show that the two rooms in dispute were built by Respondent's father and he was in possession thereof for a certain period, but there is no evidence before the Land Court to show that the Respondent's father was in actual possession of the land in dispute the area of which is 490 pics. Therefore the appeal as regards the two rooms in dispute is dismissed and that part of the judgment of the Land Court dealing with the two rooms is confirmed.

As regards the land claimed namely 490 pics this appeal is allowed and that part of the judgment of the Land Court dealing with this land is set aside and Plaintiffs' action as affecting the rights of Appellant dismissed.

The Appellant and Respondent will have half the costs here and below. No fees for attending the hearing.

Delivered this 8th day of June, 1938.

British Puisne Judge.

HIGH COURT No. 37/38.

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

BEFORE : The Acting Chief Justice and Khayat, J.

IN THE APPEAL OF :

Henry Sharf. APPELLANT.

v.

Director of Medical Services. RESPONDENT.

Licence to practice dentistry — Appeal against refusal to grant licence — Reasonable exercise of discretion.

In dismissing an appeal under sec. 6 of the Dentists Ordinance against a refusal by Respondent to grant to Appellant a licence to practice dentistry in Palestine :—

HELD : Respondent reasonably exercised his discretion as Appellant was the holder of a licence from a French institution which did not entitle him to practice in France.

ANNOTATIONS : A similar decision was given in H. C. of 1925 (C. of J. 1188). On the exercise of discretion, H. C. 9/38 (1938, 1 S. C. J. 116) and annotations.

FOR APPELLANT : Gavison.

FOR RESPONDENT : Crown Counsel (Bell).

J U D G M E N T :

This appeal fails. The reason for that is that the Director of Medical Services has under the Dentists' Ordinance complete discretion in dealing with applications for permits to practice dentistry.

The reason why the Director refused to grant the Appellant the permit is that he is the holder of a certificate from a French Institution which does not entitle him to practise in France. Under such circumstances no pover can compel the Director to issue the permit.

For the above reasons the appeal is dissmissed with costs fixed at LP. 5.—.

Acting Chief Justice.

Frumkin, J. I concur with the judgment and the appeal must be dismissed as I do not think that the Director of Medical Services has unreasonably exercised his discretion.

Delivered this 8th day of June, 1938.

HIGH COURT No. 39/38.

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

BEFORE : The Acting Chief Justice and Frumkin, J.

IN THE APPLICATION OF :

Abraham Trainin. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Bank Haolim Eretz-Israel—Polania Ltd. RESPONDENTS.

Execution — Liability of custodian as third party — Points not raised before Chief Execution Officer.

In refusing an application for an order to issue to the First Respondent directing him to show cause why his order dated the 30th May, 1938, should not be set aside, and for an interim order to stay execution :—

HELD : 1. Petitioner was liable as a third party.
2. The points which had not been raised before the Chief Execution Officer could not be taken before the High Court.

ANNOTATIONS : 2. See H. C. 32/38 (1938, 1 S. C. J. 330) and note 1 thereto. daed the 6th April, 1938 :—

FOR PETITIONER : Goldberg.

FOR RESPONDENTS : *Ex parte.*

O R D E R.

We refuse to issue order *nisi* in this petition.

The gist of this application is that the petitioner undertook to keep under his safe custody certain attached properties, and when they were

required from him they were not available. He was liable for their safe custody and as such he is considered a third party.

There are two other points which might have some substance *i. e.* (*a*) whether the petitioner is liable for the judgment debt or for the value of the goods attached, and (*b*) whether he is liable for the whole amount or for the half of it, as, it is alleged, there was another person who also undertook to keep the goods attached in safe custody.

These points were not raised before the Chief Execution Officer, and the petitioner has still the opportunity of putting them before him, and, should the Chief Execution Officer find it fit, he may revise his decision.

For the above reasons the order *nisi* is refused with costs.

Given this 8th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 121/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Saleh bin Deeb Osman. — APPELLANT.

v.

1. Sheikh As'ad Mohammad el Naj Yousef Kaddoura,
2. Osman bin Deeb Osman,
3. Government of Palestine. — RESPONDENTS.

Third party opposition — Award authenticated by Land Court — L. A. 85/29, C. P. C. 162.

In dismissing an appeal from a judgment of the Land Court of Nablus, dated the 16th April, 1938 :—

HELD : (Abdul Hadi, J. dissenting) No third party opposition is admissible against an arbitration award authenticated by a Land Court.

Followed : L. A. 80/29 (P. L. R. 524).

FOR APPELLANT : Koussa.

FOR RESPONDENTS : No. 1 — Haddad.
No. 2 — No appearance.
No. 3 — Wa'ri.

JUDGMENT:

Copland A. C. J.: This is an appeal from a decision of the Land Court of Nablus in which they rejected an opposition made by the present Appellant who sought to oppose an arbitration award given in respect of a dispute between two other parties. The Land Court dismissed the opposition on the ground that "an award does not affect in the least the rights of strangers to the submission, and such rights must be protected by a different form of action than by asking for an award to be set aside." They also said that on the strength of Article 162 of the Code of Civil Procedure which provides as follows :—

> "Art. 162. — Opposition by a third party may be made against any kind of judgment or order given by a Court of First Instance or a Court of Appeal. Provided that, inasmuch as the awards of arbitrators are inoperative except as against the parties who nominated the arbitrators, there shall be no right of opposition by a third party against such awards".

no third party opposition against an arbitration award is admissible.

Now it has been argued by the Appellant that this is a third party opposition not against the award but against the judgment enforcing the award. If we look at the substance of the opposition, it is quite clear that the opposition is against the award itself and this view is supported by a decision of this Court in Land Appeal No. 80/29, in which it was held that no third party opposition was admissible in an appeal against the confirmation by a Land Court of an arbitrator's award.

So far as the majority of the Court is concerned, we feel that that case is decisive and we see no reason not to follow it. By majority, therefore, the appeal is dismissed and the judgment of the Land Court confirmed, with costs on the lower scale fixed at LP. 10.— and LP. 5.— fees for attending the hearing of this appeal. No costs to Government.

Acting Chief Justice.

I concur. *Puisne Judge.*

Translation of Abdul Hadi J's Judgment. Whereas the third party opposition, the subject of this appeal, was made against the Judgment of the Land Court in its capacity as a Court of First Instance, in which it confirmed the arbitrators' award, and

Whereas the first part of Article 162 of the Ottoman Code of Civil Procedure allows a third party opposition against any kind of judgment, or order given by a Court of First Instance or a Court of Appeal ; and

Whereas this third party opposition was not brought against the

award itself so that it might be said that the second part of the said Article did not allow such an opposition ;

I am therefore of the opinion that the appeal must be allowed, the judgment of the Land Court be set aside, and the case remitted to that Court for re-hearing and to give a fresh judgment.

Delivered this 13th day of June, 1938.

Puisne Judge.

CIVI LAPPEAL No. 122/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Sadica bint Abdul Ghani el Jardaneh. APPELLANT.

v.

1. 'Aatef Khammash.
2. Haj Mohammed Yousef Kan'eer. RESPONDENTS.

Priority — Water rights not included in sale — Person claiming priority cannot get greater rights than the purchaser — Alteration of registration cannot be effected in action of priority.

In dismissing an appeal from a judgment of the Land Court of Nablus, dated the 2nd April, 1938 :—

HELD : 1. Appellant could not claim the water rights by priority as they had not been included in the sale.

2. In an action of priority the Court cannot vary the terms of a kushan with regard to the extent of the property transfered.

ANNOTATIONS : The following decisions bear upon the right of prior purchase : L. A. 128/23 (C. of J. 276) ; L. A. 64/32 (P. L. R. 784, P. P. 30.i.33, C. of J. 1098) ; L. A. 21/24 (C. of J. 1528) ; L. A. 5/27 (C. of J. 1528) ; L. A. 15/27 (P. L. R. 159, C. of J. 1531) ; L. A. 36/27 (P. L. R. 149, C. of J. 1531) ; L. A. 59/27 (P. L. R. 179, C. of J. 1532) ; L. A. 61/27 (P. L. R. 298, C. of J. 1533) ; L. A. 42/35 (1937, 1 S. C. J. 326, C. of J. 1934—6 487).

FOR APPELLANT : Khammash.

FOR RESPONDENTS : No. 1— no appearance.
No. 2— Zu'eiter.

JUDGMENT:

This is an appeal from the decision of the Land Court of Nablus in a claim for priority — the only point which concerns us is whether water rights are or are not included in the sale.

Now it is important to note that in this priority case, the water does not originate in the land, but is led into the land by means of a channel.

The Land Court found against the Appellant who now comes to this Court. The Appellant alleges that water rights were included in the sale, that it is the custom with regard to all sales in Nablus that water rights are included in the sale, even though they are not included in the Kushan.

The 2nd Respondent replies that in no case can the Appellant get more rights than he, the Respondent, get, and since the Respondent did not get the rights to the water when he purchased the land, the Appellant therefore cannot get them either, and we think that his contention by the Respondent is correct.

What the Appellant is, in effect, asking us to do is to alter the registration and to vary the terms of a kushan with regard to the extent of the property transferred, and it is obvious that, in an action of priority, we can do no such thing. If the Appellant thinks he has a right to that water he can bring an action against whosoever and in whatever form he likes, claiming his specific rights.

The appeal must therefore be dismissed and the judgment of the Land Court confirmed, with costs fixed at LP. 10 and LP. 5 fees for attending the hearing of this appeal, to the 2nd Respondent.

Delivered this 13th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 71/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Bank der Tempelgesellschaft, Ltd., Jaffa — APPELLANT.

v.

1. Levy Gomberg,
2. Jacob Gomberg,
3. Abraham Shahor,
4. Halvaa Vehissachon Haklai, Gedera, Cooperative Society. — RESPONDENTS.

Rule 96, Civil Procedure Rules, 1935 — Certificate of fulfillment of conditions precedent — Guarantee for appeal — Property not in fact mortgaged — No good cause shown for omission — Full disclosures to be made in application for fixing deposit.

In dismissing an application under rule 96 of the Civil Procedure Rules, 1935, for an order to be made that conditions precedent to fixing security for costs of the appeal were fulfilled :—

HELD : 1. The provisions of the Rules regarding appeals had not been complied with and the good cause which Applicant attempted to show referred to the efforts made to remedy the defect and not to the original default in not complying with the Rules.

2. There had not been full disclosure of all the facts to the Judge who fixed the deposit.

FOR APPELLANT : Karwasarsky.

FOR RESPONDENTS : Houtori.

JUDGMENT:

This is an application under Rule 96 of the Old Civil Procedure Rules, 1935, asking us to make an order that the condition precedent to giving security for costs of the appeal has been fulfilled.

The facts are as follows :—

Notice of appeal was lodged on 17th March, 1938, accompanied by a bond of guarantee purporting to be in accordance with Form 19 of the Schedule. It was than discovered that the bond was defective inasmuch as the property undertaken to be mortgaged was not in fact mortgaged, and on 7th April, 1938, the notice of appeal was placed before Mr. Justice Greene, who made an order on it fixing the sum of LP. 10.— as deposit as security for costs. The amount is stated to have been paid on the same date.

On 15.4.38, the Respondent filed his reply to the notice of appeal and in it took exception to the validity of the bond. The Appellant in this present application argues before us that he has shown a good cause for not complying with the rules, but as has been pointed to him in the course of the argument the good cause which he attempts to show refers to the efforts made to remedy the defect and not to the original default in not complying with the rules. The point that strikes us in this application is this : that it is evident from the manner in which the deposit was fixed that there was not a true representation of all material facts to the judge who fixed the deposit. It is obvious that the application to fix a deposit was not before him and we have been

informed that this is so by the clerk who brought the file to him. In these matters where mistakes have been made and attempts are made to remedy them it is essential that there must be a full disclosure of the facts to those who are asked to deal with the matter.

For these reasons the application of the Appellant must be refused, the Respondent will get costs of this application fixed at LP. 5 and LP. 5 for attending the hearing of this application.

Delivered this 15th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 127/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Elias Kutait. APPELLANT.

v.

Dr. Ya'coub Khalil Zu'rub. RESPONDENT.

Finding of fact — Admissibility of evidence on appeal.

In allowing an appeal from a judgment of the District Court of Haifa, in its appellate capacity, dated the 14th April, 1938, and in quashing the judgment of the District Court and restoring the judgment of the Magistrate :—

HELD : 1. The District Court can only interfere with findings of fact, where there is no evidence to support them, or if the findings are so unreasonable that no reasonable court could have come to the conclusion to which it arrived.

2. The letters which were produced should not have been taken in evidence before the District Court without proof that they were not available at the time the case was tried before the Magistrate.

ANNOTATIONS :

1. *Vide* C. A. 83/38 (1938, 1 S. C. J. 283) and second paragraph of annotations thereto.

2. *Vide* CR. A. 1/38 (1938, 1 S. C. J. 54) and annotations and CR. A. 93/38 (1938, 1 S. C. J. 294) and annotations.

FOR APPELLANT : Sahyoun.

FOR RESPONDENT : Atalla.

JUDGMENT:

When this case was before the Magistrate's Court, the Magistrate, on the ground of the production by the Defendant of a receipt which purported to be a general discharge of all debts existing at its date between the parties, and on the admission by the Defendant that it bore his signature, dismissed the claim of the then Plaintiff.

The defeated Plaintiff appealed to the District Court, who reversed the Magistrate's decision, holding that the receipt did not constitute a general release and also on the ground that the two letters which were produced to the District Court, and which were not produced in the Court below (Magistrate's Court) contained an admission by the Appellant that he owes money to the Respondent.

The present Appellant obtained leave to appeal to this Court. We do not think that the District Court had any right to interfere with these clear findings of fact made by the Magistrate, which there was ample evidence to support. The District Court can only interfere with findings of fact, when there is no evidence to support them, or if the findings are so unreasonable that no reasonable Court could have came to the conclusion to which it arrived. Neither of these essentials apply in this case.

The letters which were produced should not have been taken in evidence before the District Court without proof that they were not available at the time the case was tried before the Magistrate.

For these reasons this appeal must be allowed, the judgment of the District Court quashed and the judgment of the Magistrate restored.

The Appellant will have his costs on the lower scale fixed at LP. 10 together with LP. 5 fees for attending the hearing of this appeal.

Delivered this 15th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 129/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Omar Yousef Farran. — APPELLANT.

v.

1. Joseph Shabatai Ginsburg,
2. Noah Ginsburg. — RESPONDENTS.

Appeal — Change of cause of action — Points not raised in lower Court — Deciding evidence — Onus of proof.

In dismissing an appeal from a judgment of the District Court of Haifa, in its appellate capacity, dated the 14th April, 1938 :—

HELD : 1. The relinquishment by Appellant of part of his claim did not amount to a change of the cause of action.
2. The second point of appeal could not be considered as it had not been raised before the lower Court.
3. The *onus* was on Appellant to prove that he had made certain payments.

ANNOTATIONS : 2. See C. A. 90/38 (1938, 1 S. C. J. 286) and note 3. thereto.

FOR APPELLANT : Salah.
FOR RESPONDENTS : Levin.

JUDGMENT:

We need not trouble you Mr. Levin.

In this appeal three points have been raised before us, none of them of any substance.

The first point is that the cause of action was changed; nothing of the kind occurred, because part of the original claim was for rent, the balance, not for rent, was dropped by the Plaintiff in the original action.

With regard to the claim that only LP. 122 should be awarded, while the Magistrate actually gave judgment for LP. 165, this point was not raised before the District Court and that Court was under no obligation to deal with points except those raised by the Appellant.

The third point is that the Plaintiff could not divide Defendant's evidence ; the Defendant admitted in Court that he was to pay rent at the rate of LP. 7.500 m. per month and did not deny the period during which he remained on the premises. He alleges that he made certain payments on account of rent and the *onus* is on him to prove if he made such payments.

The appeal is dismissed with costs on the lower scale fixed at LP. 10, and LP. 5 fees for attending the hearing of this appeal.

Delivered this 15th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 132/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Frumkin, JJ.

IN THE APPEAL OF :

The Syndics in the Bankruptcy of the Firm S. N. Khoury. APPELLANT.

v.

Wolf Slavouski. RESPONDENT.

Specific performance — Contract to sell land — Penalty and liquidated damages — L. A. 1/36, C. A. 15/38, Art. 46 P. O. in C., C. A. 191/37, C. A. 28/38 — Effect of recent decisions on C. P. C. Art. 111 — Safeguard against repudiation of contracts done away with — Specific performance a remedy alternative to damages — Control of Director of Lands over dispositions — Interpretation against policy of Government to be remedied by legislation — Cultivators (Protection) Ordinance and Taxes Collection Ordinance do not prevent the application of the doctrine — Non-mutuality — Sec. 11 of the Land Transfer Ordinace does not apply to contracts to sell — Specific performance to be introduced since the distinction between penalties and liquidated damages adopted — C. A. 240/37, L. A. 58/25, C. A. 43/38, C. A. 20/38.

In allowing an appeal from a judgment of the Land Court of Haifa, dated the 14th April, 1938, and in remitting the case for the determination of the other issues :—

HELD : 1. In view of recent decisions adopting the equitable distinction between penalties and liquidated damages the safeguard of penalties had been taken away and once the distinction is recognised it follows of necessity that the equitable doctrine of specific performance must be brought in.

2. The courts of Palestine are empowered to grant an order of specific performance of a contract or an option for the sale of land.

3. Specific performance is an alternative remedy and is only granted where damages would not be adequate compensation.

4. Neither the Cultivators (Protection) Ordinance nor the Taxes Collection Ordinance prevent the application of the doctrine.

5. A contract to sell is not a void disposition enabling purchasers to recover money paid before transfer.

Considered : L. A. 1/36 (P. P. 30.x, 1-5, 8.xi.36 ; C. of J. 1934—6 340 ; Ha. 12, 26.xi, 10.xii.36) ;
C. A. 15/38 (1938, 1 S. C. J. 204) ;

C. A. 191/37 (P. P. 6-9.xii.37 ; 2 Ct. L. R. 169) ;
C. A. 28/38 (1938, 1 S. C.. J. 109) ;
C. A. 240/37 (1938, 1 S. C. J. 148) ;
L. A. 58/25 (C. of J. 1777) ;
C. A. 43/28 (C. of J. 1375) ;
C. A. 20/38 (1938, 1 S. C. J. 210).

ANNOTATIONS : The Land Court proceedings in this case (L. C. Ha. 28/37) were reported in the Palestine Post of the 10th May, 1938.

See the annotations to C. A. 15/38 (*supra*) and C. A. 48/38 (*supra*).

5. In addition to the authorities reviewed in the annotations to C. A. 108/38 (p. 345, *ante*), see C. A. 133/38 (26.vi.38).

FOR APPELLANTS : Sanders, Atalla.

FOR RESPONDENTS : Shapiro.

JUDGMENT:

Copland, A. C. J. : This case raises the important and difficult point whether the Courts of Palestine are empowered to grant an order for the specific performance of a contract to sell land, and it is further complicated by the fact that there has recently been a considerable difference of judicial opinion in this country on the matter. It has been argued before us very well and fully by the advocates of both sides.

The facts of the case, at this stage, are irrelevant since the case comes before us on one agreed issue of law, which, if decided in favour of the Respondent, will put an end to the case, or if decided in the Appellants' favour will necessitate sending the case back to the Land Court to determine the remaining issues.

The District Court held that the remedy of specific performance was not available in Palestine. I will deal with their reasons for so holding later.

Before us, the Appellant bases his case principally upon two recent judgments given by this Court — Haj Hassan Hammad *v.* Latin Patriarch (L. A. 1/36) and Mohammad Said el Kassem and others *v.* Younes Daoud el Younes, (C. A. 15/38). In each of these cases, however, this Court was evenly divided, and the matter therefore remains open, so far as these cases are concerned, and the Appellant in effect relies upon the *dicta* of one member of the Court in each of them. In Hammad's case (*supra*) Manning J. reviewed all the past judgments of this Court and dealt very fully with the application of the provisions of Art. 46 of the Palestine Order-in-Council, 1922, and came to the conclusion that the remedy of specific performance was available in Palestine.

In the case of Mohammad Said el Kassem and others *v.* Younes Daoud el Younes, in which I was sitting, I adopted Manning J.'s reaso-

ning, but perhaps went a little further, then, than I had intended when I said that I adopted his conclusions *in toto*. I was referring only to the case then before me where the point was whether a purchaser, who had been let into possession of land, had paid all the purchase price and had been in possession for many years, though not for the full period of prescription, had acquired a good equitable title as against his vendor. Both Manning J. and I decided that he had, and that the vendors' actions for recovery of possession must fail.

The point in the past has come before this Court on many occasions — in each case the gist of the decisions has been that there was no law in Palestine (I stress the word "law") by which specific performance of an agreement for the sale of land could be enforced. Whenever Art. 46 of the Order-in-Council was referred to, the Courts refused to apply it, holding that it was not applicable. The position has, however, recently been altered. In two cases, Sheikh Suleiman Taji El Farouki *v.* Michel Habib Raji Ayyoub and 3 others (C. A. 191/37) and Anis Bustani *v.* Joseph Ben Hanania (C. A. 28/38) this Court has laid down the principle that the equitable doctrine of the difference between a penalty and liquidated damages is one which is recognised in Palestine. In the past all contracts for the sale of land have contained a clause stipulating that on breach a sum of money should be payable by the defaulting party as liquidated damages, reliance being placed on the provisions of Art. 111 of the Civil Procedure Code, which says that when a definite sum is stated to be damages, that sum shall be payable and neither more nor less.

The effect of these two judgments is to nullify the provisions of Art. 111, and the whole basis of the present form of contracts for the sale of land has been cut away. Heavy damages on default were common form in all contracts, the object being to compel observance of the contracts so far as was possible. Since now, however, damages must be assessed, if the sum stated is deemed to be a penalty, it will be seen that the whole position has been radically altered, and this important safeguard has been taken away.

The Land Court based its judgment on several grounds, with which I will now deal.

The first is that following The Palestine Mercantile Bank *v.* Jacob Fryman and another, (C. A. 240/37) where there is an Ottoman Law available, Art. 46 of the Order-in-Council cannot be resorted to, and that here there is an Ottoman Law, namely, Art. 108 of the Civil Procedure Code which says that damages may be awarded against a

defaulting party, and that the judgment in C. A. 191/37 and C. A. 28/38 still give the right to an injured party to receive damages.

It must however be remembered that specific performance is an alternative remedy, and is only granted where damages would not be adequate compensation.

The second reason is that if specific performance were granted, the control of the Director of Lands over dispositions of immovable properties would be weakened. But the Director of Lands exercises his control subject to the law, and, in any case, he has no control over dispositions, ordered by the Court, such as sales of mortgaged property, sales in execution, or in actions for preemption. And if the law as interpreted by the Courts does not suit Government policy, the remedy is to amend the law by legislation.

I do not think that the provisions of the Cultivators (Protection) Ordinance (Cap. 40) would prevent the application of specific performance, as the Land Court apparently thought it would. In the first place, as pointed out by the Appellant, the property in this case is urban property, and in any case a purchaser will get his vendor's title, and takes the property subject to any equities attaching to it. Neither would the Taxes Collection Ordinance (Cap. 137) necessarily prove a fatal bar in every case.

Finally the Land Court held that non-mutuality would always prevent the application of the doctrine, since Sec. 11 of the Land Transfer Ordinance (Cap. 81) enables a person who has paid money in respect of a void disposition to recover it.

A contract to sell, however, is not a void disposition. It is quite true, probably, that in many, perhaps in a large proportion of cases, specific performance could not be enforced. Difficulty of enforcement is no argument against the doctrine being held to be in force.

In conclusion it seems to me that once the equitable rule of the difference between a penalty and liquidated damages is recognised, it follows of necessity that the equitable doctrine of specific performance must be brought in. There is nothing, in my view, in the circumstances of Palestine or its inhabitants to render it undesirable or inapplicable. In fact it will tend to uphold the sanctity of contracts, which will be all to the good, and will prevent these constant repudiations by vendors, when the value of land has risen — and repudiation by purchasers when it has fallen. I think that this Appeal should be allowed, and the judgment of the Land Court set aside, on the ground that the Courts of Palestine are empowered to grant an order for the specific performance of a contract or an option for the sale of land. The case

should go back to the Land Court for the determination of the other issues raised.

Costs to await result.

Delivered this 30th day of June, 1938.

Acting Chief Justice.

I Concur *in toto.* *British Puisne Judge.*

Frumkin, J. It is high time that the question of specific performance should come up before this Court for a final decision. This matter has occupied the mind of the legal profession of this country for years, but so much was the prevailing opinion against the existence in this country of such a remedy that very seldom, and then only indirectly, was the matter brought up for consideration. Without having the matter fully argued before them, Judges have now and then, in recent years expressed themselves that there is no Law of specific performance or that there is no possibility for specific performance in this country. But in most cases this point was dealt with indirectly, *inter alia,* to lay force on the necessity of enforcing a penalty clause.

In Pinhasewitz *v.* Litwinsky (L. A. 58/25) where Corrie J. held that — "There is no law whereby specific performance of a contract can be enforced in Palestine" — the land claimed by way of specific performance was already transferred to others in the Land Registry before the action was lodged.

In Sudki Kamal and others *vs.* Yousef Rokach and others, (C. A. 43/28) I expressed the opinion that : "It has been the common practice in this country to put a penalty clause in every contract relating to the sale of land. Such a stipulation is necessary because there is no possibility of specific performance of contracts relating to land".

The issue in that case was whether an agent authorised to sell land has the right to include a penalty clause in the contract of sale on behalf of his principal.

It was only in recent years that advocates felt encouraged to apply directly for specific performance, and I think that it was for the first times that the matter was fully argued before Mr. Justice Manning in Hadj Hassan Hammad *vs.* The Latin Patriarch (L. A. 1/36) resulting in his considered judgment covering practically the whole ground on the subject. His conclusions that the remedy of specific performance applies in this country were followed to a certain extent by Mr. Justice Copland in Kassam and others *vs.* Younes (C. A. 15/38). But as pointed out by the learned Acting Chief Justice, in each of these cases this Court was evently divided and there is no binding decision, and the matter therefore stands open.

The necessity of introducing the doctrine of specific performance into the legal system of this country has been urged on account of the recent drastic change in the jurisprudence of this country whereby the distinction between penalty and damages, (well known in English law), has been introduced for the first time in Faruqi *vs.* Ayoub (C. A. 191/37) and followed, I understand, in other cases.

I have had since the issue of that judgment no opportunity of expressing my own opinion on this very important question, which changes a practice invariably acted upon by this Court since the Occupation. I might, therefore, take this opportunity of stating my view on the subject, which with all due respect, differs from the view adopted by my learned colleagues on the bench of this Court, with the exception only, I think, of the Chief Justice.

The second part of Article 46 of the Palestine Order-in-Council is subject to the first part of it. What I mean is shortly this : The jurisdiction of the Civil Courts is exercised in conformity with the substance of the English common law etc., only in so far as it cannot be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, etc. Where the first part does not extend or apply the second part comes in.

So for instance when the Ottoman Law, in the Mejelle deals exhaustively with guarantee, and imposes an unqualified duty on a guarantor to honour his guarantee, without according him the right of defence of non-consideration, it was held that on the point of consideration for a guarantee the Ottoman Law extends and applies, and Article 46 of the Order-in-Council could not be resorted to. (The Palestine Mercantile Bank *vs.* Fryman and others, C. A. 240/37). But where the Ottoman Law and the other sources enumerated in the first part of Article 46 do not extend or apply to a particular point, in dealing with it the Civil Courts will exercise their jurisdiction in conformity with the substance of the English common law and other sources enumerated in the second part of the Article.

The question is therefore, does Article 111 of the Ottoman Code of Civil Procedure extend or apply to penalties or not ? It has always been my opinion that it does. It, in clear and unambiguous terms, imposes a duty on a party to pay whatever sum he has undertaken to pay as compensation (which word is to my mind the nearest equivalent of the word "Tadminat" used in the Turkish text). The argument used by Khayat J. in C. A. 20/38, that the French Civil Law from which the Ottoman Law was borrowed, does contain special provisions as regards penalties, which provisions were not incorporated

in the Ottoman Law, to my mind, with respect, supports a conclusion different from the one which he reached and goes to prove that the distinction was present to the mind of the Ottoman Legislators, and yet it was ruled that whatever sum has been stipulated as compensation, and we could safely add, whether damages or a penalty, but no more and no less, must be paid.

I most respectfully take exception to the opinion of Manning J. in C. A. 191/37, that just as equity came in England to give relief in a proper case, so here Article 46 came to Palestine. If, as I have no doubt it did, Article 111 did intend to allow the enforcement of a penalty, that Article does extend and apply, and the relief granted by Article 46 of the Order-in-Council is not available, by the clear provision of the said Article in its first part.

But whatever be my opinion, under the law as it at present stands the Courts would not enforce a penalty. If it is thought however that the doctrine of specific performance will serve as a remedy to compel parties to honour their pledges in contracts, I must say it will be a very poor remedy. In most cases of agreements of sale of land, matters are very complicated, and the removal of difficulties very often depends on the good-will of the vendor. Sometimes things in the nature of personal services are involved, sometimes the consent of outsiders is to be obtained, so that even if the Court would have the power to order specific performance, in a great number of cases it would be unable to use its power.

I am stating all this simply in order to indicate that I am approaching the problem of the possibility or otherwise of ordering specific performance not under any pressure of necessity to create a remedy, but on its own merits. In the present case there is certainly nothing to prevent the Court from ordering specific performance if it will be found that it has power so to do.

The Law of Palestine including the Ottoman Law in force in November, 1914, and all other sources enumerated in Article 46 of the Palestine Order-in-Council contain no provision one way or the other as regards the doctrine of specific performance of contracts. The law is therefore silent, and does not extend or apply to specific performance. In view of what I have said above, the Court must exercise its jurisdiction in conformity with the substance of common law and doctrines of Equity in force in England, as enumerated in the second part of Article 46 of the Palestine Order-in-Council.

In resorting to such doctrines however regard must be taken to the last part of Article 46, which reads as follows :—

> "Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary".

To my mind there is nothing in the circumstances of Palestine and its inhabitants to disallow the enforcement in Palestine of the said common law and doctrines of equity in so far as they relate to specific performance.

In contracts relating to movable property, for instance, I have expressed an opinion elsewhere as early as 1920 that a remedy closely resembling the remedy of specific performance not only is not inconsistent with the Mejelle but that there is very much in it to support such remedy. Article 262 of the Mejelle lays down the rule that after a sale has been concluded the vendor is under an obligation to deliver the goods sold to the purchaser. There is therefore nothing to prevent a Court in this country from maintaining an action for the delivery of chattels, and although such an action differs from an action for specific performance, since it is based on an allegation not that a contract to deliver has not been performed, but that the chattel is the property of the plaintiff and is being wrongfully detained by the defendant, under English authorities the remedy closely resembles the remedy of specific performance. See Halsbury, Vol. XXVII, p. 4.

The matter is more difficult when it comes to contracts relating to land. Neither in the arguments advanced in this case nor in all the judgments referred to above, was any mention made of the Ottoman Land Law. There is no doubt that under the Ottoman Land Code there was no possibility of enforcing a sale of land made outside the *Tabu*. Article 36 of the Land Code is quite clear an this point. It contains the following passage ;

> "Transfer of all kinds of Miri land shall be invalid without the consent and the knowledge of the Mamour (Official). The right of possession (Tasseruf) to the land acquired by the transferee depends in any case upon the consent of the Mamour. If the transferee dies before obtaining the consent of the Mamour, the the transferor can have possession as before. If the transferor dies the land passes to his heirs entitled to Intical of Miri land if he has such heirs," etc.

Article 9 of the Ottoman Law of 1331 regulating the right to dispose of immovable property is no less explicit. The relevant parts of it read as follows (from the Baghdad Translation) ;

> "Every kind of disposition of Miri and mauqufe land must be made only in the Tabu Registry and a formal title-deed shall be

> delivered for every disposition. A Disposition without receiving a formal title-deed is not allowed. In places where under the new cadastral law the new cadastral system has been carried out, the Civil and Sharia Courts will not hear any case, nor will the Administrative authorities allow any dealings with regard to lands for which no formal deed is produced.
>
> This provision also applied to all Mulk land and Mustaghilalat and Musaqqafat land of 'Waqf Madbutah' and Waqf Mulhaqa and Waqf Mustathna".

These provisions have been modified by the Land Court Ordinance (Cap. 75). Section 8(1) of which reads as follows :—

> "A land court shall apply the Ottoman Law in force at the date of the British occupation as amended by any Ordinances or rules of court issued since the occupation :
>
> Provided that the court shall have regard to equitable as well as to legal rights to land and shall not be bound by any rule of the Ottoman Law prohibiting the courts from hearing actions based on unregistered documents".

It follows from the latter part of the proviso that under the Ottoman Law alone there would be nothing to prevent the Court from ordering specific performance of contracts relating to the sale of land. But before the promulgation of the Land Courts Ordinance 1921 the Land Transfer Ordinance introduced provisions similar to those of the Ottoman Land Law declaring as null and void dispositions made without the consent of the Director. Such dispositions although not illegal are unlawful in so far as they are contrary to statutes regulating transactions of that sort and the question which presents itself for an answer is this : Can a party to such a transaction avail himself of the remedy of specific performance ?

Manning J. in Land Appeal 1/36 seems to have overcome this difficulty by holding that an agreement for sale is not a disposition. An agreement for sale is therefore not unlawful. At first sight it appeared to me that this does not solve the difficulty, because what in fact the plaintiff seeks to do is to obtain the help of the Court in converting such an agreement into a disposition. The fact that in certain cases, like partition, execution and enforcement of mortgages, the Court orders transfer without the previous consent of the Director is also not conclusive, because in those cases it is done by operation of law under express statutory provision.

But on examining the matter further I find that an agreement for sale is not contrary to law and this Court always gave legal effect to such agreements. It is part of the obligations, express or implied, of

a vendor under such an agreement to obtain the consent of the Director to convent the agreement into a disposition, and upon the failure of the vendor to comply with this obligation the purchaser may apply to the Court for specific performance. The Court granting such relief may do so, subject to the consent of the Director of Land being obtained.

In most cases it may be assumed that the Director will not, upon an order of the Court, withhold his consent, which is now nothing more than a matter of formality in order to exercise a control over land transactions for the benefit of the public.

As regards the objections taken that the Cultivators (Protection) Ordinance (Cap. 40) and the Tax Collection Ordinance (Cap. 137) would prevent the application of specific performance, I share the view expressed by the Acting Chief Justice.

In conclusion I think that Judgment should be given in the terms of the last paragraph of the Judgment of my learned brother the Acting Chief Justice.

Delivered this 30th day of June, 1938.

Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 134/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :

1. Amneh Mustafa Luswi,
2. Mohammad Khalil Shihab el Din,
3. Shafiqa Ali Jiha Shihab el Din,
4. As'ad Khalil Shihab el Din,
5. Safieh Khalil Shibab el Din — APPLICANTS.

v.

1. Mohammad el Jurf Shihab el Din,
2. Miriam Mustafa el Jurf Shihab el Din,
3. Shafiyya Ali Jiha Shihab el Din,
4. Ahmad Hussein el Jurf Shihab el Din,
5. Abdul Aziz Abbas Mahmoud Farawi Shihab el Din. — RESPONDENTS.

Privy Council appeal — Guarantee by way of attachment of lands — Cannot be allowed after bank guarantee required.

In refusing an application for leave to file a bond by a third person suffering attachment of his property, in lieu of a bank guarantee for LP. 300, as security for costs of the appeal :—

HELD : When a bank guarantee is required by the Court no other form of security can be accepted.

ANNOTATIONS : See note to P. C. L. A. 171/37 (*post*, p. 399).

FOR APPLICANTS : Elia.

FOR RESPONDENTS : Ankar.

ORDER:

This is an application for the substitution of a bank guarantee for the sum of LP. 300 by an attachment of land to secure the costs for an appeal to the Privy Council. It has been laid down on previous occasions that when a bank guarantee is required by the Court, no other form of security can be accepted. We are not therefore prepared to vary the previous order of the Court, and the application is refused. The Respondents to have LP. 2 as costs and advocate's fees.

Given this 24th day of May, 1938.

British Puisne Judge.

CIVIL APPEAL No. 117/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Hajjah Labibeh ahmad Issa,
2. Tuffaha Issa Ahmad,
3. Hamsi Issa Ahmad, on behalf of the other heirs of Issa Ziedeh. APPELLANTS.

v.

1. Haj Khadr Shehadeh,
2. Nimr Shehadeh. RESPONDENTS.

Appeal — Finding of fact — Deposit for appeal.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 31st March, 1938 :—

HELD : 1. There had been evidence before the lower Court that Respondents were in possession for a period exceeding that of prescription.
2. The deposit was not paid.

ANNOTATIONS : Earlier proceedings in this case : L.A. 13/34 (2 P.L.R. 352).

FOR APPELLANTS : In person.
FOR RESPONDENTS : Abcarius Bey.

JUDGMENT:

This case was remitted to the Court below to hear the evidence. The Court heard the evidence and on the facts before it found that the Respondents were in possession for a period exceeding that of prescription.

The deposit fixed at LP. 15 was not paid and the Court can do nothing in this matter.

The appeal is therefore dismissed. No order as to costs, as advocate for Respondents does not ask for same.

Delivered this 8th day of June, 1938.

British Puisne Judge.

PRIVY COUNCIL LEAVE APPLICATION No. 171/37.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :

Benjamin Mashieff. PETITIONER.

v.

Fritz Sonnenfeld. RESPONDENT.

Privy Council Appeal — Practice.

Application for an order to issue rescinding the order dated the 14th February, 1938, granting conditional leave to appeal granted.

ANNOTATIONS : Other recent decisions on Privy Council appeals practice : P. C. L. A. 2/35 (*ante*, p. 213) ; P. C. L. A. 134/37 (*ante*, p. 397) ; P. C. L .A. No. 9 (*Post*, p. 410) ; P. C. L. A. 191/37 (*ante*, p. 252), P. C. L. A. 66/25 (21.vi.38).

Earlier proceedings in this case (C. A. 171/37) are reported in 2 P. L. R. 137.

FOR PETITIONER : Levitsky.

FOR RESPONDENT : Marein.

ORDER:

WHEREAS under Article 20 of the Palestine (Appeal to Privy Council) Order-in-Council it is provided that where an Appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave to appeal, the Court may, on the application in that behalf made by the Respondent, rescind the order granting conditional leave to appeal, notwithstanding the Appellant's compliance with the conditions imposed by such an order, and may give such directions as to the costs of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires ; and

WHEREAS an application has been submitted to the Court by the Attorney for the Respondent requesting the issue of such order on the grounds that the Appellant did neither comply with the terms of the order granting him conditional leave to appeal, nor did he apply with due diligence to the Court for an order granting him final leave to appeal ; and

WHEREAS the application was heard by the Court on the 17th day of June, 1938, the Attorney for the Appellant admitting the facts as stated and raising no objection thereto ;

THE COURT orders and it is hereby ordered that the order granting conditional leave to appeal and dated the 14th February, 1938, be rescinded.

AND IT IS FURTHER ORDERED that the Appellant do pay to the Respondent taxed costs amounting to LP. to include LP. 5 advocate's fees.

Given this 17th day of June, 1938.

Acting Chief Justice.

HIGH COURT No. 40/38.

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

BEFORE : The Acting Chief Justice and Frumkin, J.

IN THE PETITION OF :

Shimon Slutzki — PETITIONER.

v.

1. The President, Local Council of Ramat Gan,
2. The Electoral committee of the Local Council of Ramat Gan,
3. The Returning Officer for the Forthcoming Elections of the Local Council of Ramat Gan. — RESPONDENTS.

Elections — Mandamus — Objection to register of voters — Must relate to something contrary to law — Short & Mellor's Crown Office Practice — Hearing not essential, H. C. 64/35.

In discharging a rule *nisi* for an order to issue to the Respondents directing them to show cause why the names of Dersoli Malka and eighty others as appear in this petition should not be excluded from the register of voters for the forthcoming election of members of the Local Council of Ramat Gan.

HELD : 1. The only duty imposed upon the Electoral Committee was to consider objections in writing submitted to them. There was no duty imposed upon them to grant a hearing.

2. An objection to the register, to be well founded, must relate to

something which is contrary to law. The words "contrary to law" had been crossed out from the objection and the objection was, therefore, on the face of it, unfounded.

Not followed : H. C. 64/35.

(In C. A. 126/38 (*post*, p. 428) it was also held that a case need not be followed which has not been fully argued).

ANNOTATIONS : An identical decision was given on the same date in H. C. 41/38 — Yerushalmi *v.* President, Ramat Gan Local Council.

Other decisions on elections : H. C. 80/25 (C. of J. 1681) ; H. C. 54/26 (C. of J. 727) ; H. C. 3/26 (C. of J. 1685) ; H. C. 16/26 (C. of J. 1687) ; H. C. 70/27 (P. L. R. 134, C of J. 1307) ; C. A. 17/28 (P. L. R. 256, C. of J. 730) ; H. C. 1/32 (P. L. R. 649, C. of J. 1403) ; H. C. 21/32 (P. L. R. 683, C. of J. 734) ; H. C. 22/32 (P. L. R. 695, C. of J. 737) ; H. C. 23/32 (P. L. R. 687, C. of J. 740 ; H. C. 24/32, (P. L. R. 691, C. of J. 743) ; H. C.57 /32 (C. of J. 1000) ; H. C. 70/34 (2 P. L. R. 165, P. P. 14.ix.34, C. of J. 1934-6 365) ; H. C. 77/34 (2 P. L. R. 171, P P. 4.x.34) H. C. 78/34 (2 P. L. R. 172, P. P. 30.ix.34, C. of J. 1934-6 369) ; H. C. 22/35 (P. P. 25.ii.35) ; H. C. 79/35 (P.P. 29.x.35, C. of J. 1934-6 647).

FOR PETITIONER : Smoira (*ex-parte*)

ORDER :

This is a return to an order *nisi* directed against the President of the Local Council of Ramat Gan, the Electoral committee of the Local Council of Ramat Gan, and the Returning Officer of the Local Council of Ramat Gan, to show cause why the names of a large number of voters should not be excluded from the Register of Voters.

Many arguments today on a preliminary point have been taken by the Respondents to the effect that a Petitioner, when making an objection, must state the grounds of his objection.

Regulation 4, sub-paragraph 4, of the schedule to the Local Councils (Ramat Gan) Order, dated the 16th March, 1926, is in these words :—

> "(4) Any person who is, or claims to be, entitled to have his name included on the register may, within the said period of seven days (the period during which a copy of the register is posted at several places) but not later, lodge with the committee an objection in writing that a name has been improperly included in, or excluded from, the register and the electoral committee shall, within three days of its presentation, consider every such objection and, if the objection is well founded, shall amend the register accordingly."

A copy of the objection which is said to be typical of all objections filed in respect of these numerous names has been produced to us. It is noteworthy that the words "contrary to law", which were typed in the original notice, have been crossed out. In the first place, I would remark that an objection to be well founded must relate to something

which is contrary to law. If the objection has the words "contrary to law" crossed out, on the face of it the objection is not well founded on something contrary to law. In Short and Mallor's Practice of the Crown Office, page 205, it is stated :—

> "A mandamus will not be issued against an officer, whose office and duty are prescribed by statute, although it may be highly convenient and desirable that such an act should be done by him."

Now, when we look at the Regulation in the Schedule, the only duty imposed upon the Electoral Committee is the duty to consider objections in writing lodged with them. There is no duty imposed upon the Electoral Committee to grant a hearing to anybody. The law would therefore appear to be quite clear, but a case has been quoted to us, High Court Case No. 64/35, Eliesha Levin, Local Council of Rishon-le-Zion and others, in which a contrary opinion to the one that we have just enunciated has been expressed by the High Court. We have looked through the notes of the presiding judge and it would appear from those notes that no argument took place upon this particular ground which was taken by the Respondents in this case and none of the authorities have been quoted in the previous case which have been quoted to us today. If they had been quoted to that Court, it is quite possible that the conclusion might have been a different one.

In the case before us we have no doubt, on the arguments and authorities quoted to us, that it is obvious that the only duty imposed upon the Electoral Committee is to consider objections in writing lodged with them. There is no duty imposed on them to grant a hearing. For this reason, we are of opinion that an order for *mandamus* will not lie. I would add that there is nothing in the written objection showing what grounds the objector was relying upon — he merely states that he objects to the inclusion of the name in the register of voters.

The rule *nisi* for *mandamus* must therefore be discharged and the Petitioner will pay to the Respondents costs fixed at LP. 10 together with LP. 5 advocate's fees.

Given this 20th day of June, 1938.

Acting Chief Justice.

I concur.

Puisne Judge.

CIVIL APPEAL No. 134/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE CASE OF :

1. Mohammad ahmad Abu Hub,
2. Mariam Mohammad Abu Azizeh. APPELLANTS.

v.

1. Abdul Hadi Abdallah El-Ula,
2. Fatmah Mohammad Abu Shayeb. RESPONDENTS.

Absence of advocate — Findings of fact — Inspection.

In dismissing an appeal from a judgment of the Land Court of Nablus, dated the 25th April, 1938 :—

HELD : The Court below carried out an inspection itself, made its own measurements and calculations and gave its decision on the strength thereof. This finding would not be interfered with.

ANNOTATIONS : An inspection may be carried out by the Court itself : L. A. 24/30 (C. of J. 1019). Other decisions on inspection are collected in the notes to C. A. 247/37 (*ante*, p. 95). See also C. A. 8/38 (p. 223) and C. A. 124/38 (p. 365).

FOR APPELLANTS : Moghannam

FOR RESPONDENTS : Bushnak.

JUDGMENT:

This is an appeal from the judgment of the Land Court of Nablus. We agree that it was unfortunate for the Appellant that his advocate was injured and could not appear at the last sitting in the Court below.

The points raised on appeal are all questions of fact which were before the Land Court, and, as a Court of Appeal, we cannot interfere with the findings of fact of the Court below. Mr. Moghannam very energetically tried to convince the Court that those findings of fact are actually points of law. The Court below carried out an inspection itself, made its own measurements and calculations and gave its decision on the strength thereof, and, that being the case, we are not in a position to interfere with its decision.

The appeal is therefore dismissed and the Judgment of the Land Court confirmed, with costs fixed at LP. 10 and LP. 5 fees for attending the hearing of this appeal.

Delivered this 21st day of June, 1938.

British Puisne Judge.

CIVIL APPEAL No. 142/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPLICATION OF :

Stealo Awad. APLICANT.

v.

1. T. Dounie,
2. B. Katinka,
3. Joseph P. Albina. RESPONDENTS.

Leave to appeal — Application made to Court of Appeal after refusal by District Court — Leave to appeal against order of remission of award — Of refusal to set award aside — Binding force of a long line of decisions relating to practice and procedure — Interest.

In dismissing an application for leave to appeal from a judgment of the District Court of Jerusalem, dated the 14th April, 1938 :—

HELD : 1. In view of the long line of decisions on this question, application for leave to appeal was properly made to the Court of Appeal after refusal by the District Court.

2. Leave to appeal was required in the present case as the order under review was a refusal to set the award aside, not an order of remission.

ANNOTATIONS :

1. On the binding force of a long line of decisions, see C. A. 96/36 (1 Ct. L. R. 39); H. C. 65/37 (1938, 1 S. C. J. 43); H. C. 4/38 (1938, 1 S. C. J. 91). See *per contra* C. A. 177/38 (28.vii.38). See also C. A. 178/38 (27.vii.38).

2. See C. A. 21/38 (1938, 1 S. C. J. 144) and case quoted therein on the distinction between remitting an award and setting an award aside.

FOR APPLICANT : Eliash.

FOR RESPONDENTS : Goitein — by delegation.

JUDGMENT:

Two preliminary objections have been raised, by Mr. Goitein :

The first point is that the Applicant cannot come to the Court of Appeal and apply for leave to appeal when his application for leave was refused by the District Court — he can either come to the District Court or to the Court of Appeal.

The second point is that this case is of the type of case in which leave

is not necessary, as the order of the District Court is for remitting the case and not setting aside the award of the Arbitration, and therefore leave to appeal against the order of remission is not necessary.

As regards the first point, we have decided to reject it, because it is very difficult to upset a long line of decisions relating to practice and procedure.

With regard to the second point, we have decided to overrule it, because the appeal is against an order refusing to set aside the award, not against an order of remission.

As regards the application for leave, we have decided to refuse it, as we think that the District Court were right in remitting on the point stated by them.

The District Court did not deal with the question of interest. When the case comes before them again, after remission and the issue of a new award, they should make their ruling on it — the present Applicant will be entitled to raise this point of interest again before the District Court when enforcement is applied for.

The Appellant will pay to the Respondents costs fixed at LP. 5.— and LP. 5.— fees for attending the hearing of this application.

Delivered this 21st day of June, 1938.

Acting Chief Justice.

HIGH COURT No. 44/38.

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

BEFORE : The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Shlomo A. Beibe. PETITIONER.

v.

1. Chief Execution Officer, Tel-Aviv,
2. Rachel Beibe. RESPONDENTS.

Religious Courts — Allegation that a person is a foreigner — Implied consent to jurisdiction — Maintenance.

In refusing an application for an order to issue to the First Respondent directing him to show cause why his order dated the 6th May, 1938, in Execution

File No. 17568/37, Tel-Aviv, whereby he ordered the execution of the judgment of the Rabbinical Court, dated the 14th November, 1937, should not be set aside and why the execution of the said judgment should not be stopped ; and that the Execution Officer, Tel-Aviv, be ordered to forward the Execution File No. 17568/37 to the High Court to form part of these proceedings as Petitioner has no money to make certified copies of the contents of the said file ; and that the execution proceedings be stayed pending the determination of this petition.

HELD : 1. When a person alleges that he is a foreigner he must prove it.

2.. A person who appears before a religious court must be considered to have consented to its jurisdiction.

3. Maintenance is one of the matters to which consent could be given to come within the jurisdiction of the religious court.

ANNOTATIONS :

1. *Cf.* A. A. 15/27 (C. of J. 487) where the Court drew the inference that an accused person was not a Palestinian from the fact that be was not habitually resident in Palestine on the 1st August, 1925.

2. To the same effect : H. C. 5/30 (C. of J. 131) ; and H. C. 34/35 (2 P. L. R. 345, P. P. 3.vii.35) ; but *cf.* C. A. 163/33 (P. P. 22.ii.35, C. of J. 1614 at p. 1622) and C. A. 12/37 (1937, 1 S. C. J. 235, 1 Ct. L. R. 44).

For conduct which cannot be construed as consent to the jurisdiction, see C. A. 127/26 (P. L. R. 109, C. of J. 1668) ; H. C. 29/30 (P. L. R. 462, C. of J. 1610).

3. See H. C. 70/28 (P. L. R. 342, C. of J. 1606).

FOR PETITIONER : Felman.

FOR RESPONDENTS : *Ex parte.*

ORDER :

This application is dismissed on the following grounds :—

(a) When a person says he is a foreigner he must produce his proof that he is a foreigner ;

(b) When he appears before a Religious Court and argues before it he must be considered to have consented to its jurisdiction ; and

(c) Maintenance is one of these matters to which consent could be given to come within the jurisdiction of the Religious Court.

The application is therefore refused.

Given this 21st day of June, 1938.

Acting Chief Justice.

PRIVY COUNCIL LEAVE APPLICATION No. 66/25.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice and Khayat, J.

IN THE APPLICATION OF :

Reuven Swatitsky — APPELLANT.

v.

Government of Palestine. — RESPONDENT.

Privy Council Appeals — Practice.

Application by Respondent for the issue of a certificate of non-prosecution under Article 24 of the Palestine (Appeal to Privy Council) Order in Council, 1924, refused.

ANNOTATIONS : *Vide* P. C. L. A. 171/37 (17.vi.38) and annotations.

FOR APPELLANT : Felman.

FOR RESPONDENT : Salant, J. G. A.

ORDER:

I am afraid that everybody concerned with this case, both the Appellant and the Respondent, have shown a considerable degree of negligence. What determines us in taking the decision that we do is that this case was before the Chief Registrar on the 25th February, 1938, and the Respondent agreed to the record as settled — he merely asked that there should be no further delay and that the final preparation and printing be carried out and the record despatched as early as possible.

It is now four months after that was done, the record was printed within the period stipulated by the Chief Registrar, but no certifying fees were paid until after a long delay.

In the circumstances, we think that the application of the Respondent will have to be refused. The Appellant will have his costs fixed at LP. 5 and LP. 5 fees for attending the hearing of this application.

Given this 21st day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 144/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Khaldi and Abdul Hadi, JJ.

IN THE CASE OF :—

As'ad Taha Ali Dajani. APPELLANT.

v.

1. Rifka Said Dajani in her capacity as guardian upon her children Farid, Subhi and Fatmeh, children of Sheikh Hassan Dajani.
2. Sheikh Rashid Hussein Dajani.
3. Sheikh Jamal Eddin Hussein Dajani. RESPONDENTS.

Claim to land — Effect of deed of partition on wakfieh — Findings of fact — Inspection.

In dismissing an appeal from a judgment of the Land Court of Jerusalem, dated the 31st March, 1938 :—

HELD : No authority was produced by Appellant to prove that the deed of partition was likely to invalidate the *wakfieh*.

ANNOTATIONS : On inspection, see note 1 to C. A. 134/38 (21.vi.38) *ante*.

FOR APPELLANT : Haddad.

FOR RESPONDENTS : Ibrahim Kamal for Respondent 1.
Other two Respondents waived their rights.

JUDGMENT:

We need not trouble you Ibrahim Eff.

This is an appeal from the judgment of the Land Court of Jerusalem whereby Plaintiff's claim that he is entitled to a share in a house situated at the Nebi Daoud Quarter was dismissed.

No authority was produced by the Appellant to prove that the deed of partition is likely to invalidate the *Wakfieh*.

The second and third grounds of appeal are only questions of fact and we cannot interfere with the findings of the Land Court on these points.

The Land Court carried out a local inspection and as a result came to the conclusion that the building in question is still in existence.

The appeal is therefore dismissed, and the Judgment of the Land

Court is confirmed with costs fixed at LP. 10 and LP. 5 fees for attending the hearing of this appeal.

Delivered this 22nd day of June, 1938.

British Puisne Judge.

CIVIL APPEAL No. 131/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice and Greene, J.

IN THE APPEAL OF :

1. Daoud Yasmini,
2. Hanna Izhaq,
3. Elias Kronfel,
4. Manuel Bandak. — APPELLANTS.

V.

1. Michel Haddad,
2. Christian Messerle — RESPONDENTS.

Breach of contract — Damages — Both parties in default.

In dismissing an appeal from a judgment of the District Court of Jerusalem, dated the 14th April, 1938 :—

HELD : Both parties being in default damages were not available.

ANNOTATIONS : — As readiness and willingness to complete the contract is a condition precedent to a claim for damages : C. A. 100/34 (2 P. L. R. 409, P. P. 29.xi.35, C. of J. 1934-6 145), following P. C. 47/32 (P. L. R. 831, C. of J. 406).

FOR APPELLANTS : Cattan.

FOR RESPONDENTS : Buxbaum.

JUDGMENT:

We are of opinion that this appeal must be allowed.

From the evidence before the District Court, we think the correct judgment should have been that both sides were in default — the Appellants were in default because they should have taken gravel at the place where it was crushed ; the Respondents were in default because they did not supply the gravel at the times it was demanded.

That being so, damages are not available, and the question of the measure of damages does not arise.

The appeal is therefore allowed, the judgment of the District Court is set aside, judgment is entered for the Appellants, and Respondent's claim dismissed. The Respondents will pay the Appellants costs fixed at LP. 10.— and LP. 5.— fees for attending the hearing of this appeal.

Delivered this 23rd day of June, 1938.

Acting Chief Justice.

P. C. L. A. No. 9
(CIVIL APPEAL No. 119/37).

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice and Greene, J.

IN THE APPLICATION OF :

Keren Kayemeth le Israel — PETITIONER.

v.

Mahmoud el Haj Naser and 61 others — RESPONDENTS.

Leave to appeal to Privy Council — Effect of withdrawal of motion.

In dismissing an application for conditional leave to appeal to His Majesty in Council against the judgment of the Supreme Court of Palestine dated the 27th April, 1938.

HELD : Petitioner had withdrawn his motion and could not ask for leave to appeal.

ANNOTATIONS : See annotations to P. C. L. A. 171/37 (*ante*, p. 399).

FOR PETITIONER : Eliash.

FOR RESPONDENTS : Bushnaq.

ORDER.

We need not trouble you Osman Kff. Bushnaq.

In this petition for leave to appeal to the Privy Council the judgment against which leave to appeal is being sought is in these terms :—

> "An application for withdrawal having been submitted by the Appellant, this appeal is struck out".

By an interlocutory judgment, some few weeks earlier, the major part of the present Appellant's claim had been dismissed, leaving only a

comparatively minor point still outstanding on which the Court said it was prepared to hear further argument.

When the case was listed for hearing on the 27th April last, the Appellant withdrew his appeal. We think that a withdrawal means that everything goes and whilst it is true that an interlocutory judgment is included in a final judgment, yet a withdrawal of the appeal must include the whole appeal, and we do not think that a party can appeal against a judgment when he has withrawn his motion and with his own consent the appeal has been struck out.

It is unfortunate but we think that this petition will have to be refused. The Appellant must pay the Respondents costs fixed at LP. 5 and LP. 5 fees for attending the hearing of this application.

Given this 23rd day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 118/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

1. Bandali Khoury,
2. Salim Khoury. APPELLANTS.

v.

Kazia Khoury. RESPONDENT.

Probate of will — Constitution of Court — Removal of executors and of administrators contrasted — Evidence to justify finding of fact.

In allowing an appeal from a decree of the District Court of Jerusalem, dated the 2nd April, 1938, and in setting aside the decision of the President, District Court :—

HELD : 1. The application was made under the Succession Ordinance and the Court was, therefore, properly constituted by the President sitting alone.

2. Executors are appointed by the testator who, presumably, has the fullest confidence in them and for that reason they can only be removed by the Court on very serious grounds.

3. The evidence before the President, District Court, was not sufficient to justify his findings of fact.

C. A. 70/33 (2 P. L. R. 119, C. of J. 1678) and *Cf.* C. A. 118/27 (P. L. R. 259, C. of J. 1061), H. C. 47/30 (P. L. R. 491, C. of J. 50).

FOR APPELLANTS : Cattan.

FOR RESPONDENT : Hanania.

JUDGMENT:

This is an appeal from a judgment of the District Court of Jerusalem, removing the two Appellants from their positions as executors under the Will of the late Shukri Khoury.

The late Shukri Khoury, by his last Will dated 23.2.1932, appointed the two Appellants, his brothers, and the Respondent, his widow, as his executors, and ordered that in the event of disagreement, any two of them could act. The Will was duly confirmed by the appropriate Religious Court, but the administration was later removed under the jurisdiction of the District Court.

The estate was in debt to a considerable amount, stated to be some £. 5000, and the administration was apparently a matter of considerable difficulty ; some £. 4000 worth of debts have however been paid off. Disagreements arose between the Appellants on the one hand and the Respondent on the other, and finally, on the 28th October, 1938, the widow filed an application in the District Court, under the Succession Ordinance, 1923 alleging mismanagement of the estate and various derelictions of duty on the part of the Appellants, and asking for the latters' dismissal from the office of Executors, and the appointment, of herself and someone else to be nominated by the Court to act as executors of the Will.

The District Court appointed a temporary administrator of the estate by an interlocutory order, and finally on 2nd April, 1938, granted the widow's petition and removed the two Appellants from the office of executors of the Will. The learned President, sitting alone, stated that he was satisfied "from the evidence produced and accounts, audit etc.", that the Appellants had not given proper attention to the management of the estate, had been guilty of mismanagement, and that their continuance in office would be detrimental to and not for the benefit of the estate.

On appeal to this Court, two points were taken by the Appellants' Counsel, and the first one can be easily disposed of. It has been argued that this was not an application under the Succession Ordinance, and therefore that the learned President could not sit alone. It is quite obvious, though, that this application concerns the administration of an estate, and is therefore a matter under the Succession Ordinance, and the Court was accordingly properly constituted.

The main ground of appeal is that there was no evidence to justify the findings of fact made by the learned President, and in any case, supposing that there was evidence, yet this evidence was in no way sufficient for a revocation of Probate to the two Appellants.

The Respondent has called our attention to various items mentioned in the Auditor's report, payments made to one of the executors, Bandali Khoury, and we entirely agree with the learned President's remarks that they are payments which would never have been authorised by the District Court, and for which an executor should never have put in a claim. They were, however, passed by the Religious Court which was then in charge of the administration and they cannot now be queried.

It must be remembered, contrary to the case of administrators, that executors are appointed by the testator, being persons in whom, presumably, he has full confidence, and for that reason, they can only be removed by the Court on very serious grounds. They are, however, always liable to be sued by a beneficiary if by mismanagement they cause a loss to the estate.

In the present case, we do not think that the evidence before the learned President was sufficient to justify his findings of fact. There appears to have been a succession of quarrels between the three executors, but the evidence of the widow, and such evidence as may be gathered from the accounts is certainly insufficient to support the decision to remove the two Appellants from their executorships. Neither is the fact that the Appellants live in Jaffa of any assistance to the Respondent — Jaffa is but a short distance from Jerusalem or Jericho, where the properties are situated. It might be another matter if they resided in another country.

The appeal must be allowed and the decision of the learned President, dismissing the two Appellants from the position of executors, is set aside. The costs of all parties, assessed for each side at LP. 10 and LP. 5 advocate's fees to come out of the estate.

Delivered this 24th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 133/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Khayat, JJ.

IN THE APPEAL OF :

1. Costandi Habib Hawa,
2. Jalilah Habib Hawa,
3. Nassibeh Habib Hawa,
4. Hassan Habib Hawa. APPELLANTS.

v.

1. Raja S. Rayyes, in his personal capacity and on behalf of the heirs of his father Salim, Rayyes,
2. Administrators of the estate of Iskander Kossab. RESPONDENTS.

Prescription — Commencement of period — Mejelle, Art. 1667 — Date from which claimant could sue — Lack of consideration occasioned by Plaintiff's own default — Estoppel — Return of purchase price — Advocates' fees — Costs.

In allowing an appeal from a judgment of the District Court of Haifa, in its appellate capacity, dated the 14th April, 1938, and in varying the judgment of the lower Court :—

HELD : 1. Prescription did not begin to run until the time when Respondents could sue, *i. e.* form the expiration of the power of attorney.
2. The failure of consideration was occasioned by Respondents' default and Respondents were estopped from setting up their own default as a ground for the recovery of the money paid.
3. (Regarding fourth Appellant). Advocates fees are awarded to the client and an advocate is not entitled to them.

ANNOTATIONS :

L. A. 46/36 (3 Ct. L. R. 17, Ha. 17.ii.38) are the proceedings wherein the power of attorney was held to be ineffective after fifteen years. This case was followed in C. A. 92/38 (*ante*, p. 310).

1. See L. A. 45/29 (C. of J. 1499) and C. A. 92/38 (*supra*) to the same effect.
2. See annotaions to C. A. 108/38 (*ante*, p. 345).
3. *Cf.* the case of experts' fees : H. C. 38/38 (1938, 2 S. C. J. 24).

FOR APPELLANTS : Nos. 1–3 — Abcarius Bey,
No. 4 — in person.

FOR RESPONDENTS : Olshan.

JUDGMENT:

This is an appeal by leave from a judgment of the District Court, Haifa, confirming a judgment of the Magistrate's Court.

The facts are as follows :—

In the year 1327, the ancestor of the present Appellants and others agreed, by means of an irrevocable Power of Attorney, to sell to the late Salim Rayyes and the late Iskander Kossab certain shares in lands duly described in the Power of Attorney, in consideration of the sum of 47,600 Turkish piastres, which amount was duly paid and received.

Some twenty years later the holders of the power endeavoured to exercise it, but after protracted litigation involving three successive appeals to this Court, it was held that the power was prescribed after fifteen years from its date, and became void and ineffective.

The representatives of the late Salim Rayyes and Iskander Kossab thereupon entered an action in the Magistrate's Court against the present Appellants, claiming from them the sum of LP. 71.397 m. being their shares of the purchase price received by their ancestor. The Magistrate gave judgment in favour of the present Respondents, holding that prescription on the debt only began to run fifteen years after the date of the Power of Attorney, that is to say, from 1342 fiscal year, or 1345 Hejira, and since fifteen years from this latter date had not expired the action was maintainable. The District Court confirmed this view, but gave leave to appeal to this Court.

Many points were raised in the notice of appeal, but with the exception of one, namely prescription, have all been dropped.

Abcarius Bey for the Appellants admits all the facts but argues that prescription began to run from the date of the power, and that now they cannot be sued. He says that the Appellants were left in undisrtubed possession of the Land, that they had done all that they had to do under the power, that the Respondents have been guilty of negligence in that they did nothing for all these years and slept on their rights for this period. He says, truly, that the Respondents could have got the land at once, and since they are suing on an admission in a document, time begins to run from the date of the admission. And finally he argues that the Respondents never had any right to recover the money from the Appellants since the latter had committed no default, and had not in any way prevented the Respondents from exercising their rights.

Mr. Olshan for the Respondents replies that they could only claim the money when the contract was abandoned or became ineffective, — that their claim is not based on the Power of Attorney, but is a claim for money had and received — that if they had sued before the expiration of fifteen years they would have lost on the ground that

there was still a good contract existing, and it was not until there was a total failure of consideration that a cause of action arose, that is, not until the power became prescribed.

Article 1667 of the Mejelle states that prescription starts from the date when one can claim.

This is not an easy question, but after consideration we think that the Respondents' arguments are correct, and that prescription did not begin to run against them until the time when they could sue, and that they could not sue until the power became ineffective by lapse of time. Their claim therefore was not prescribed.

But this does not dispose of the case. There was a failure of consideration, but that failure was caused entirely by the default of the Respondents, and it seems to us that they are estopped from setting up their own default as a ground for the recovery of the money paid by them. There is no act or default on the part of the Appellants which can support this claim, and particularly after this long lapse of time. We think that the Respondents never had any right to sue.

Holding this view the judgments of the Courts below cannot be supported. The appeal of the first three Appellants must be allowed, the judgments of the Magistrate's Court and the District Court set aside, and judgment entered for these Appellants, the claim of the Respondents being dismissed. The Respondents must pay to the Appellants all costs both here and below assessed at LP. 10. together with LP. 5. advocate's fees. The provisional attachment must be released.

With regard to the appeal of the 4th Appellant, this was in regard to a claim by him that a sum of LP. 30. awarded to him as advocate's fees in the previous hearings of the land case between these parties, and attached by the Respondents in the action, should not have been attached and should be released. As already intimated to him, his appeal fails on the ground that the advocate's fees were awarded by the judgment, not to him, but to his clients, and are a debt due to the clients. His appeal is dismissed, but without costs, since his intervention occasioned no extra costs to the Respondents, and in any case the point is now academic the provisional attachment being released on the allowing of the main appeal.

Delivered this 26th day of June, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 55/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

Ya'coub el Jamal. APPELLANT.

v.

The Attorney General. RESPONDENT.

Town Planning — Amendment of Charge — Description of premises — Town Planning Ordinance, Sec. 38, H. C. 40/30 — Whether judgment in personam or in rem.

In dismissing an appeal from a judgment of the District Court of Jaffa, sitting in its appellate capacity, dated the 30th April, 1938, whereby Appellant was convicted under Section 38 of the Town Planning Ordinance, and ordered to demolish the two rooms he built on the western side of his house.

Considered : H. C. 84/30 (P. L. R. 510, C. of J. 1758).

HELD : 1. There had been no amendment of the charge after the beginning of the trial — only a further description of the property.

2. Sec. 38 of the Town Planning Ordinance had not been wrongly applied as the proceedings had been brought against Appellant *in personam.*

ANNOTATIONS : The case considered in the above judgment is Elk *v.* Chairman of the Local Town Planning Commission, Jm. (H. C. 84/30) and not Aronson & an. *v.* Director of Lands (H. C. 40/30).

FOR APPELLANT : Hawa.

FOR RESPONDENT : Akel.

JUDGMENT:

Three points have been raised in this appeal.

The first is that the prosecution have no power to amend the charge once the trial began before the Magistrate. The case was originally sent back because the two rooms which the Magistrate has ordered to be demolished were not sufficiently described to enable execution to issue. The second time the case came before the Magistrate, the description of the property was given more fully. We do not consider this an amendment — it is merely by way of further description.

The second point is that Section 38 of the Town Planning Ordinance has been wrongly applied in view of the fact that the High Court

in H. C. 40/30 Rivka Aaronson and another *v.* The Director of Lands held that that Section only applied *in personam* and not *in rem*. If, however, we turn that to the judgment of Mr. Bourke which was adopted by the learned Magistrate when the case came back for retrial, we find that he states there as a fact :— "I find as a fact that the accused was engaged in the construction of the two rooms". It is clear therefore that the present Appellant was the person rightly sued.

The third point, I am afraid, is not very clear and it really depends on the successful fate of the second point, if the second point fails, the third point also fails, and it therefore does not arise.

The appeal is dismissed.

Delivered this 27th day of June, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 56/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

Abdel Rahman Nageeb. APPELLANT.

V.

The Attorney General. RESPONDENT.

Criminal appeal — Escape from custody amounts to abandonment,

In dismissing an appeal from a judgment of the District Court of Nablus, dated the 18th May, 1938, whereby Appellant was convicted of :

(1) Obtaining money by false pretences, contrary to Section 301 of the Criminal Code Ordinance, 1936 ; and

(2) Stealing property entrusted to him, contrary to Section 276(b) of the Criminal Code Ordinance, 1936 ;
and sentenced to four years' imprisonment on each count, term to run concurrently.

HELD : Appellant having escaped from custody he must be deemed to have abandoned the appeal.

ANNOTATIONS : CR. A. 168/36 (1937, 1 S. C. J. 439, P. P. 30.viii.37) is to the same effect.

FOR APPELLANT : Kamleh.

FOR RESPONDENT : Crown Counsel (Hogan).

JUDGMENT:

In this case, the Appellant has escaped from custody, and in these circumstances, he must, I think, be deemed to have abandoned his appeal.

The appeal is therefore dismissed.

Delivered this 27th day of June, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 57/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Curry and Khaldi, JJ.

IN THE APPEAL OF :

Hassan Hussein Sharar. APPELLANT.

v.

The Attorney General. RESPONDENT.

Adjournment to call witnesses refused — Arrangements to be made before trial — Court has no power to summon witnesses from abroad — Evidence to support a conviction — Sentence.

In dismissing an appeal from the judgment of the Court of Criminal Assize, sitting at Jerusalem, dated the 30th day of May, 1938, whereby Appellant was convicted of manslaughter, contrary to Section 212 of the Criminal Code Ordinance, 1936, and sentenced to fifteen years' imprisonment.

HELD : 1. Appellant should have made arrangements before the trial for calling witnesses.

2. The Court had no power to call witnesses from Damascus.

ANNOTATIONS : 2. CR. A. 24/38 (1938, 1 S.C.J. 143) is to the same effect.

FOR APPELLANT : Moghannam.

FOR RESPONDENT : Crown Counsel.

JUDGMENT:

The main ground of Appeal in this case is that the Court refused an adjournment to the accused to call his witnesses from Damascus. This was very fully dealt with by the Trial Court, and that Court

pointed out to the accused that the question of calling witnesses from Damascus was only raised at the trial. and if he wanted these witnesses to be present at the trial he must have made his arrangements before hand. The Court also pointed out that they have no power to call these witnesses from Damascus.

There was ample evidence before the Court below on which they could convict. The accused was also identified in Hebron at the time of the offence as being the person who actually committed it.

The last ground of appeal is that the sentence is excessive. The Court, in their judgment, stated that this is a border-line case, and the accused is fortunate enough not to have been convicted of murder. With this finding, we see no reason to interfere with the judgment of the trial Court.

The appeal must be dismissed and the conviction and sentence are confirmed.

Delivered this 27th day of June, 1938.

British Puisne Judge.

CRIMINAL APPEAL No. 61/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Khayat, JJ.

IN THE APPEAL OF :

Ibrahim Abdel Hafiz Kakouni. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal — Sentence of detention under Young Offenders Ordinance, whether appealable under sec. 5(1) *of the Magistrates Courts Jurisdiction Ordinance,* 1935 *— Appeal a statutory right.*

In dismissing an appeal from a judgment of the District Court of Jaffa, sitting in its appellate capacity, dated the 16th May, 1938, whereby Appellant was convicted of seditious conspiracy and libel, contrary to secs. 59(c) and 12 of the Criminal Code Ordinance, 1936, and sentenced to one year's detention in a reformatory school :—

HELD : 1. There was no appeal as of right from a sentence of detention under the Young Offenders Ordinance.

2. *Quaere* whether leave to appeal could be granted in such a case.

ANNOTATIONS: An identical decision was given in the case of Kefafi *v.* A. G. (CR. A. 59/38) delivered on the same date.

1. Similar decisions were given in C. A. 34/35 (P. P. 23.iii.36, C. of J. Vol. VIII, 515) — *no appeal from judgments of the District Court on appeal from the Rents Tribunal;* C. L. A. 7/34 (2 P. L. R. 230) — *from refusal of President District Court to grant leave to appeal* (and see notes to last mentioned case); C. A. 71/33 (2 P. L. R. 34, P. P. 2.ii.34, C. of J. 1665) — *from District Court judgment on case stated by stamping commissioners;* C. A. 148/38 (*post*, p. 447) — *from refused of President, District Court, to grant leave to appeal.*

2. It has been held in C. A. 177/38 (28.vii.38) that no appeal lies from a decision of a District Court sitting in an appellate capacity.

FOR APPELLANT: Haddad.

FOR RESPONDENT: Crown Counsel (Hogan).

JUDGMENT.

We need not trouble you Mr. Hogan.

This appeal depends upon the point whether a sentence of detention under the Young Offenders Ordinance is appealable under Section 5(1) of the Magistrates Courts Jurisdiction Ordinance, 1935. In the first place, we must again remark that an appeal is entirely a statutory right given by the law, and unless it is given by law there can be no right of appeal.

Now it is quite clear from the Young Offenders Ordinance that detention is an alternative punishment to imprisonment. Cases have been quoted to us from the English Law to the effect that such sentences as preventive detention are appealable, but these cases depend upon the statute law.

We are quite satisfied there is no statutory provision in this country which enables a person sentenced to detention or for punishment which is a fine not exceeding LP. 10 or imprisonment not exceeding seven days, to appeal against such punishment as of right. No such person has any such right of appeal. His remedy, if he feels aggrieved would appear to be to apply for leave to appeal under Section 5(5) of the Magistrates Courts Jurisdiction Ordinance, 1935, but, as this point is not definitely before us at the moment, I do not bind myself as to whether this Section can be invoked or not.

The appeal is therefore dismissed — in the circumstances, the period of detention will commence to run from the date of the original conviction.

Delivered this 27th day of June, 1938.

Acting Chief Justice.

CRIMINAL APPEAL No. 62/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Greene and Frumkin, JJ.

IN THE APPLICATION OF :

The Attorney General. RESPONDENT.

v.

Alexander Aharon Reich RESPONDENT.

Immigration — Illegal entry and stay — Whether prescribed — Immigration Ordinance, sec. 12 — Two elements of the offence — Continuing offences.

In allowing an appeal from the judgment of the District Court at Tel-Aviv, dated the 24th May, 1938, whereby the Respondent was acquitted of the charge brought against him under Section 12(2) of the Immigration Ordinance.

HELD : The offence consisted of two elements : (1) the remaining, and (2) being found in Palestine. Remaining in Palestine is a continuing offence and a person commits the offence during every day on which he remains in Palestine illegally.

Followed : CR. A. 51/38 (p. 367, *ante*).

ANNOTATIONS : *Vide* CR. A. 51/38 (*supra*) and annotations.

The proceedings before the District Court (CR. A. D. C., T. A. 4/38) are reported in the *Palestine Post* of the 21st February, 1938.

FOR APPELLANT : Crown Counsel (Hogan).

FOR RESPONDENT : Kaduri.

JUDGMENT:

This appeal is allowed.

Two grounds were raised by the Crown Counsel. Firstly, that this offence, under Section 12(2)(b) of the Immigration Ordinance, is a continuing offence in that the offence, or part of the offence, is "remaining" in Palestine, and "remaining" connotes an offence which takes place every day if one remains in Palestine. Secondly, that this offence is not prescribed until the person remaining in Palestine is actually found in Palestine.

As we stated in a previous case, the offence consists of two elements : (1) the remaining, and (2) being found in Palestine, and it is unnecessary for me to repeat the remarks made on this subject. That was our

judgment and remains our judgment now and will continue to be our judgment, and we agree that remaining in Palestine is a continuing offence and that a person commits the offence during every day on which he remains in Palestine illegally.

For these reasons, the appeal must be allowed. Both the Magistrate and the District Court were wrong and their judgments must be set aside. The Respondent must be convicted of an offence under Section 12(2)(b) of the Immigration Ordinance, and in the circumstances, the judgment of this Court will be a fine of LP. 10 or six weeks imprisonment in default of payment of the fine. We also recommend him for deportation from the country. The Respondent is given seven days from today to pay the fine.

Delivered this 28th day of June, 1938.

Acting Chief Justice.

HIGH COURT CASE No. 46/38.

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

BEFORE : The Acting Chief Justice and Greene, J.

IN THE APPLICATION OF :

Shlomo Ben Yossef. PETITIONER.

v.

Superintendent of Prison, Acre. RESPONDENT.

Military Courts — Palestine (Defence) Order in Council, 1937, Arts. 2, 3, 6, 10, 12 — Defence Regulations — "Law" within the meaning of Art. 2 — Regulations need not be proclaimed — Nor billed or approved by Advisory Council — Orders of Military Courts cannot be challenged.

In dismissing a petition for an order *nisi* to stay proceedings of execution of death sentence passed by the Military Court of Haifa :—

HELD : 1. There is nothing in the Palestine (Defence) Order in Council which says that Defence Regulations must be proclaimed.

2. In view of Art. 12 of the Order in Council the Regulations did not have to be published for one month or approved by the Advisory Council.

3. No judgment, order or proceedings of a Military Court could be called in question by any Civil Court.

FOR PETITIONER : Felman, *ex-parte*.

JUDGMENT:

This is an application on behalf of one, Shlomo Ben Yossef, asking for an order *nisi* directed to the Superintendent Central Prison, Acre, to stay proceedings of execution of a sentence of death passed upon the applicant by the Military Court of Haifa.

The Palestine (Defence) Order in Council, 1937, Part II thereof, was brought into force on the 24th March, 1937, by proclamation by the then High Commissioner, in accordance with Article 3 of the Order in Council.

Art. 6(1) empowers the High Commissioner to make such regulations (called in the Order "Defence Regulations") as appear to him in his unfettered discretion to be necessary or expedient for, amongst other things securing the public safety, the maintenance of public order, and the suppression of mutiny, rebellion and riot.

By subsection 2 of this Article, without prejudice to the generality of the powers conferred by the preceeding subsection, Defence Regulations may — "(g) provide —

(iii) for the trial by such military courts as may be established by Defence Regulations, of persons committing offences against Defence Regulations either before or after the date of the establishment of such courts, and of persons committing offences under any other law after that date :

(iv) for the imposition... by any military court established as aforesaid, of such punishments as may be prescribed, in the case of offences against the Defence Regulations, by Defence Regulations....

(viii) that judgments, orders and proceedings of such military courts shall not be called in question, whether by writ or otherwise, or challenged in any manner whatever by or before any court, otherwise than by way of appeal provided for by Defence Regulations."

Subsection 4 of Article 6 is :—

"A Defence Regulation or any order, rule or by-law made in pursuance of such a Regulation shall have effect notwithstanding anything inconsistent therewith contained in any law, and any provision of a law which may be inconsistent with any Defence Regulation, or any such order, rule or by-law shall, whether that provision shall or shall not have been amended notified or suspended in its operation under this Section, to the extent of such inconsistency have no effect so long as such Regulation, order, rule or by-law shall remain in force."

and by Article 2 of the Order, "law" includes any order of His Majesty in Council, and any ordinance, Ottoman Law, order, rule, regulation, by-law or other law for the time being in force in Palestine.

Article 12 of the Order provided :—

> "12. Any document purporting to be an instrument (whether legislative or executive) made or issued in pursuance of, or for the purposes of
>
> (1) this order, the Order of 1931, the order of 1936, or
>
> (2) any provision contained in, or having effected by virtue of Defence Regulations, or any Regulations made under the Order of 1931 or the Order of 1936.
>
> shall be deemed to be an instrument validly made or issued as aforesaid, and the validity of the provision contained in the document shall not be called in question in any court, or in any other manner whatsoever."

On the 11th November, 1937, the Defence (Military Courts) Regulations 1937, were issued under Arts. 6 and 10 of the Order in Council, setting up Military Courts for the trial of certain offences specified in the Regulations.

On the 17th November, 1937, Defence (Military Courts) (Amendment) Regulations were issued, Regulation 9 (a) of which states :—

> "9(a). No judgment, order or proceeding of a Military Court shall be called in question, whether by writ or otherwise or challenged in any manner whatever by or before any Court".

It is argued that Regulations must be proclaimed. We do not agree, as there is nothing in the Order in Council which says so.

It has been further argued that the Regulations must be published for one month and approved by the Advisory Council. Again, we do not agree for Article 12 of the Order in Council effectively disposes of this argument. Any Regulation is deemed to be validly made and issued.

And the Order in Council is a legislative act by His Majesty in Council and is not an act of the legislature of Palestine.

It is quite clear that by the Palestine (Defence) Order in Council, 1937 and by the Regulations made thereunder, no judgment, order or proceeding of a Military Court can be called in question by any Civil Court whatever.

The application for an order *nisi* is therefore refused.

Given this 28th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 125/38

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL :

1. Khalil Ali Abu Siseh,
2. Yousef Ali Abu Siseh. APPELLANTS.

v.

1. Ismail Yousef El Najjar.
2. Mustafa Hussein el Najjar.
3. Jibril Hussein el Najjar.
4. Hassan Abdul Rahman Yousef el Najjar. RESPONDENTS.

Title to land — Evidence against registered title — Whether land included in registration — C. A. 228/37.

In dismissing an appeal from a judgment of the Land Court of Jaffa, dated the 29th March, 1938 :—

HELD : The existence of a difference between the registered and actual area did not mean that the seven plots situate in that locality were not registered.

ANNOTATIONS : C. A. 228/37 is reported on p. 99, *ante*.

FOR APPELLANTS : Germanus, Kalefawi.
FOR RESPONDENTS : Husseini.

JUDGMENT:

The two Appellants in this case, together with another person Khamaf Ali Abu Siseh, asked in their statement of claim dated the 27th September 1936, that judgment be given in their favour ordering the Respondents to refrain from interfering with their enjoyment in their shares in the seven plots of land claimed.

2. The Land Court, Jaffa, heard the Plaintiffs' (Appelants') action and on the 29th March, 1938, gave its judgment, the relevant part of which is as follows :—

> "With regard to the other two Plaintiffs their claim is on an entirely different posting. They claim that they bought by unofficial deed of sale from a third party who is an heir of the wife of Abdalla. In view of this it is difficult to see how they can sustain their claim against the Defendants who derive their title from a registered title deed and we therefore hold on the authority of Civil Appeal No.

228/37, that they cannot attack a registered title deed by oral evidence of possession. Their claim is therefore dismissed with costs and advocate's fees of LP. 3".

3. The Plaintiffs (Appellants) appealed against the said judgment of the Land Court — this present appeal which is before us.

4. Counsel for the Appellants in his pleadings before us said that the whole lands of the village were divided formally into four localities known as the Shamalieh, Ginoubieh, Sharkieh and Cheraieh, and were registered in the names of eighteen persons of the villagers, and that the seven plots in dispute, although they were included in the Shamalieh locality when the division took place, were not included in the registration of the said locality, because the Shamalieh locality was registered with nearly an area of 150 dunams, whereas the area of the lands comprised in that locality, including the lands in dispute, is more than 600 dunams, and that this difference in the area must be taken to mean that the seven plots in dispute are not registered, and the Land Court went wrong in its judgment where it held that these plots were included in the registration.

5. With this contention of Counsel for Appellants, we are unable to agree, because the existence of a difference in the area of the Shamalieh locality as it is registered and its true area, even if this statement is correct, does not mean that the seven plots in dispute — especially when he admitted that these plots were included in the Shamalieh locality that has been registered — are not included in the registration.

6. For those reasons, we hold that the appeal must be dismissed and the judgment of the Land Court confirmed with costs fixed at LP. 10 and LP. 5 for attending the hearing of this appeal.

Delivered this 29th day of June 1938.

Acting Chief Justice.

CIVIL APPEAL No. 126/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Sa'adiah Paz. APPELLANT.

v.

1. Salim Mustafa el Zeidan,
2. Hassan Mustafa el Zeidan,
3. Kamel Suleiman Hajir,
4. Ahmad Suleiman Hajir,
5. Raja Suleiman Hajir,
6. Jum'a Mahmoud Hajir. RESPONDENTS.

Damages — Distinction between liquidated damages and penalties — C. A. 191/37, C. A. 20/38 — Measure of damages under Palestine law — English law not applicable — C. A. 147/26 — C. P. C. 108–110 — Costs.

In dismissing an appeal from a judgment of the District Court of Haifa, dated the 29th March, 1938 :—

HELD : 1. The distinction between penalties and liquidated damages is now settled in Palestine law.

2. The amount stipulated in the contract was a penalty as it was not in the contemplation of the parties that the land would rise in value to such an extent.

3. (Not following C. A. 147/26). In assessing the actual amount of damage in respect of a breach of contract, English law is not applicable and only the actual loss suffered is payable, not loss of profit.

Considered : C. A. 191/37 (P. P. 6–9.xii.37, 2 Ct. L. R. 169, Ha. 23.xii.37). C. A. 20/38 (1938, 1 S. C. J. 350).

Not followed : C. A. 147/26 (P. L. R. 116, C. of J. 378).

ANNOTATIONS : Earlier proceedings : C. A. 118/36 (1937, 1 S. C. J. 211; 2 Ct. L. R. 36).

1–2. See C. A. 20/38 (*supra*) and annotations, and C. A. 135/38 (29.vi.38).

3. Unless the breach was committed *mala fide* : C. A. 54/38 (*ante*, p. 268).

The principle of not following a case not fully argued is also adopted in H. C. 40/38 (20.vi.38).

FOR APPELLANT : Eliash, Feiglin.

FOR RESPONDENTS : Koussa.

JUDGMENT.

This is an interesting case of some difficulty, but we have been much assisted in its solution by the excellent manner in which it has been argued by counsel on both sides. It is an appeal from a judgment of the District Court, Haifa, in which the Appellant, who was then plaintiff, did not succeed in his claim against the Respondent for the sum of LP. 300 stated to be liquidated damages in the contract between them, but only succeeded in obtaining judgment for some smaller sums, being the actual amounts expended by him in respect of the contract.

When this case was previously before this Court there had been a disagreement between the two judges in the District Court, one holding that the action was premature. This Court sent the case back for retrial holding it was properly brought.

The Appellant has made a formal point that there is no distinction in Ottoman Law between a penalty and liquidated damages but very properly has not attempted to argue this point. It could not very well now be argued because two cases — C. A. 191/37 Farouki *v.* Ayyoub followed by Zahra Y. Akel *v.* Khalil Ibrahim Abu Alayyan (C. A. 20/38) have recently been decided by this Court in which it has been held that this distinction does exist in this country, and that must be the Law of this country now until it is set aside by a higher authority. Whatever the opinion of individual judges may be — and though I did not sit on either of these appeals, I am far from saying that I disagree with them — every Court is now bound to follow these judgments, and we see nothing to justify us in not following these decisions.

The second point taken by the Appellant is that in this case the amount claimed was in fact liquidated damages and not a penalty. The District Court held that it was a penalty on the ground that this sum of LP. 300.— was payable if the legal costs and the *Werko* and *bedl il misl* were not paid. To our minds the deciding factor is that the sum of LP. 300.— is more than three times the contract price for the sale of the land and we do not think that it was in the contemplation of the parties that the land would rise in value to such an extent within so short time because, if such an excessive rise had been anticipated, then we have little doubt that the price would have been very much higher.

The Appellant, however, argues that, if it is a penalty, then the English Law as to the damages should apply. This rule is that where any damages are stipulated in a contract, then the

measure of damages is the difference between the contract price and the price obtainable at the time of breach. He goes on to say that if the English Law is not applicable then, even under the Civil Procedure Code, he can claim damages for consequential loss. It may be convenient here to set out the provisions of the Code on this point :

> *Art.* 108 : Damages may be awarded against a contracting party for non-performance or delay in the performance of a condition of the contract even though he has not acted in bad faith. Provided that, if such non-performance or delay was due to causes outside his control, damages shall not be awarded against him.
>
> *Art.* 109 : If the non-performance of an obligation be not due to bad faith on the part of the person bound to perform it, the damages awarded against him shall be equivalent only to the direct and determinate loss suffered by the other party owing to such non-performance.
>
> *Art.* 110 : If the non-performance of the obligation be due to fraud or bad faith on the part of the person bound to perform it, he shall be liable to pay damages which shall include both direct loss caused to the other party by such non-performance and also profits of which he may have been deprived owing to such non-performance.

Article 46 of the Palestine Order in Council 1922 states that if there is no Ottoman Law on the subject, then the Courts of Palestine shall apply the principles of English common law and equity. Here, however, there is an Ottoman Law and the manner of calculating damages is not really an equitable rule, and it does not follow in our opinion that because the Law of this country recognizes a distinction between a penalty and liquidated damages, then necessarily the English rule of assessment must follow — they are two totally different principles and we think therefore that the Ottoman Law in this respect has not been superseded by English principles as to the measure of damages.

Now to obtain damages for any expected profits under the Ottoman Law there must be bad faith on the part of the party committing the breach. Here the District Court had found that there was no allegation of bad faith made by the plaintiff. This is a finding of fact and we are not prepared to interfere with it.

There is however one case decided some years ago by this Court which has been quoted to us : Zeide *v.* Alkalai (C. A. No. 147/26). In that judgment this Court held that if a contract for the sale of land is broken the party injured has a right in the absence of any agreement for damages, to be compensated in damages, and the measure would be the difference between the agreed price and the estimated

market price of the land at the time when the contract was broken. We have read the Judges' notes of the hearing of this case and it was somewhat sketchily argued in Court ; it appears that no reference was made to articles 109 and 110 of the Civil Procedure Code. If reference had been so made, then we think that the result might well have been different. In our opinion this case must now be considered as no longer good law. In the result we think that only the actual loss suffered is payable and not profits which might have been made if the contract had not been broken. We think that the District Court arrived at a correct result in its judgment and the appeal must be dismissed.

With regard to the cost the Appellant has argued that, in any case, owing to the disagreement in the first trial in the District Court, he had to appeal, and therefore that in any case he should get his costs of the first appeal. The Respondent replies that the Appellant did not ask for appeal costs in the District Court, and, secondly, that he lost most of his claim there. In our first appeal judgment we made an order : "Costs to follow the result". We think that there is nothing to cause us to alter the usual rule which is that the losing party pays the costs. The Appellant will get the costs allowed to him by the District Court in respect of the second trial there but will pay the costs of this appeal in this Court assessed at LP. 10.— together with LP. 5.— advocate's fees. Those costs to be set off one against the other.

Delivered this 29th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 128/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Shabetay Drory. — APPELLANT.

v.

1. Solel Boneh, Ltd., Haifa,
2. Aguda Hadadith "Geulim", Baith Meshutaph, Hadar Hacarmel Ltd., Haifa. — RESPONDENTS.

Bills of exchange — Plea of failure of consideration on promissory note — Subsequent endorsement by payee — Collusion — Bills of Exchange Ordinance, secs. 28(2), 35(2), *— Endorsement after maturity — Negotiation under circumstances amounting to fraud — Defect of title — Chalmers, Byles on Bills of Exchange.*

In dismissing an appeal from a judgment of the District Court of Haifa, in its appellate capacity, dated the 4th April, 1938, and in remitting the case to the District Court with directions :—

HELD : The indorsers of the notes, by indorsing them after maturity knowing that a defence of failure of consideration had been raised, negotiated them under circumstances amounting to fraud and their title had thereby become defective so that first Respondents did not acquire any better title to the notes.

ANNOTATIONS : See C. A. 126/31 (C. of J. 238).

FOR APPELLANT : Agranat.
FOR RESPONDENTS : No. 1. — Shapiro.
No. 2 — No appearance.

JUDGMENT:

This is a difficult case, as indeed most cases under the Bills of Exchange Ordinance, are, but it has been very well argued by Counsel on both sides, and their arguments have been of much assistance to us.

The facts are complicated, but the following is a sufficient *resumé* of them. The Appellant had signed as maker four promissory notes which were guaranteed by the second Respondents, to the order of Missrad Kablani Co-Operative Poalei Haifa Ltd., (hereinafter called the Indorsers). These notes were not met on maturity and the Indorsers entered an action on them against the Appellant and the second Respondents in the Magistrate's Court. During the hearing of the action, the defence raised, amongst other items, the point that a building in payment of the construction of which the promissory notes had been given, had not been completed, and that therefore there was a failure of consideration and that they were not liable on the notes. The Indorsers thereupon withdrew their case, and indorsed the notes to the first Respondents, who in their turns entered a fresh action in the Magistrate's Court on these same notes against the same defendants, who raised the same defence as in the first action against them, as well as the defence of collusion between the first Respondents and the Indorsers.

The Magistrate, basing himself on Section 35(2) of the Bills of

Exchange Ordinance (Cap. 10) found in favour of the defence, and dismissed the claim.

On appeal to the District Court that Court allowed the appeal, saying that if Solel Boneh, the 1st Respondents were holders for value, the defence of lack of consideration between the present Appellant and the Indorsers was not available against Solel Boneh — that no defects of title as set out in Section 28(2) of the Bills of Exchange Ordinance were alleged by the present Appellant, and that the main question was whether the present Appellant had proved that Solel Boneh were not holders for value. The District Court further commented on the fact that the Magistrate had not made any finding of fact with regard to the allegation of collusion between Solel Boneh and the Indorsers, but went on to say that there was no evidence of collusion on the record. Finally the District Court stated that "in the circumstances the defence of lack of consideration raised by the Respondent" (the present Appellant) "does not apply to 'Solel Boneh', and the Magistrate erred in dealing with the question of lack of consideration as between the Respondent" (the present Appellant) "and the payee" (the Indorsers) "before first finding that the Appellant was not a holder for value." The District Court thereupon set aside the Magistrate's judgment, and entered judgment in favour of the present first Respondent, against the present Appellant and his guarantor the present second Respondents. Hence this appeal by leave of the District Court to this Court.

The relevant Sections of the Bills of Exchange Ordinance to which reference must be made are as follows :—

> "S. 28 (1) A holder in due course is a holder who has taken a bill complete and regular on the face of it, under the following conditions, namely :—
>
> (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;
>
> (b) that he took the bill in good faith and for value and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.
>
> (2) In particular the title of a person who negotiates a bill is defective within the meaning of this Ordinance, when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.
>
> (3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not

a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."

"S. 35 (2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had."

It is not disputed that the notes were endorsed by the Indorsers to the first Respondents after maturity.

Before us the Appellant has repeated the same arguments as he advanced in the Courts below. He has urged that since the building has been wrongly constructed, there is a failure of consideration, and that the negotiation of the notes by the Indorsers after maturity to the first Respondents was a negotiation in circumstances amounting to fraud, since the Indorsers knew that the defence of failure of consideration had been pleaded and that therefore, by Section 28(2) there was a defect in title, and he is not liable to the first Respondents. The first Respondents reply that by Section 35(2) only a defect in title can affect them, that they are holders for value and absence or failure of consideration is not an equity attaching to a note, and that the consideration was the part construction of the building and that the notes were given for payments due before the completion of the building.

We find it a little difficult to understand the judgment of the District Court when it says that no defects in title such as are set out in Section 28(2) of the Bills of Exchange Ordinance were alleged by the present Appellant, Drory. All through the arguments, that would seem to have been one of the main defences. Neither does it seem to us correct to say that the main question was whether the present Appellant had proved that the first Respondents were not holders for value. In our opinion the case turns on the question whether the negotiation of the notes by the Indorsers was in circumstances amounting to fraud ; and it seems to us that since the Indorsers, knowing that the defence of failure of consideration had been raised, and thereupon withdrawing the notes, and negotiating them after maturity, did so in circumstances amounting to fraud. And in doing so the Indorsers' title became defective, within the meaning of Section 28(2), and consequently under Section 35(2) the first Respondents did not acquire any better title. We are supported in this view by two passages in Chalmers on Bills of Exchange, 10th Ed. at pp. 118 and 142.

"Failure of consideration, it seems, is a *defence against a remote holder for value with notice.* The reason probably is that it is in

the nature of a fraud to negotiate a bill when the holder knows that the consideration on which he received it has failed."

"The position of a holder who takes a bill when overdue is this: he is a holder with notice. He may or may not be a holder for value, and his rights will be regulated accordingly. He is a holder with notice for this reason; he takes a bill which, on the face of it, ought to have got home and to have been paid."

Whilst it is true that in Byles on Bills this opinion is not followed, we prefer the opinion expressed in Chalmers.

We think therefore that this appeal must be allowed, and the judgment of the District Court quashed.

The case is remitted to the District Court to deal with the main point on which the judgment of the Magistrate's Court was based, namely, that there was a failure of consideration and then to give a fresh judgment.

Costs to await result of retrial.

Delivered this 29th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 135/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE: The Acting Chief Justice, Khaldi and Khayat, JJ.

IN THE APPEAL OF:

Avia Ratner — APPELLANT.

v.

Eliezer Goldhamer — RESPONDENT.

Liquidated damages and penalties — Tests to determine whether amount is a penalty, C. A. 191/37, Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.

In allowing an appeal from a judgment of the District Court sitting at Tel-Aviv, dated the 6th February, 1938, and in setting aside the judgment of the lower Court and remitting the case with directions to ascertain the actual damage suffered by Respondent:—

HELD: The amount stipulated as damages in the contract was payable in respect of any breach. The duty of a court, in interpreting a

contract, is to ascertain the intention of the parties when the contract was made and not when the breach occurred. The amount stipulated in the contract constituted a penalty and the Court had to assess the amount actually suffered. The point that interest in respect of three years was now due, was immaterial.

Followed: Faruqi v. Ayoub, C. A. 191/37 (P. P. 6-9.xii.37, 2 Ct. L. R. 169, Ha. 23.xii.37) ;

Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd. 1915, A. C. 79.

ANNOTATIONS : *Vide* C. A. 20/38 (1938, 1 S. C. J. 350) and cases quoted therein and in annotations thereto.

See also C. A. 126/38 (29.vi.38).

FOR APPELLANT : Olshan.
FOR RESPONDENT : Lebel.

JUDGMENT:

This is an appeal from a judgment of the District Court sitting in Tel-Aviv where it was found that the sum mentioned in the contract was liquidated damages and not a penalty. This is the only point raised in the appeal. The sum of LP. 1236,576m was paid to the vendor on account of the purchase price of a certain plot of land. In clause 3 of the contract the price was said to be payable by instalments and interest was due on any overdue instalments. By clause 6 the obligation was laid on the vendor to remove any claims that might be on the land in question and by clause 10 the sum of LP. 850 was made payable as liquidated damages for a breach of the contract or any part thereof.

Various defences were raised, but the only one referred to us is whether this sum of LP. 850 was one of liquidated damages or a penalty. This Court, in the case of Sheikh Suliman El Farouqui v. Michel Nagib Ayoub (C. A. 191/37) quoting from the English case of Dunlop Pneumatic Tyre Co., Ltd., v. New Garage and Motor Co., Ltd. (1915 A. C. 79) laid down the principle of English Law on the subject of what constituted a penalty. These principles are :

(a) The question whether a clause in a contract is penalty or damages is a question of construction to be decided by the Court upon the terms and inherent circumstances of each particular contract judged of as at the time of the making of the contract not at the time of the breach.

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.

(c) There is a presumption that it is penalty when a single lump sum is made payable by way of compensation on the occurrence of one or more of several events some of which may occasion serious and others but trifling damage.

The District Court held that the sum of LP. 850 was liquidated damages because the Plaintiff, the present Respondent, had paid in cash a substantial sum of money, *viz.* LP. 1236,576 m without any security, that interest was due on this amount for nearly three years, and that the sum was not excessive taking into consideration the risks inherent in all land transactions in this country. But it must be remembered that this sum was payable in respect of any breach of the contract and it is not correct to say, as the District Court held, that the only obligation incumbent on the Defendant under the terms of the contract was to transfer land. He was equally under the obligation to pay the instalments. The duty of a Court in interpreting a contract is to ascertain the intention of the parties when the contract was made, not when the breach occurred. The point therefore that three years' interest is now due on the sum advanced on account of the price, is thus irrelevant. We think that in the circumstance of this case, the sum of LP. 850 is a penalty and not liquidated damages. The appeal must, therefore be allowed and the judgment of the District Court set aside and the case remitted to them to assess the actual damages suffered by the Respondent.

The Appellant will have the cost of this appeal assessed at LP. 10. and advocate's fees LP. 5, in any event.

Delivered this 29th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 139/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL :

Jamil Hanna Shomar. — APPELLANT.

v.

Mary Hanna Shomar. — RESPONDENT.

Canon law — Assessors cannot advise without proof of — Assessor cannot sign judgment.

In allowing an appeal from a judgment of the District Court of Jerusalem, dated the 29th March, 1938, and in remitting the case for evidence of Canon law to be produced :—

HELD : 1. Canon law must be proved by evidence. The statement of the assessor was insufficient.

2. The assessor should not sign the judgment as he is not a judge.

ANNOTATIONS : The civil Courts therefore regard Canon law as foreign law which requires proof. The position is different in England where Canon law is part of the Common law of which judicial notice is taken (Mackonochie *v.* Lords Penzance — *Digest* Vol. XIX, p. 225 Nos. 16(5) and 17). It does not however, include the whole Canon law as known on the Continent (R. *v.* Millis — *ibid.* No. 20).

See H. C. 43/28 (C. of J. 299) and C. A. 42/37 (1937, 1 S. C. J. 271, 1 Ct. L. R. 38).

JUDGMENT.

This appeal must be allowed.

The judgment of the District Court was based, so far as I can see, on no evidence whatsoever, but apparently upon what the assessor told them what the law was during the deliberation. No judgment can be given except upon evidence and the Canon Law must be proved by evidence.

The appeal must be allowed, the judgment of the District Court quashed and the case remitted to that Court to hear evidence as to what the Canon Law is. I also would call attention to this, if the assessor is again summoned, that he must not sign the judgment because he is not a judge, otherwise the judgment will also be liable to be set aside.

Cost to await the result.

Delivered this 29th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 149/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Atalla Hassen Abu 'Assi,
2. Ybrahim Hassen Abu 'Assi. APPELLANTS.

v.

1. Suleiman Hassen Abu 'Assi,
2. Labesbeh Hassen Abu 'Assi,
3. Basheedah Hassen Abu 'Assi,
4. Abed Ali Hassen Abu 'Assi in his capacity as curator on his father's property,
5. 'Abboudeh 'Aleiweh el Jirjawi, in his capacity as one of the heirs of his wife, Fahesmeh Hassen Abu 'Assi. RESPONDENTS.

Appeal — Copy of decree — Bond — Civil Procedure Rules, Rules 325, 326 —Judgment and decree — Statement of claim.

In dismissing an appeal from a judgment of the District Court of Beersheba, dated the 17th May, 1938 :—

HELD : 1. A decree contains nothing more than is to be found in the judgment on which it is based.

2. Objection to the lack of bond should be dismissed as the deposit had been paid into Court.

3. The lower Court was right in dismissing the claim as it was based on a *sanad* which was worthless.

ANNOTATIONS :

1. This ruling was followed by the A/Chief Justice in miscellaneous Application No. 38/38 reported in the Palestine Post of the 7th July, 1938, and 4 Ct. L. R. 20, in C. A. 155/38 (23.vii.38) and in C. A. 161/38 (11.vii.38).

Cf. C. A. 147/38 (30.vi.38).

2. Decisions on defective bonds : C. A. 80–81/38 (1938, 1 S. C. J. 271) and cases collated in the annotations ; C. A. 120/38 (1938, 1 S. C. J. 364).

3. *Cf.* C. A. 107/38 (30.vi.38).

FOR APPELLANTS : Zein El-Din.

FOR RESPONDENTS : Elia.

JUDGMENT:

Two preliminary objections were raised by Counsel for Respondents.

The first is that a copy of the judgment has been filed and not a copy of the decree as is required by Rule 326 of the Civil Procedure Rules, 1938.

The second is that the bond is not in conformity with Rule 325 of the Civil Procedure Rules, 1938, and Form 31 made thereunder.

With regard to the first objection, we are of opinion that if a party goes to expense of filing a lengthy judgment instead of a decree, it is his look-out, and this objection is rejected. A decree contains nothing more than is to be found in the judgment on which it is based.

As regards the second objection, the bond of guarantee has been authenticated by the Notary Public, Gaza, and further an attachment has been ordered by the Magistrate and an entry of such an attachment has been entered in the Land Registry Registers to that effect. In the circumstances, the Court has decided to call upon the Appellants to pay the sum of LP. 10.— as deposit, and as this sum has been paid now, the objection is also overruled.

This appeal, I am afraid, has nothing in it. We have heard Said Eff. Zein El-din, but his arguments have failed to convince us.

The main point is, of course, to be found when one looks through the statement of claim to the Land Court. In that statement Appellants claimed to be owners of this land by virtue of a *sanad,* admittedly stated to be made in the year 1922. That *sanad,* of course, is of no use whatsoever — it is no more than a waste piece of paper and the Land Court were right, therefore, in rejecting it.

This case shows the necessity for the very careful drafting of statements of claim.

We are of opinion that the judgment of the Land Court, though short, is correct.

The appeal must, therefore be dismissed with costs fixed at LP. 5.— and LP. 5.— fees for attending the hearing of this appeal.

Delivered this 29th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 107/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

Amer Amer el 'Aloul. APPELLANT.

v.

1. Haana bint Mohammed Sayed Ahmed, on behalf of the estate of Mohammed Suleiman el Barbary,
2. Mahmoud Suleiman el Barbary,
3. Mustafa Suleiman el Barbary. RESPONDENTS.

Forgery — Evidence on forged documents — Remittal for fresh evidence.

In dismissing an appeal from a judgment of the Land Court of Jaffa, dated the 26th March, 1938 :—

HELD : 1. A claim to title cannot be proved by means of a forged document.

2. The case would not be remitted for fresh evidence to be heard as Appellant had had ample opportunity to produce his evidence before the lower Court.

ANNOTATIONS :

1. See also C. A. 149/38 (29.vi.38).

2. *Cf.* CR. A. 1/38 (1938, 1 S. C. J. 54) and see annotations thereto. C. A. 93/38 (*ibid* 294) ; C. A. 40/38 (*ibid* 211).

FOR APPELLANT : Cattan.

FOR RESPONDENTS : Germanus.

JUDGMENT:

We need not trouble you Mr. Germanus.

The Appellant's case is based upon a deed of purchase which has been found by a competent Court to be forged. When the case came before the Land Court, for some reason which I am unable to follow, they proceeded to hear evidence against this deed. I can only assume that they did not appreciate that it had already been found to be forged. The Land Court came to certain conclusions about the deed and dismissed the Appellant's case. The appeal must equally be dismissed because it is an incredible thing that anybody should come with a forged document and try to prove his right of ownership with it.

The Appellant asks that, in any case, this case should be remitted so that other evidence may be heard. We are agreed that in these circumstances, Appellant had ample opportunity to produce the evidence which was within his power to produce, when the case was before the Court below.

The appeal must be dismissed with costs fixed at LP. 10 and LP. 5 fees for attending the hearing.

Delivered this 30th day of June, 1938.

Acting Chief Justice.

CIVIL APPEAL No. 123/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Frumkin and Khayat, JJ.

IN THE CASE OF :

Yehoshoua Khankin. APPELLANT.

v.

1. Aref Abdallah Samara,
2. Mahmoud Abdallah Samara,
3. Abdel Lateef Abdallah Samara,
4. Farid Abdallah Samara,
5. Abdallah Ibrahim Samara,
6. Abdel Hameed Ibrahim Samara,
7. Fatmah Haj Jaseen, widow of Ibrahim Samara,
8. Sheikh Muhammad Bustani,
9. Said Mohammed Ali Samara,
10. Seifeddin Mohammed Ali Samara,
11. Samara Mohammed Ali Samara,
12. Masra Mohammed Ali Samara,
13. Farseeden Mohammed Ali Samara,
14. Mas'oudeh El Haj Huslen Hannoun. RESPONDENTS.

Release — Point not mentioned in judgment of Court — Effect on subsequent proceedings — L. A. 43/36 — Interpretation of contract — H. C. 40/28 — Purchase as a broker — Exclusion of damages clause.

In dismissing by a majority (Frumkin, J. dissenting) an appeal from a judgment of the District Court of Nablus, sitting in Tul Karem, dated the 26th January, 1938 :—

HELD : 1. (Following L. A. 43/36) The fact that a point which was argued before the Court of Appeal was not mentioned in the judgment must not be taken to mean that it was disregarded by the Court as of no value.

2. Upon the proper construction of clause 11 of the contract, Appellant could not claim damages.

Followed : L. A. 43/36 (not reported).

Considered : H. C. 40/28 (C. of J. 119).

ANNOTATIONS : Previous proceedings : L. A. 45/29 (C. of J. 1499) ; C. A. 149/33 (C. of J. 1510, P. P. 10.vii.34) ; H. C. 40/28 (*supra*).

1. *Cf.* C. A. 76/38 (1938, 1 S. C. J. 266) and annotations thereto.

FOR APPELLANT : Eliash

FOR RESPONDENTS : Cattan.

JUDGMENT:

This appeal from the District Court of Nablus raises a short but interesting point for our determination.

In 1914 the Respondents and the Appellant concluded an agreement for the sale of certain lands. The Appellant paid to the Respondents 1000 Napoleons on signing, and undertook to pay the balance on transfer. At the same time the Respondents executed a Power of attorney in favour of the Appellant, to convey the land to any purchaser whom he, the Appellant, might find. Nothing was done under the power for many years, until in 1928 the Respondents repudiated the power, and returned the 1000 Napoleons to the Appellant. Litigation then began of a protracted nature — this is, in fact, the third Appeal to this Court — but with most of its details we are not here concerned, with one exception, which will be referred to later in the judgment.

The whole appeal turns on the true construction of clause 11 of the contract of 1914, which is in these terms :

> "Agreement is hereby entered on the said proceeding transaction and each of the contracting parties has discharged the other of any right of claim concerned with this transfer, sale and price. This discharge by each was given independently and they both accepted it. After the parties had approved the contents of this agreement the latter was drawn up in duplicate, each copy to be retained by one of the contracting parties".

The District Court held that this clause barred the claim for damages which the Appellant had brought, and held that damages could not be claimed, and dismissed the action. Hence this appeal.

I will first deal with the last point raised by the Appellant in his arguments before us. He says that the question of the true construction of clause 11 was argued before this Court on the second appeal here, and that since this Court made no mention of it in its judgment it must be taken to have disregarded the point as of no value, and that it must have rejected it. I do not think that this is so. The second appeal turned on the point of prescription of the Power of attorney, and it does not follow that, because no mention is made of a point in a judgment remitting a case for retrial that point must be taken to have been overruled. Indeed the case of Politis *vs.* Calmy (L. A. 43/36) is an authority to the contrary.

The Appellant's main arguments on clause 11 of the agreement are that it can only mean that all claims are discharged that existed prior to the agreement — that the clause is a usual form of discharge, to be found in all old Turkish deeds — that the District Court's view that it excluded a claim for damages is unreasonable, because it would mean tearing up the agreement and finally, that whilst it is true that there is no specific clause for damages *eo nomine* in the agreement, yet if the agreement is repudiated the injured party obviously has a right of redress.

The Respondent replies that the clause constitutes a mutual release, and that it must relate to future events since at the date of the agreement, transfer and sale had not yet taken place. He goes on to say that there had been no previous disputes or relations between the parties (which is admitted) to which this clause could refer, and that since it has been found by a judgment of the High Court in Mahmoud Abdallah Samara and others *vs.* Registrar of Lands and another (H. C. 40/28) that the Appellant was merely acting as an agent or broker it was only reasonable and natural that he should not be compelled personally to take the land, and that it was for this reason that the parties mutually excluded damages.

The Respondent's arguments commended themselves to the District Court, and after careful consideration they equally commend themselves to me. Whether or not clause 11 is a form which was commonly used in old Turkish sale deeds, I cannot of course say. All that I can say is that after a lengthy judicial experience in this country, in the early years of which some considerable number of these old contracts has come before me, I do not remember ever having seen this particular form of clause before, and my brother Khayat tells me that it is equally unknown to him. But even if it were common form in Turkish deeds, I do not think that it can be regarded as meaningless, and parties

must be bound by the words that they use. I cannot see what other meaning the clause can have, for damages are very obviously a claim that would arise out of the transfer and sale, if these were repudiated. The agreement was made before the war, when no one but an Ottoman subject could hold land in the Ottoman Empire, and since the Appellant was merely a broker, it would indeed be natural that damages would be excluded if he found himself unable to find a purchaser, and such exclusion would have to be mutual.

For these reasons I myself think that the judgment of the District Court was right, and would dismiss this appeal.

The appeal is by a majority dismissed with costs LP. 10 and advocate's fees LP. 5.—

Delivered this 30th day of June, 1938.

Acting Chief Justice.

Frumkin J.: The judgment of the Court below is based on what I consider a misconstruction of clause 11 of the contract entered into between the parties.

Whatever be the meaning of that clause, it could certainly not mean that by the very same instrument the parties intended to discharge each other from any liability to conform with the terms of the same instrument. I don't think even the ingenuity of Mr. Katten will carry him so far as to say that the vendor would, under clause 11, be precluded from claiming the balance of the price, had the transfer taken place under the Irrevocable Power-of-Attorny, or that the purchaser would, under clause 11, be unable to claim the return of the thousand French Pounds paid on account of the price, had the Power-of-Attorney been revoked without returning that sum. And yet, under clause 11, each party discharged the other of any right of claim concerned with the Transfer, Sale and Price.

Clauses of this sort in pre-war Arabic drafting meant to keep the parties to the agreement, with no right to claim anything outside the agreement.

I therefore do not think that clause 11 prevents either party from suing the other party for any right arising out of the agreement, and hence they can also sue for damages for any breach of any of the terms of the agreement.

On the merits I fail to see what the damages of the Appellant are, since he was held to be an agent, and all losses and profits would

therefore fall to his principal, whom he is suing. But that is a matter for the District Court to deal with and decide.

It is therefore my opinion that the judgment of the District Court should be set aside and the case remitted for completion.

Delivered this 30th day of June, 1938.

Puisne Judge.

CIVIL APPEAL No. 147/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : Greene, Frumkin and Khayat, JJ.

IN THE APPEAL OF :

Farha Elias Awayyed. — APPELLANT.

v.

1. Najib Awkal,
2. Adeeb Yousef Sroujy,
3. Amin Yousef Sroujy,
4. Nakhleh Sroujy,
5. Salim Sroujy,
6. Hanna Shaheen. — RESPONDENTS.

Appeal — Copy of decree not filed with appeal — Civil Procedure Rules, Rule 330 *— Fees.*

In dismissing an appeal from a judgment of the District Court of Nablus, dated the 7th May, 1938 :—

HELD : Copy of the decree not having been attached to the notice of appeal, there was no appeal before the Court.

ANNOTATIONS : But it is now settled that copy of the decree or the entire judgment may be attached to the notice of appeal : C. A. 149/38 (29.vi.38) and note 1 thereto.

Copy of the judgment had been attached to the appeal. This case must be deemed to be overruled by C. A. 149/38 (*supra*).

FOR APPELLANT : Abcarius Bey,

FOR RESPONDENTS : No. 1 — no appearance.
No. 2—6 Asfour and Cattan.

JUDGMENT:

A preliminary objection has been taken that no decree was attached to the notice of appeal. This fact was agreed to by counsel for Appellant.

Under Rule 330 of the Civil Procedure Rules, 1938, the appeal should not have been accepted for filing, and there is therefore no appeal before us. Counsel for Appellant says that no decree has been issued as yet, and, if an appeal is lodged again after the issue of the decree, we will then consider the question of the fees.

The order is therefore that there is no appeal properly before this Court at present. Respondents to have their costs fixed at LP. 12.— to include fees for attending the hearing.

Delivered this 30th day of June, 1938.

British Puisne Judge.

CIVIL APPEAL No. 148/38.

IN THE SUPREME COURT SITTING AS A COURT OF APPEAL.

BEFORE : The Acting Chief Justice, Khaldi and Abdul Hadi, JJ.

IN THE APPEAL OF :

1. Najib Hajdalani,
2. Zareefeh Hajdalani. APLICANTS.

v.

Marie (Hajdalani) Hussina. RESPONDENT.

Leave to appeal — Court of Appeal may not grant after refusal by President District Court — Civil Procedure Rules, 1938, rules 313–333 — Applicability to District and Land Courts.

In dismissing an application for leave to appeal against the order of the President of the District Court of Haifa, dated the 24th May, 1938, refusing to grant the Appellants leave to appeal to the Supreme Court against the judgment of the District Court, in its appellate capacity, dated the 28th April, 1938.

HELD : Rules 313—333 of the Civil Procedure Rules, 1938, do not apply to District and Land Courts and, therefore, Rules 317 does not apply in the case of appeals to the District or Land Courts, and there is, therefore no power under the Rules or elsewhere to grant the application.

ANNOTATIONS : See note 1 to CR. A. 61/38 at p. 421, *ante*.

FOR APPELLANTS : Asfour.

FOR RESPONDENT : Hakeem.

JUDGMENT:

We need not trouble you Mr. Hakeem.

This is an application for leave to appeal against an order of the President of the District Court refusing to grant leave to appeal.

The application is made under Rule 317 in Part XXXI of the Civil Procedure Rules, 1938. Rule 334 which is also in part XXXI reads as follows :—

> "The following rule of this Part shall apply to appeals to the Supreme Court and to appeals to the District and Land Courts when they are heard in open Court, and shall also extend so far as they are applicable to all other appeals to the District and Land Courts",

that is to say, Rules 334 and onwards to the end of the Part apply to appeals to District and Land Courts. This, as we see it, means that Rules 313 to 333 of Part XXXI do not apply to District and Land Courts and therefore Rule 317 does not apply in the cases of appeals to the District and Land Courts, and there is therefore no power, under the Rules or elsewhere, to grant the application which Mr. Asfour, with his usual force and vigour, has tried to convince us so to do.

The application is dismissed with costs fixed at LP. 5.— fees for attending the hearing.

Delivered this 30th day of June, 1938.

Acting Chief Justice.

HIGH COURT No. 42/38.

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

BEFORE : The Acting Chief Justice and Abdul Hadi, J.

IN THE APPLICATION OF : —

Asma el Jamal. PETITIONER.

v.

1. The Chief Execution Officer, Jerusalem.
2. The Arab Agricultural Bank, Jerusalem. RESPONDENTS.

Execution — Evidence in support of application.

In dismissing an application for an order to be issued to the 1st Respondent directing him to show cause why his order dated 8th June, 1938, should not be set aside, and why the Execution preceedings in Execution file, Jerusalem No. 1073/35 should not be cancelled and carried out anew according to law, and for an interim order of stay of execution.

HELD : The only evidence in support of the application was Petitioner's affidavit. No documents had been filed.

FOR PTITIONER : Cattan.

FOR RESPONDENTS : *Ex parte.*

JUDGMENT:

In this case, I am tempted to make a remark which I made with regard to a High Court case that was before this Court last week in which I said :

"The application has no merits and the less said about it the better."

but in this case I will differ from what I have said in the above case, as I will say a few words about this present application.

The Petitioner has alleged a large number of irregularities to have occured at various stages in the proceedings in respect of the sale of her property. In support of these allegations, her Counsel has filed only an affidavit sworn to by his client, and has not filed in this Court one single copy of any official document found in the Execution Office. That is not the manner in which to come to this Court and expect a favourable judgment. As a matter of fact, we do not think that this application has any merits.

The Rule *nisi is* discharged with costs fixed at LP. 5 and LP. 5 fees for attending the hearing.

Delivered this 30th day of June, 1938.

Acting Chief Justice.